



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CRIMINAL APPEAL NO. E001 OF 2020**

**MARY ACHIENG NDIRE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(From the original conviction and sentence in Criminal case No.222 of 2020 of the Principal Magistrate's Court at Ndhiwa by Hon. M.A Ochieng – Principal Magistrate)

**JUDGMENT**

1. Mary Achieng Ndire, the appellant herein, was convicted of the offence of injuring of an animal contrary to section 338 of the Penal Code.
2. The particulars of the offence were that on 21<sup>st</sup> day of August, 2020 at lower Kwandiko location, Ndhiwa Sub County of Homa Bay County, jointly with another not before court, wilfully and unlawfully stole and killed a pig valued at Kshs.7000/= the property of Peter Okoth Kwach.
3. The appellant was sentenced to serve 3 years imprisonment. She now appeals against both conviction and sentence.
4. The appellant was in person. She raised one ground of appeal namely that she pleaded guilty to a charge read to her in a strange language.
5. The state conceded the appeal through Mr. Ochengo Justus, learned counsel on grounds that the plea was equivocal.
6. Section 338 of the Penal Code provides:

**Any person who wilfully and unlawfully kills, maims or wounds any animal capable of being stolen is guilty of a felony and is liable, if the animal is an animal such as is referred to in section 278, to imprisonment for fourteen years, and, in any other case, to imprisonment for three years.**

7. The charge and the evidence were at variance. Whereas the charge was of injuring of an animal contrary to section 338 of the Penal Code, the particulars were of theft and killing of a pig.
8. The appellant pleaded guilty to the offence. However, while mitigating, she said the pig was taken to her by her husband. The

plea was therefore equivocal. The learned trial magistrate ought at this juncture to have entered a plea of not guilty. The facts that were read in court supported the offence of theft.

9. I find that the facts as read by the prosecution do not support the charge. Where the particulars of the offence are at variance with the charge, the accused is entitled to an acquittal. This was held in the case of **John Brown Shilenje vs. R. High Court (NBI) Criminal Appeal No 181 of 1981** (unreported)

10. From the foregoing analysis, I find that the conviction was unsafe. I quash it and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

**DELIVERED AND SIGNED AT HOMA BAY THIS 14<sup>TH</sup> DAY OF DECEMBER, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**



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