

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 70 OF 2019

EVRAH KALUNDA MBITHI *alias*

DARREN MBITHI KALUNDA APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

(An Appeal from Original Conviction and Sentence in Makueni SPM Criminal Case No. 07 of 2015)

JUDGMENT

1. **Evrah Mbithi Kalunda *alias* Darren** the Appellant was charged with the offence of theft contrary to section 278 of the penal code. The particulars were that on 5th January 2015 at Kivandini Village, Wote Location of Makueni County he store one cow valued at Kshs. 35,000/= the property of **Charles Kyale Kalunda**. He faced an alternative count of handling stolen property contrary to section 322 (2) of the penal code.
2. The prosecution called a total of six (6) witnesses. The witnesses PW1, PW2, PW3 and PW4 and the Appellant are related. The missing cow was taken away from the boma without the permission of PW1. This was on 5th January 2015. Word spread very fast and **PW2 P.C. Julius Kalunda** went to Kilala market as it was a market day there and found the Appellant trying to sell the cow. The cow had a white coat on the back and brownish black spots on its frontal part.
3. It was identified by PW1, PW2, PW3 and PW4. Police officers PW5, PW6 also testified on the recovery and photos taken (EXB1 a & b). Infact **PW6 Cpl Isaac Kiplangat** had accompanied PW2 to the market when the cow was recovered. **PW5 Cpl Samuel Mbat** took photos of the various views of the said cow. The Appellant in his unsworn defence denied the charge saying he was arrested on 04/01/2015 on his way to work. The learned trial Magistrate well analyzed the evidence by the prosecution witnesses and that of the Appellant.
4. I am satisfied that the learned trial Magistrate arrived at the correct decision by convicting the Appellant on the main count of stealing. In his appeal the Appellant is not contesting the conviction. He is asking this court to reduce his sentence by considering the period he was in custody prior to his conviction. That he has been transformed during his stay in prison.
5. In reply the state through **Mrs. Owenga** did not oppose the Appeal on sentence. She conceded that the 5 years sentence was excessive. She believed the Appellant who said he appreciates his time in prison and had even undertaken some course.
6. I have perused the record of proceedings from the lower court and I do appreciate the reason why the harsh sentence was meted out on the Appellant. He has been on frequent guest of the State at the prisons in a good number of criminal cases. The convictions were however quashed on appeal to the high court.
7. The learned trial Magistrate should have however considered the period the Appellant had been in custody and the fact that the stolen cow had been recovered and given a lighter sentence in the circumstances. The Appellant has served two (2) years imprisonment which is sufficient punishment.
8. I therefore set aside the sentence of five (5) years imprisonment and substitute it with the period already served. The appeal is allowed to that extent ONLY. The Appellant shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

DELIVERED, SIGNED & DATED THIS 10TH DAY OF JULY, 2019 IN OPEN COURT AT MAKUENI.

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HON. H. I. ONG'UDI

JUDGE