



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 68 OF 2015**

**EZEKIEL MWAKABA MWACHORA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 111 of 2015 in the Senior Principal Magistrate's Court at Wundanyi delivered by Hon G.M. Gitonga (RM) on 21<sup>st</sup> September 2015)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Ezekiel Mwakaba Mwachora, was tried and convicted by Hon G. M. Gitonga, Resident Magistrate for the offence of stealing stock contrary to Section 278 of the Penal Code Cap 63 (Laws of Kenya). He was sentenced to serve six (6) years imprisonment for this offence. He considered that the Appellant had already been in custody for a year before his conviction. The Learned Trial Magistrate made no finding in respect of the alternative charge on the ground that all the evidence pointed to the Appellant as having been the one who slaughtered the goat he had been charged with stealing.
2. The particulars of the main charge were as follows :-

**“On the 27<sup>th</sup> day of June 2014 at Chakareli Village Kishamba Location within Taita Taveta County stole one goat valued at Kshs 3,500/=, the property of KILATYA MUTIE.”**

**ALTERNATIVE CHARGE**

**“On the 27<sup>th</sup> day of June 2014 at about 1140 HRS at Chakareli Village Kishamba Location within Taita Taveta County otherwise than in the course of stealing, dishonestly received or retained 15 kgs goat meat knowing or having reason to believe them (sic) to be stolen.”**

3. Being dissatisfied with the said judgment, on 25<sup>th</sup> November 2015, the Appellant filed a Notice of Motion application seeking leave to file an Appeal out of time. The said application was allowed and the Petition of Appeal was deemed to have been duly filed and served. The Mitigation Grounds of Appeal were as follows:-

1. **THAT the law has take its way, now the court should consider the humanitarian(sic).**
2. **THAT he was a father of four children for their school fees and all basic needs(sic).**

3. **THAT the harsh sentence had now made his family to suffer mentally and physically(sic).**

4. **he begged the court not to make the law punish him and his family hence the law should him alone by putting this matter on the hands of the probation officer(sic).**

5. **THAT the court should consider his mitigation and grant him a non-custodial sentence which he can also serve his poor family(sic).**

4. On 1<sup>st</sup> December 2016, this court directed him to file his Written Submissions. On 7<sup>th</sup> February 2017, he filed Amended Grounds of Appeal and his Written Submissions. The Amended Grounds of Appeal were as follows:-

1. **THAT the Hon. Trial Magistrate erred both in law and facts by relying on the Prosecution witnesses without properly finding that the Charges as framed against him were not properly investigated.**

2. **THAT the Hon. Trial Magistrate erred both in law and facts by failing to consider the unproven allegations as from PW 1, PW 2, PW 3, PW 4 and PW 5, that the benefit of doubt should be upon him the Appellant thus contravening Section 109 of the Evidence Act(sic).**

3. **THAT the Hon. Trial Magistrate erred both in law and facts by misleading himself during his judgment Page 6 lines 17-18 whereby no evidence on record to sustain the harsh sentence.**

5. The State's Written Submissions were dated 14<sup>th</sup> March 2017 and filed on 15<sup>th</sup> March 2017 while the Appellant's Further Written Submissions were filed on 20<sup>th</sup> April 2017.

6. When the matter came up on 20<sup>th</sup> April 2017, both the Appellant and the counsel for the State requested this court to deliver its judgment based on their respective Written Submissions which they were relying upon in their entirety. The Judgment herein is therefore based on the parties' respective Written Submissions.

### **LEGAL ANALYSIS**

7. As can be seen from the initial Mitigation Grounds of Appeal, the Appellant appeared to have admitted to having committed the offence that he was charged with as he was pleading for leniency from this court. Ordinarily, no value then would be added in analysing the evidence that was adduced during trial. However, in the interests of justice, this court deemed it prudent to consider the Appellant's Amended Grounds of Appeal because he did not have any legal representation at the time of trial and at the appeal stage.

8. Accordingly, this being a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.**

9. It appeared to this court that the only issue that was really before it for determination was whether or not the Prosecution had proven its case beyond reasonable doubt. The court therefore dealt with all the Amended Grounds of Appeal together as they were related.

10. The Appellant argued that the Learned Trial Magistrate ought not to have convicted him on the Charge the investigations that were conducted herein were shoddy. It urged this court to find that the

evidence by the Prosecution witnesses that he was taken to the scene of crime and surrounded by members of public and that he led them to the place the goat had been slaughtered was a mere allegation that had not been proven.

11. It added that the Prosecution's case was far-fetched and was not proven to the required standard. It also said that no Veterinary Postmortem Report was produced in respect of the exhibits. It was his further contention that it was not clear when the goat died and if he really had come into possession of the said goat.

12. In this regard, it placed reliance on the case of Mwangi vs Republic 1952 20 EACA where it was held as follows:-

**“Where an exhibit has not been found in possession, the Accused then is not reliable (sic).”**

13. It his further argument that the sentence of six (6) years imprisonment that was meted upon him by the Learned Trial Magistrate was manifestly excessive in the circumstances, a fact he pointed out had been conceded to by the State.

14. On its part, the State submitted that the ingredients forming the offence of stock theft were sufficiently proven from the evidence that was adduced by the Prosecution witnesses and that not all witnesses must be called to prove a fact. It relied on the provisions of Section 143 of the Evidence Act Cap 80 (Laws of Kenya) provides **“that no particular number of witnesses shall in the absence of any provision to the contrary be required to prove any fact.”**

15. It was emphatic that the Appellant was found in possession of the goat and he had a knife that was bloodstained. It pointed out that it was unrealistic that someone would go through the trouble of stealing a goat, killing it and then leaving it. It submitted that the Appellant's defence that was unsworn was not subjected to verification by the Prosecution but that it linked him to the theft of the goat.

16. It placed reliance on the case of Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs RNYR CA Criminal Appeal No 272 of 2005 where the Court of Appeal stated as follows:-

**“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof first, that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was recently stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”**

17. On the issue of sentence, it conceded, as was stated hereinabove, that the sentence the Learned Trial Magistrate meted upon the Appellant was excessive, considering that he was a first offender and he had only stolen one (1) goat. It opined that a sentence of two (2) years would have been sufficient despite Section 278 of the Penal Code providing for a maximum sentence of fourteen (14) years.

18. It referred this court to the case of Criminal Appeal No 365 of 2011 John Muendo Musau vs Republic(full citation not given) but did not elaborate the argument it was advancing. It also relied on the case of Alister Anthony Pareira vs State of Maharashtra(citation not given) where it stated it was held as follows:-

**“Sentencing is an important task in the matters of crime. One of the prime objectives of criminal law is imposition of an appropriate, adequate, just and passionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightforward formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts of the crime, motive for the crime, nature of the offence and all other attendant circumstances.”**

19. So as to establish whether the Learned Trial Magistrate acted correctly when he convicted the Appellant based on the evidence that was adduced in the Trial Court, this court carefully analysed all the evidence that was adduced by the Prosecution witnesses.

20. According to the Complainant, Cosmas Kilatya Mutie (hereinafter referred to as 'PW 1'), he was herding some cows and goats on 27<sup>th</sup> June 2014 at about 10.00am when two (2) of his goats disappeared. He stated that he followed the foot prints of the goats and he noticed that one returned to his home while the other led him to a bush where he found a man seated under the tree. He averred that the said man asked him if the goat was his and he saw the slaughtered goat and some meat placed on top of a stone.

21. He was categorical that he recognised his goat from the white and brown colour of the skin. More specifically, he said that his goat was white with a brown neck and head. He said the said man left the meat on the stone and ran while carrying a blood stained knife. His evidence was that the Appellant washed the blood stained knife with water from a bottle that he was carrying.

22. His further evidence was that he then called other members of the public who managed to arrest the said man. He identified the Appellant herein as the man who slaughtered his goat. During his Cross-examination, he stated that he was alone when he found the Appellant under the tree but that they were many when they arrested him.

23. PW 2 said that on the material date and time, PW 1 found him at his house and requested him to look after his goats as he went to search for his two (2) missing goats. He averred that PW 1 called him that he had found the person who had slaughtered the goat. He said that he went to the scene and found PW 1 and the Appellant standing. He also said that it was the Appellant who took them to the scene where he had slaughtered a goat.

24. His further evidence was that when he got to the scene, the Appellant was holding a knife. He said that the meat was hanging on a tree and there was blood and intestinal waste of the goat. He was emphatic that he knew the said goat because it was white and brown and therefore he could recognise it.

25. During his Cross-examination, he stated that they arrested the Appellant at the road and that the Appellant was holding a bloodstained knife. When he was Cross-examined by the court, he stated that he knew PW 1's goats as they were neighbours and the goat that had been slaughtered had brown spots on the body.

26. Catherine Mashame Kasaru (hereinafter referred as "PW 3") was PW 1's wife. She corroborated his evidence that when she got to the scene, she found the goat hung on a tree with some meat on some stones. She also said that there was a knife with some water and that she was able to identify the goat as he had branded the leg with initials "CK".

27. During her Cross-examination, she stated that the Appellant told her that he found the goat trapped by a wire and that is why he slaughtered the goat. When Cross-examined by the court, she stated that it was the Appellant who took them to the place where he had slaughtered the goat.

28. In his unsworn evidence, the Appellant denied ever having been committed the offence. He merely stated that he was selling charcoal when a man stopped and starting talking on the phone in the Kamba languagewhereafter, a woman and two (2) men came and assaulted him. He said that he was then arrested and taken to Mwatate Police Station.

29. Notably, inconsistencies and/or contradictions in testimonies in a trial are expected because each witness will normally testify as to what he perceived and/or observed at any given time. However, these inconsistencies and/or contradictions must not be so glaring as to lead a trial court to entertain doubt as to what really transpired at any given time. The version of unfolding events must more or else be similar so as to render the inconsistencies and/or contradictions immaterial and irrelevant.

30. However, in this particular case, there were apparent inconsistencies and contradictions between the

testimony of PW 1's, PW 2's and PW 3's evidence on several issues as will be demonstrated hereinbelow.

31. Whereas PW 1 stated that the Appellant ran away and that he was taken back to the scene where he packed the meat in a sack before being taken to Mwatate Police Station connoting that there were several people at the scene, PW 2 said that he went to the scene of crime and found the Appellant and PW 1. He did not mention other people having been present. This also confused this court because PW 2 testified that he arrested the Appellant at the road.

32. There were some inconsistencies relating to the knife the Appellant was said to have been having at the material time. PW 1 stated that the Appellant ran away with the knife which he washed with water from a bottle that he was carrying. However, PW 2 said that when he got to the scene, the Appellant was carrying a blood stained knife. The fact that both PW 1 and PW 2 were at the scene at the same time, it was expected that their versions ought not to have been so much at variance. This was not an inconsistency this court would have wanted to ignore.

33. Additionally, if as PW 3 stated that it was the Appellant who showed them where he had slaughtered the goat, this contradicted PW 1's evidence that he is the one who found the Appellant under the tree slaughtering the goat. If this court was to accept PW 3's evidence as having been the correct sequence of events, then the same contradicted PW 2's evidence who said that he went to the scene after PW 1 called him. The other question was, how did PW 2 know where the scene was as when PW 1 called him? There was no evidence that PW 1 explained to him exactly where the scene was so as to go there directly.

34. Of utmost importance were the discrepancies in the description of the goat. There was a major disparity in the description of the goat by all the Prosecution witnesses. Whereas PW 1 testified that his goat was white with a brown neck and head, PW 2 said the goat was white and brown and also said that it had brown spots on the body. Notably, PW 1 never mentioned of his goat having had brown spots as this was a material piece of evidence in its identification.

35. Notably, a perusal of the photographs that were produced by the Scene of Crime photographer, No 93081 PC Shem Asher (hereinafter referred to as "PW 4"), showed that the goat was brown with a black strip along the middle of its back and head. No 88391 PC David Masinde (hereinafter referred to as "PW 5") said that the goat that the Appellant had slaughtered was brown like hers.

36. Notably, the goat in the photographs was not white with a brown neck as PW 1 had told the Trial court. The said goat did not also have brown spots as had been stated by PW 2. There was also no indication that the goat was branded 'CK' on the leg as PW 3 had contended. If it had, then the photographs did not bring out that detail. PW 4 only stated that it had the letter "V" on the ear. PW 1, PW 2 and PW 3 did not mention this important detail of description of the said goat.

37. It is also important to point out that PW 1 also spoke of having recovered the head of his goat and its brown skin. However, the photographs that were tendered in evidence by PW 4 showed a half body of a brown goat. If indeed, PW 1 had found the half goat, nothing would have been easier than for him to have said so. However, he only concentrated on the head leading this court to infer that it was actually the head that he recovered, if at all. As the goat was almost half in size, this court would definitely have seen the white body and brown neck and head or the black spots. It saw neither of these details.

38. Having said so, this court looked at the Probation Report that the Learned Trial Magistrate relied upon when sentencing the Appellant and noted that it had been indicated that the Appellant had contended that he was coming from the forest when he saw a goat trapped by a wire that is used for hunting wild animals whereupon he slaughtered it. The said Report stated that the Appellant was a notorious petty thief and the area where he came from had been peaceful since he was convicted.

39. Appreciably, the Probation Report painted the Appellant as a person who could not fit in the society due to his criminal ways. It may very well be that PW 3 had seen him stealing a donkey as she had told the Trial Court. Indeed, any criminal case must be decided on the strength of the evidence that has been

adduced in a trial court.

40. A trial court must only convict an accused person if it is satisfied that the prosecution has proven its case to the required standard, which in criminal cases, is beyond reasonable doubt. It must never rely on speculations, innuendo, suspicions or unproven facts in making a determination of a person's guilt.

41. , the goat in the photographs that were adduced in evidence was not the colour PW 1 and PW 3 had contended it to be. On that ground alone, doubt was raised in the mind of this court as to what were the real circumstances of the case herein lending this court to conclude that the Learned Trial Magistrate erred when he convicted the Appellant herein based on the evidence that was adduced in the Trial Court. Indeed, the Appellant was under no obligation to assist the Prosecution in proving its case. Indeed, he had a constitutional right to remain silent and let the Prosecution prove its case.

42. Accordingly, having analysed the evidence that was adduced by PW 1, PW 2, PW 3 and PW 5 particularly on the description of the goat vis-a-vis the documentary evidence PW 4 adduced in the Trial Court, the Written Submissions by both the Appellant and the State, this court came to the firm conclusion that the Prosecution failed to prove its case beyond reasonable doubt.

43. The above notwithstanding, although this court found that the Prosecution had not proved its case to the required standard, it nonetheless deemed it fit to address its mind to the sentence that was imposed upon the Appellant by the Learned Trial Magistrate.

44. Section 278 of the Penal Code provides as follows:-

**“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, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.”**

45. the case of Katana Ali vs Republic [2016] eKLR, Muktar Shogolo vs Republic [2016] eKLR and Mohammed Hassan vs Republic [2016] eKLR, this very court acceded to the Prosecution's request to reduce the sentence from ten (10) years to five (5) years where the appellants therein had been charged with the offence of stealing two (2) cows worth Kshs 150,000/=, one of which was recovered.

46. In the case of Beshick Mombo Mwake vs Republic [2016] eKLR this very court considered that the appellant therein was a grandchild of the complainant and having noted he had once been put on probation, a non-custodial sentence was not appropriate but reduced the sentence from three (3) years to six (6) months imprisonment for having stolen three (3) pieces of timber worth Kshs 1,500/= belonging to his grandmother.

47. Bearing in mind that the value of the goat was Kshs 3,500/=, this court came to the firm conclusion that the sentence that the Learned Trial Magistrate meted upon the Appellant herein, was manifestly harsh, severe and excessive in the circumstances of the case. It was the considered view of this court that a sentence of three (3) months would have been sufficient more so as the Prosecution had asked the Learned Trial Magistrate to treat the Appellant as a first offender.

48. The fact that the Probation Report showed that the Appellant had had a previous conviction without adducing proof of the same and that the fact that enquiries had established that he was a notorious thief was not sufficient reason for the Learned Trial Magistrate to have sentenced the Appellant to six (6) years imprisonment. Each offence must be considered on its own merit and the penalty imposed upon an accused person accordingly. There must be justification to impose a higher sentence where there is said to be past convictions.

## **DISPOSITION**

49. For the foregoing reasons, in view of the fact that the evidence that was adduced before the trial created doubt in mind of this court, that benefit of doubt leads it to quash, set aside the conviction and

sentence that was meted upon the Appellant by the trial court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

50. The upshot of this court's Judgment was that the Appellant's Appeal that was lodged on 25<sup>th</sup> November 2015 was merited and the same is hereby upheld.

51. It is so ordered.

**DATED and DELIVERED at VOI this 22<sup>ND</sup> day of JUNE 2017**

**J. KAMAU**

**JUDGE**

In the presence of:-

Ezekiel Mwakaba Mwachora - Appellant

Miss Karani - for State

Josephat Mavu – Court Clerk