



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CRIMINAL APPEAL NO. 108 OF 2010**

*(Appeal from Senior Resident Magistrate honourable R. Oigara in Kimilili Court in Criminal no.717 of 2008)*

**MUSA KIBET HUMPHREY.....APPELLANT**

**~VRS~**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant was convicted by the Senior Resident Magistrate at Kimilili of stock theft contrary to section 278 of the Penal Code whose particulars were that on 21/9/2008 at Kapsokwony village in Kapsokwony location in Mt. Elgon District in Western Province he stole two sheep (ewe and a lamb) valued at Ksh.2,000/= the property of Emmily Chemlany Ndiewa. He was asked to serve 3 years on probation which the court reviewed to 4 years in jail. He was aggrieved by the sentence and preferred this appeal.

The evidence on which he was convicted was that on 21/9/2008 the complainant woke up to find her two sheep worth Ksh.2,000/= missing from the shed. At 3.00 p.m that day, she was informed by Leonard Kwemoi and Simon Macharia that they had at 7.30 a.m. seen the Appellant driving two sheep towards Kaptama. The Appellant is the complainant's neighbour. This is what led to his arrest. The sheep were not recovered. Leonard and Simon did not know about the loss of the complainant's sheep until she mentioned. That is when they disclosed what they had seen. The description given by the complainant fitted what they had seen. The court found that the sheep must have been the complainant's. The Appellant did not complain about this finding, but the law gives this court the responsibility of considering and evaluating afresh the evidence before the trial court to be certain that the conviction and sentence were properly arrived at.

In my view, the Appellant was convicted on the suspicion that the two sheep that were stolen from the complainant's home were the same ones he was seen driving to Kaptama in the morning of 21/9/08. The law is that suspicion alone, however strong, cannot be the basis for a conviction in a criminal case. The standard of proof in a criminal case is beyond any reasonable doubt and the burden has to be discharged by the prosecution. Leonard and Simon did not know the complainant's sheep and could not for certain say that the sheep they saw with the Appellant belonged to her. Similarly, the complainant did not see the two sheep that the Appellant was seen driving to Kaptama. She cannot certainly say they were hers. The description may have fitted hers. The fact that the Appellant was her neighbour and that that early he had two sheep taking to Kaptama may have raised the suspicion that he was the thief. But these facts, when scrutinized, could not lead to the irresistible conclusion that the Appellant was the thief. The conviction was consequently not safely reached and is quashed.

The Appellant was initially placed on probation for 3 years. This followed a probation report. The sentence was on 12/8/2009. However, on 17/9/2010 one M/s Bucheka asked the court to review the sentence. No reasons were given. The court reviewed the sentence to 4 years in jail. The record does not say who M/s Bucheka was. Was she a probation officer? Had the Appellant breached the probation terms? There is no further report on record to show any breach. In any case, the record does not show that the Appellant was requested to respond to the application to review the sentence. In short, the court

became *functus officio* after it placed the Appellant on probation for 3 years. It has no jurisdiction to review the sentence. The power belonged to the High Court. The sentence was therefore illegal.

In conclusion, the conviction is quashed and the sentence set aside. The Appellant is set at liberty immediately unless he is otherwise being lawfully held.

Dated and delivered at Bungoma this 26<sup>th</sup> day of January, 2012 in the presence of the Appellant, the State Counsel Mrs. Leting and Lilian Gimose the court clerk.

**A. O. MUCHELULE**  
**JUDGE**