



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 306 OF 2012**

**FRED LUTTA ATITWA ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

***(Appeal against the order of [HON. H.M. WANDERE, P.M.] in Mumias Criminal Case No.150 of 2006 issued on the 19.11.2012)***

**J U D G M E N T**

The appellant was charged with the offence of stealing contrary to **section 275** of the **Penal Code**. The particulars of the offence were that the appellant on the 18.8.2005 at Kisumu Ndogo village, Shibinga location in Butere/Mumias District within Western Province, stole one Mumias Sugar ordinary share No.0029843 containing 970 shares valued at KShs.31,310/= the property of **SALEH BOIYO NANGABO**.

The appellant was found guilty and placed on probation for three years. The grounds of appeal are that the trial court ought to have considered a non-custodial sentence, option of a fine, consider his mitigation and that the cancellation of his probation terms violated the Probation of Offenders Act. It is further contended that the trial magistrate acted on information that was not under oath. Mr. Kundu counsel for the appellant relied on his written submissions. Counsel contends that the appellant's probation terms were unlawfully cancelled. **Section 4(3)** of the Probation of Offenders Act was not complied with. Similarly **sections 5(3)** and **8(1)** were not followed. The probation officer concluded that the appellant was fit to be put on probation. Miss Opiyo, State Counsel, opposed the appeal and submitted that the probation terms were cancelled as the appellant failed to abide by those terms. His mitigation was considered and the court had the powers to alter the sentence.

Before the trial magistrate **SALEH BOIYO NANGABO** was the complainant and testified as PW1. His evidence is that the appellant took his Mumias Sugar Company share certificate for 970 shares on the 18.8.2005. His wife PW2 was present. The appellant promised to go and check the complainant's two other share certificates that had been lost. The appellant took his identity card but never returned. He reported the matter to the area assistant chief and later to the police. **PW2 AMIDA AMORI SALEH** testified that she was present when her husband handed over the share certificate to the appellant.

**PW3 JAMES AKUNGWI WESAMBA** used to be the area village elder. On the 27.1.2006 he was at the assistant chief's place and he saw the appellant and the complainant coming together. The complainant stated his case and PW3 was told to escort the appellant to Mumias police station. **PW4 EMMANUEL MALASALA WEZETSE** testified that he was present when the appellant was given the share certificate. He promised to go to Nairobi and find out the status of the shares. **PW5 PC MICHAEL MUVA** investigated the case and charged the appellant with the offence.

The appellant was put on his defence and he gave sworn testimony. His evidence is that on the 2.2.2006 the assistant chief sent someone to call him and he complained. He went to the assistant chief's office and met the complainant who was a stranger to him. He was told to take the complainant to Mumias police station and while there he was told to give out the share certificate. He was surprised as he was not aware of any share certificate.

The evidence on record shows that the complainant knew the appellant. It is his evidence that he

gave his share certificate to the appellant. PW2 and PW4 were present when the share certificate was given. PW1 expected the appellant to go back to him and explain the status of the shares but that did not happen. Given the evidence on record I am satisfied that the appellant was given the share certificate. The prosecution proved its case beyond reasonable doubt and the defence evidence was mere denial. On the issue of the sentence the record of trial court shows that the appellant was put on probation for a period of three years. He failed to comply with the probation terms after some time and the probation was cancelled. The appellant was sentenced to serve the remaining three years in prison. He had only served five months' probation. When he was produced before the court on the 14.11.2012 he admitted that he had not complied with the probation order. Since the probation order is merely an opinion to the court which can be disregarded, I do find that the trial magistrate correctly cancelled the probation order and replaced it with a prison sentence. The appeal lacks merit and the same is disallowed.

***Delivered, dated and signed at Kakamega this 15<sup>th</sup> day of May 2014***

**SAID J. CHITEMBWE**

**J U D G E**