



REPUBLIC OF KENYA



KENYA LAW
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**Ochieng v Republic (Criminal Appeal E030 of 2021)
[2022] KEHC 3109 (KLR) (27 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 3109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E030 OF 2021
FA OCHIENG, J
APRIL 27, 2022**

BETWEEN

WALTER MUGA OCHIENG APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of the Magistrate's Court at Nyando
by Hon. S. O. Temu dated the 29th June 2021 in Criminal Case No. E610 of 2021)*

JUDGMENT

1. The Appellant was convicted on his own plea of "Guilty".
2. However, in this appeal, he has asserted that the plea was not unequivocal.
3. Meanwhile, on the issue of the sentence, he has submitted that the trial court had taken into account factors which were irrelevant and extraneous, when passing the said sentence.
4. As a result of what the Appellant perceives as the failure by the trial court to give consideration to the sentencing guidelines, he submitted that the sentence meted out was excessive.
5. The charge sheet in this case had the following particulars of the offence of Stealing Stock contrary to Section 278 of the *Penal Code*:

"Tom Otieno Opon and Walter Muga Ochieng:

On the 28th day of June 2021 at Kochieng
West Sub-location in Nyando Sub-County
within Kisumu County, stole a she-goat



brown in colour, valued at Kshs 5,000/=,
the property of Joseph Akongo Gayo.”

6. When the charge was read and explained to the Appellant, he responded by saying that it was true.
7. Thereafter, in accordance with the provisions of Section 207 of the *Criminal Procedure Code*, the facts giving rise to the charge were read out to the Appellant. The said facts indicated that on the material night, the Complainant was woken up;

“ by the young ones of the sheep, and
dogs which were barking.
He woke up and he went to where the
sheep were.
He found that one brown sheep was
missing. He screamed but he could
not trace it.
At about 6.00a.m he went to the
slaughter-house at Rabuor and he
had seen his goat.”
8. After the arrest of the 2 suspects who had taken the goat to the slaughter-house, they failed to explain where they recovered the goat from.
9. The Appellant lay emphasis on the fact that whilst the charge sheet made reference to a she goat; the facts purportedly supporting the charge, mentioned sheep.
10. He submitted that the discrepancy between the type of the stock which was allegedly stolen, was very material and that that therefore rendered the plea equivocal.
11. On the other hand, the Respondent considered as minor, the
“ mix-up on the facts of sheep and goat.....”
12. In the light of the mix-up, as described by the Respondent, it is my considered opinion that justice can only be done if the Appellant was retried.
13. I find that there was a definite mix-up or discrepancy.
14. However, it is also true that because a photograph of the goat was produced in evidence, there ought not to have been any difficulty in the prosecution giving facts which confirmed that it was a goat that was stolen.
15. The Respondent has not tendered any explanation to this court why and how the mix-up occurred, when the subject matter of the charge was so obvious.
16. The offence was committed fairly recently, and there should be no difficulty in procuring witnesses.
17. I also find, on a prima facie basis, that the available evidence would probably lead to a conviction, if a retrial was conducted.



18. And because the evidence appeared so overwhelming, I find that it would be a travesty of justice to grant an acquittal to the Appellant.
19. In the event, the conviction is quashed and the sentence is set aside. I direct that the Appellant be produced before Court 1 at the Nyando Law Courts on 11th May 2022 for plea.
20. Until the Appellant is produced in court on 11th May 2022, he shall be held in prison custody.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF APRIL 2022

FRED A. OCHIENG

JUDGE

