



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

AT MOMBASA

Criminal Appeal 85 of 2009

(From Original Conviction and Sentence in Criminal Case No. 793 of 2008(B) of the Principal Magistrate's Court at Kwale: A.M. Obura – R.M.)

NDURIA MWAMBODZE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant **NDURIA MWAMBODZE** has filed this appeal against his conviction and sentence by the Resident Magistrate sitting at Kwale Law Courts on a charge of **STEALING STOCK CONTRARY TO SECTION 278 OF THE PENAL CODE**. The Appellant entered a plea of '*Not Guilty*' to the charge. His trial before the lower court commenced on 11th August 2008. The prosecution called a total of four (4) witnesses in support of their case.

The brief facts of the prosecution case were that on 11th June 2008 a young boy of 10 years **T M** was grazing his father's 3 sheep and 7 goats. He later came and informed his father **PW1 MWERO JEFA** that one sheep went missing. They began to search for that sheep. On 13th June 2008 two days after the sheep went missing **PW2 JEFA MWERO** went to the Appellant's home and noticed animal parts indicating that an animal had been slaughtered there. He saw the Appellant digging a hole and hiding a sheep-skin in it. **PW2** asked the Appellant to give him the jembe. He dug out the hole and recovered a sheep-skin for a white sheep with a red head. **PW1** identified this as the skin from his missing sheep. Police were called in. They arrested the accused and took him to the police station where he was charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He opted to give an unsworn defence in which he denied the charges. On 19th May 2009 the learned trial magistrate delivered his judgement in which he convicted the Appellant and after listening to his mitigation sentenced the Appellant to serve seven (7) years imprisonment. Being dissatisfied with both his conviction and sentence, the Appellant filed this appeal.

The Appellant who was unrepresented at the hearing of his appeal chose to rely entirely upon his written submissions which had been duly filed with the leave of the court. **MR. ONSERIO** the learned State Counsel who appeared for the Respondent State made oral submissions in opposition to the appeal.

I have myself as the first court of appeal carefully and anxiously perused the record of the trial before the lower court. I have found several unexplained anomalies which in my view render the conviction of the Appellant questionable.

Firstly both **PW1** and **PW2** tell the court that neither of them was present when this sheep went missing. Both state that it was the 10 year old son of **PW1** one **T M** who was herding the sheep when one was stolen. The said T M was not called as a witness in this case. He was a crucial witness. The sheep went missing from his custody thus it was only he who could enlighten the court on how it was taken away. Did it just wander off or did he see any person lead the sheep away? These are key questions which remain unanswered because this witness was not called to testify. No reason is given for the failure by the prosecution to call him.

Secondly whereas both **PW1** and **PW2** state that the stolen sheep was white with a reddish/brown head **PW3** **PC SAMUEL NGARIBO** who received the recovered hide states at page 8 line 2

“The complainant came with the hide that was recovered from the accused I took the hide as an exhibit and referred them to the crime offices. The hide was white and black in colour”

The evidence of **PW3** directly contradicts that of **PW1** with respect to the colour of the hide. Black and red cannot be said to be in any way similar. If **PW1** lost a white/red sheep and a white/black one was recovered, they cannot be said to be the same. The description of the recovered item is in doubt, thereby casting doubt on the prosecution case.

Lastly the prosecution witnesses referred to photographs of the hides. The scenes of crime officer who took photographs of the recovered hide was not called to testify and did not produce these photographs. Once again no reason was given for failure to call him as a witness, yet he played an important role in the investigation of this matter. Instead it was **PW4** **PC STEPHEN SHIKUNDI** the investigating officer who produced the photographs. He gave no explanation about the whereabouts of **PC RASHID** who took and developed the photographs. This was another major omission by the prosecution.

Taking into account all the above, it is my opinion that the prosecution case contained several loop-holes and loose ends. They did not meet the legal threshold of **‘proof beyond a reasonable doubt’**. The conviction of the Appellant was unsafe and I do hereby quash the same. The subsequent sentence is also set aside. This appeal therefore succeeds. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 5th day of October 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Appellant in person

Mr. Onserio for State

M. ODERO

JUDGE

5/10/2010