



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO. 9 OF 2019**

**JAMES OCHIENG MAGERO ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the original conviction and sentence in Criminal case No.292 of 2018 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi- Senior Resident Magistrate)*

**JUDGMENT**

1. **James Ochieng Magero**, the appellant herein, was convicted of an offence of stealing stock contrary to section of 278 of the Penal Code.
2. The particulars were that on the 8<sup>th</sup> February 2018 at Mungats Sub location, Nambale sub location within Busia County, stole a female pig valued at Kshs.6,000/= the property of Fredrick Okwara.
3. The appellant pleaded guilty to the offence and was sentenced to serve four years imprisonment.
4. He has appealed against the sentence.
5. The appeal was opposed by the state through Mr. Gacharia, learned counsel who contended that the sentence was the minimum prescribed for the offence.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. In the case of **Nelson vs Republic [1970] E.A. 599** the court of Appeal stated that an appellate court can only interfere with the sentence of the trial court upon being satisfied of the existence of certain circumstances. This is what the court said:

**The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewcity (1912) C.CA 28 T.LR 364.**

In the instant case, the appellant pleaded guilty but he was not a first offender. He had previously in 2017 committed a similar offence. I am therefore not persuaded to interfere with the sentence.

8. The upshot is that the appeal is dismissed.

**DELIVERED and SIGNED at BUSIA this 10<sup>th</sup> Day of December, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**