



REPUBLIC OF KENYA  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Criminal Appeal 273 of 2009**

*(From Original Conviction and Sentence in Criminal Case No. 3210 of 2008 of the  
Chief Magistrate's Court at Mombasa: T. Gesora – S.R.M.)*

**ZULUFA ABDALLA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant **ZULUFA ABDALLA** filed this appeal challenging her conviction and sentence by the learned Senior Resident Magistrate sitting at Mombasa Law Courts. The Appellant and another had been charged with the offence of **STEALING CONTRARY TO SECTION 278 PENAL CODE**. The case revolved around a certain structure which was being put up by the complainant **MARIAM SHEE ALI** in her plot at Kisauni. It is alleged that the Appellant and her companions objected to the structure being put up claiming that it belonged to a witch. They pulled it down and stole the plywood and timber. At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on her defence. She opted not to make any defence and left the matter to the court to decide. On 8<sup>th</sup> December 2009 the learned trial magistrate delivered his judgement in which he acquitted the Appellant of the charge of stealing but proceeded to convict her of procuring the offence under S. 20(1)(d) of the Penal Code.

The Appellant who appeared in person at the hearing of this appeal opted to rely entirely upon her written submissions. **MR. ONSERIO**, learned State Counsel who appeared for the Respondent State made oral submissions opposing the appeal.

I have perused the record from the lower court. The evidence of the prosecution witnesses was that the Appellant encouraged or procured others to demolish the complainant's structure after she had erected it. **PW2 ISSA GHULAN MOHAMED** tells the court at page 7 line 12

*“Accused was saying “break it there is nowhere they are going to take us, I will put music for you” accused entered the house and put on the radio on high volume I think so that the neighbours don’t hear what they are*

*doing”*

His evidence is therefore that the Appellant actively encouraged the others to demolish the structure. There is no evidence that the Appellant in any way participated in this demolition. Likewise I find no evidence that the Appellant encouraged or told anybody to **steal** the complainant’s materials. She therefore cannot be said to have procured this offence of stealing. **PW5 MOHAMED JUMA** confirms this position when he states at page 10 line 23

***“I looked for Mwanakombo and asked her why she destroyed the structure and she explained that she was hired by Geni Zulfa [the appellant] and Halima who she said comforted her not to worry”***

Once again the evidence of this witness is specific – accused only encouraged the others to demolish the structure but not to steal. She therefore procured the offence of Malicious Damage to Property. The accuseds had been charged with the offence of stealing contrary to S. 278. I find no evidence to show that the Appellant in any way procured, participated in or encouraged her co-accuseds or indeed any other person for that matter to **steal** the complainant’s building materials. As such I find that the learned trial magistrate erred in applying S. 20(1) (d) in the circumstances. The conviction had no basis and I do hereby quash the same. The attendant sentence is also set aside.

**Dated and Delivered at Mombasa this 30<sup>th</sup> day of September 2010.**

**M. ODERO**  
**JUDGE**

Read in open court in the presence of:-

Mr. Onserio for State

Appellant in person

**M. ODERO**  
**JUDGE**

**30/9/2010**