



REPUBLIC OF KENYA

High Court, at Nairobi

Criminal Appeal No 30 of 1985

Loramatu

versus

Republic

(Appeal from the Resident Magistrate's Court at Nairobi, N Nyaanga, Miss)

Advocates

Appellant absent, unrepresented and not wishing to be present

A Haq (State Counsel) for respondent

October 14, 1985, Mbaya J delivered the following

Judgment.

The appellant and three others were jointly charged with stock theft contrary to section 278 of the Penal Code. The particulars of the charge stated that they:

*“On the 28th day of October, 1984 at Nairobi West within the Nairobi Area jointly stole one sheep valued at Kshs 300 the property of Lucas Mwenda.”*

All the accused persons pleaded guilty to the charge and on conviction the appellant and one of his co-accused Sidiyo Kulesoi were each sentenced to 7 years' imprisonment whereas the other two accused persons were placed on probation. Both the appellant and Sidiyo Kulesoi are Tanzanians. The appellant was aged 15 at the time of the sentence.

I must commend the learned trial magistrate for appreciating, what is much often forgotten by the subordinate courts, that in circumstances such as appertain in this case, there are alternatives to the minimum sentences of imprisonment in form of a probation, or an absolute or conditional discharge: See *Mwangi v R* 1971 E A 3807 and my decision in Thomas Kerio s/o Echumani v R Eldoret H C C A No 110 of 1982 (unreported).

In the instant case the appellant and his Tanzanian co-accused merely joined people who were eating goat meat. The appellant is a young person who pleaded guilty and was a first offender. The only reason why he and his Tanzanian co-accused were not placed on probation is because the learned trial magistrate felt, I think quite rightly that a probation sentence would be inconvenient because the appellant and his named co-accused were foreigners. But on the authorities I have cited there was nothing to prevent the giving of an absolute or condition discharge. The result of this appeal therefore, is that I set aside the sentence of imprisonment imposed on the appellant, and in its place I order that he be given an absolute discharge under section 35 of the Penal Code. In exercise of my powers of remission, I also make similar order for Sidiyo Kulesoi who has not appealed. Both will be released from prison forthwith unless otherwise lawfully held, but the trial magistrates recommendation for their repatriation to Tanzania will remain.

Delivered on the October 14, 1985

Mbaya J