

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 305 of 2007

ABDUL AZIZ WAES.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Nanyuki in Criminal Case No.2257 of 2005 dated 18th October 2007 by Ndungu H. N. (Miss), Senior Principal Magistrate)

JUDGMENT

ABDUL AZIZ WAES, the appellant herein with four others were jointly tried on a charge of stealing stock contrary to *Section 278* of the Penal Code. The particulars of the charge are that on the 5th day of October 2005, at Muthaiga Estate in Laikipia District within Rift Valley Province they jointly stole 40 sheep valued at ksh.120,000/= the property of Rosemary Kaparo. After undergoing a trial, the Appellant was convicted and sentenced to four (4) years imprisonment whereas his co-accused were sentenced to eight (8) months imprisonment. Being dissatisfied, the Appellant preferred this appeal.

On appeal, the Appellant listed six (6) grounds in his Petition of Appeal. Miss Ngalyuka, learned State Counsel conceded the appeal on the ground that there was no sufficient evidence to sustain a conviction. She was of the view that there was no evidence to show how the Appellant was involved in the commission of the offence.

The Appellant is entitled to a re-evaluation of the evidence in view of the fact that this is the first appellate court. The Appellant's six grounds may be summarized to two main grounds: First that there was no credible evidence to sustain a conviction against the Appellant. Secondly, that the sentence imposed against the Appellant was harsh and excessive. Let me consider the above grounds vis-à-vis the evidence by way of re-consideration. The prosecution's case was supported by the evidence of two witnesses. **ROSEMARY SAILE KAPARO** (P.W.1), told the trial court that on 5th October 2005 at 7.30 a.m. she left for Muthaiga Primary School where she is a teacher leaving behind one Josphat Lokwata, her herdsman. The record shows that Josphat Lokwata Letoona, was charged as the first accused before the trial court. He disappeared when he was released on bond hence the case proceeded for hearing in his absence. P. W. 1 said she left her herdsman herding her 68 sheep. When she went back home at 4.30 p.m. she did not find Josphat Lokwata at home. She waited upto 6.00 p.m. when she started to search for him near Rural trading centre. Twenty Eight (28) sheep were found and driven back home. A report was made to Nanyuki Police Station who launched a massive manhunt. The Police managed to arrest him at Archers Post and taken to the Police Station where P.W. 1 managed to identify Josphat Lokwata as her herdsman. She said Josphat Lokwata said he sold the missing sheep to the other accused persons. On cross-examination P.W. 1 said that her herdsman did not tell her the names of the people who bought her sheep. P. C. Julio Mutembei (P. W. 2) said he booked a report made by P.W. 1 in which she stated that Josphat Lokwata had absconded herding her sheep. P. W. 2 said he arrested Josphat Lokwata at Archers Post and the Appellant within the Rural area upon being pointed out by Josphat Lokwata. When placed on his defence the Appellant said he was arrested by the Police while he was on his way back home from Rural trading Centre. He denied having committed the offence. The learned trial magistrate formed the opinion that the Appellant was named by Josphat Lokwata as the one who bought the stolen sheep from her. The learned magistrate also stated that the Appellant named the other accused persons as the people he sold the sheep. I have carefully re-evaluated the evidence and it is clear that there is no credible evidence which has established the role the Appellant played in the offence. The learned magistrate relied on the evidence of P. W. 1. The evidence of P.W. 1 is the evidence allegedly received from Josphat Lokwata, who absconded. In fact the prosecution later terminated his case when it became apparent that he would not be traced. The evidence of P. W. 1 will remain as hearsay evidence in the absence of Josphat Lokwata. The learned Senior Principal Magistrate made erroneous conclusions regarding the evidence of the other accused persons. It is clear from the evidence of Elias Mboka Kauze, Boru Sona Taneu and Miriti Anampiu that none of them knew the Appellant. In the end I agree that there was no credible evidence to sustain a conviction against the Appellant. I am convinced Miss Ngalyuka rightly conceded this appeal. I do not need to consider the aspect concerning the sentence in view of the fact that I have come to the conclusion that the conviction should be quashed.

In the end I allow the appeal with a resultant order quashing the conviction and set aside the sentence. The Appellant should be set free forthwith unless lawfully held.

Dated and delivered this 13th day of November 2009.

J. K. SERGON

JUDGE