



**Edwar v Republic (Criminal Appeal E002 of 2022)
[2023] KEHC 2751 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E002 OF 2022
RN NYAKUNDI, J
MARCH 30, 2023**

BETWEEN

HENRY EDWAR APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the sentence of Hon. R. Odenyo (SPM) in Eldoret Chief Magistrate's Court Case No. E104 of 2022 – Republic vs Henry Edwar delivered on 17th January 2022)

JUDGMENT

1. The appellant was charged with the offence of stealing farm produce contrary to section 278 of the [Penal Code](#). the particulars of the offence were that on the January 15, 2022 at Makongi farm in Segero location, Soy Sub County within Uasin Gishu County, stole farm produce (Unshelled maize) valued at Kshs 1,000/-, the property of Thomas Kiplagat.
2. The appellant was convicted of his own plea of guilty and upon considering the mitigation of the trial court sentenced him to three years' imprisonment. Being aggrieved with the sentence, the appellant instituted the present appeal vide a petition of appeal filed on January 24, 2022 premised on the following grounds;
 1. That, the learned trial magistrate erred in law and facts by sentencing the appellant yet failed to recognize that the section 278 of the penal code, in which the appellant was charged with stealing stock and not stealing farm produce.
 2. That, the trial court erred in law and fact by sentencing the appellant to 3 years in custody without alternative of pains hence infringing his cardinal right and fundamental freedom.
 3. That, the trial court imposed the sentence against the appellant which was manifestly unjust in any event.



4. That, other grounds will be raised during hearing.
Section 278 of the Penal Code provides as follows;
278. Stealing stock
- If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years
3. The appellant was charged with stealing farm produce and not stealing stock. The provision clearly states that the offence is stealing stock and the description of what amounts to the same does not cover the items that the appellant stole, being unshelled maize. The offence of stealing farm produce is provided for under Section 8(1) of the Stock Produce Theft Act, cap. 355 and not the Penal Code.
4. It is my considered view that in order to determine whether the sentence should be reviewed, the issue of the defective charge sheet needs to be ironed out. The Court of Appeal in Peter Ngure Mwangi v Republic [2014] eKLR stated that:
- A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in Yongo v R, [198] eKLR that:
- “In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
- (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
 - (ii) when for such reason it does not accord with the evidence given at the trial.”
5. The evidence at the trial with regards to the charge was that the appellant had stolen unshelled maize. The same does not accord with the charge as the charge refers to an offence that does not exist in law. There is no provision for the offence of stealing farm offence under section 278 of the Penal Code and therefore the appellant pleaded guilty to an offence not known in law. The plea cannot be considered unequivocal in the premises and thus cannot be sustained.
6. I therefore find justification in exercising this court’s powers of review under section 362 of the Criminal Procedure Code (cap 75) and quash the conviction and set aside the sentence imposed on him. The appellant be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 30TH DAY OF MARCH 2023

.....
R. NYAKUNDI

JUDGE

In presence of :

Appellant Present.

Mr.Mugun for the State

Coram: Hon. Justice R. Nyakundi



Mr.Mugun for the State

