



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 22 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 339 of 2009 of the Senior Resident Magistrate's Court at Taveta: C.N. Ndegwa – S.R.M.)

ABUGA JOHN OMWENGA APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGEMENT

This is the appeal filed by **ABUGA JOHN OMWENGA** against his conviction and sentence by the learned Senior Resident Magistrate sitting at Taveta Law Courts. The Appellant had been arraigned before the subordinate court on 19th June 2009 on a charge of **STEALING STOCK CONTRARY TO SECTION 278 OF THE PENAL CODE**. The particulars of the offence were that:

“On the 18th day of June 2009 at about 1.00 p.m. at California estate in Taveta District within Coast Province, jointly with another not before court, stole 7 goats valued at Kshs.20,500/- the property of Josephine Yayoo Jacob”

The Appellant entered a plea of **‘not guilty’** to the charge. His trial commenced on 19th June 2009 at which trial the prosecution led by **CHIEF INSPECTOR ONGERI**, called a total of three (3) witnesses in support of their case. At the conclusion of the trial the learned trial magistrate delivered his judgement on 3rd September 2009 in which he convicted the Appellant on the charge of stealing stock and after listening to his mitigation proceeded to sentence the Appellant to serve four (4) years imprisonment. Being dissatisfied with both this conviction and sentence the Appellant filed this appeal. **MR. ONSERIO**, learned State Counsel who appeared for the Respondent State conceded the appeal. I have myself carefully perused the record of the trial and I am quite in agreement with the decision of the State to concede the appeal.

This trial commenced before a magistrate **HON. J.M. GITHAIGA** on 19th June 2009 who heard one witness. On 8th July 2009 the matter was taken over by **HON. C.N. NDEGWA**, a Senior Resident Magistrate. The Criminal Procedure Code clearly provides at S. 200(3) that where one magistrate takes over the conduct of a trial, the succeeding magistrate must make enquiry from the accused person whether he wishes to recall any of the witnesses who had testified before the preceding magistrate. This was not done in this case. At page 3 line 28 the record shows that the trial magistrate merely made the following

orders:

“Hearing to proceed from where the case has reached”

The Appellant was not invited to indicate whether he wished to recall **PW1** who had already testified. This breach nullifies subsequent proceedings. As such the conviction and sentence of the appellant had no basis and were null and void. For this reason I do quash the conviction of the Appellant and set aside the 4 year prison term imposed on him. This appeal therefore succeeds. The Appellant is to be released forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 8th day of March 2011.

M. ODERO
JUDGE