



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM:HANCOX JA, CHESONI & PLATT AG JJA)**

**CRIMINAL APPEAL NO 126 OF 1983**

**ROTICH .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

This is a second appeal from the decision of the High Court at Kisumu, which dismissed an appeal from a sentence passed upon a conviction for stock theft by the senior resident magistrate at Kisii, save that for some reason the sentence of corporal punishment passed upon the appellant was reduced from five strokes to one stroke. Under section 361(1) of the Criminal Procedure Code, an appeal lies only to this court on a matter of law, and severity of the sentence is expressly stated thereunder to be not a matter of law, but of fact, so we have no jurisdiction to enter into the question of the sentence in this appeal. The appellant in our view validly pleaded guilty to the offence of stealing stock contrary to section 278 (not 278A) of the Penal Code and received the statutory minimum sentence of seven years' imprisonment, the corporal punishment just stated and five year reporting order. He admitted the facts stated by the prosecutor. Even though he said in mitigation, and in both his memoranda of appeal, that he committed the offence while under the influence of alcohol, this did not in our judgment, in any way detract from the unequivocal plea of guilty which the appellant made. Consequently there exists no ground for saying that the magistrate wrongly accepted the plea or that he misconstrued it as one of guilty, which would alone have been a matter of law: see as to this point *Nashom Marenya v Republic*, Criminal Appeal (Nairobi) 123 of 1982. However, the sentence should have been expressed to have been imprisonment with hard labour, as the section requires and to this extent the sentence contained an error of law.

We therefore substitute for the custodial sentence as expressed by the magistrate, a sentence of seven years' imprisonment with hard labour. The second error was that as a first offender, the appellant was not liable to a police supervision order. In the result we alter the conviction to be expressed as under section 278 of the Penal Code and order that the sentence on the appellant be seven years' imprisonment with hard labour. The police supervision order is set aside. Otherwise the appeal to this court is dismissed.

Dated and Delivered at Kisumu this 6<sup>th</sup> Day of December, 1983

**A.R.W. HANCOX**

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**JUDGE OF APPEAL**

**Z.R. CHESONI**

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**JUDGE OF APPEAL**

**H.G. PLATT**

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**Ag JUDGE OF APPEAL**



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