

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARSEN**  
**CRIMINAL APPEAL NO. E053 OF 2025**

**SOLOMON SHIPITI AMBANI.....APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**.....RESPONDENT**

*(Appeal from original conviction and sentence by Hon. F.M MULAMA,  
Principal Magistrate, in LAMU Principal Magistrate's Court stock theft Case  
No. E055of 2024 delivered on 26/8/ 2025)*

**JUDGMENT**

1. The appellant was convicted in count 1 for the offence of Stealing stock contrary to section 278 of the Penal code and in count 2 for the offence of injuring an animal Contrary to Section 338 of the Penal Code. The particulars of the offence in count 1 were that on 15<sup>th</sup> January 2025 at around 1430hrs at Sabasaba area in Hindi Division of Lamu Central Sub- County with Lamu County with another with another before court he stole two female goats white and brown in colour all valued at Kshs 19000/=, the property of Joseph Murigi Machoro (herein referred to the complainant).
2. The particulars in count 2 were that on the same date time and place as in count 1 he willfully and unlawfully killed two goats all valued to Kshs 19000/= the property of the above said complainant.
3. In count 1 the appellant was sentenced to serve 5 years imprisonment while in count 2 he was sentence to serve 3

years imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal.

4. The grounds of appeal are that:

1) That the trial magistrate erred in law and facts by failing to find that guilt on the Appellant was not established beyond reasonable doubt.

2) That the trial magistrate erred in law and facts for failing to find that the prosecution evidence was full of massive contradictions and inconsistencies as a result of which the evidence adduced in the case was not credible.

3) That the trial magistrate erred in law and facts in convicting the Appellant when the exhibits mentioned in the evidence were not produced.

4) That the trial magistrate erred in law and facts in convicting the Appellant when the prosecution failed to call crucial witnesses in the case. The prosecution called 5 witnesses in this case while the appellant was the only witness in his case.

5. The prosecution called 5 witnesses in the case while the Appellant defended himself and did not call any witness.

### **Case for prosecution**

6. The complainant who was PW1 in the case testified that on the material day at around 9.00 am he tied his goats in his farm for grazing. At 2 pm he went to check on them and found 2 of them missing. He informed his son Moses PW2 who mobilized some young men to mount a search for the thieves. That after about 10 minutes he was called

and informed that the search party had found the place where the goat had been slaughtered. He went to the scene of slaughter and found the skin, heads and intestines of the slaughtered goats. That Moses later called him and informed him that they had arrested one young man with the meat of the goat and another young man had escaped. Later policemen went to the scene of the slaughter. He recorded his statement with the police.

7. The son to the complainant Moses Nyutu PW3 testified that on the material day he was at his shop at 2-3 pm when his father PW1 informed him that 2 of his goats had gone missing. That he mobilized young men to look for the goats. He went to the scene of the theft on his motor cycle. He was called by Kiseu PW4 who told him that they had found the scene where the goats had been slaughtered. That Kiseu then called him again and told him that he had seen 2 people who were going towards the direction where he PW3 was. That the people got on to the road and started walking along the road. They followed them on his motor cycle. That on getting to them, they jumped on them and manage to arrest one of them called Nahashon while the other one escaped. He knew the one who escaped as Solomon. Nahashon took them to the scene where goats had been slaughtered where they found 2 goat heads, intestines, skins and hooves.
8. Benard Kiseu PW4, testified that he is a bodaboda rider. That on the material day he went to shop of Moses, PW3 and found him with 3 other people. PW3 told them that

some goats had been stolen. PW3 and asked them to help him search for the goats. That he PW4 went and climbed a tree. He saw 2 people coming from shamba heading to a thicket. They were carrying a sack. He informed PW3 about it. They followed the people on a motor cycle. That on getting to them they jumped on them and they arrested one of them called Nahashon. The other one escaped. PW3 said that he knew the one who escaped as he was one of their tenants. They visited the scene where the goats had been slaughtered.

9. Joseph Muruga PW2 told the trial court that he was on the material day at Hindi township when he was informed by Moses PW3 that there were goats that had been stolen and people who were out searching for them had found the place where they had been slaughtered. He PW2 joined in the search. He was later signaled by Moses PW3. He went to where Moses was and found a young man who had been arrested. They interrogated him and he mentioned a person called Solo. He took them to the scene where the goats were slaughtered.

10. The case was investigated by Sgt. Zimbo Awadhi PW5 of Hindi police station. It was his evidence that the appellant was a suspect of stealing goats. That his accomplice was convicted but the appellant was on the run. Later the appellant was arrested at Kibokoni. He charged him with the offence.

11. It was further evidence of PW5 that he got photographs of the scene. He prepared an exhibit memo

and forwarded photographs for certification by the scene crime officers. During the hearing of the case in court he PW5, produced 7 photographs as exhibits, as P. Exh. 1 (a)-(g). He also produced the exhibit memo and certificate of photographic evidence, P.Exh. 2 and 3 respectively.

### **Defence Case**

12. The appellant in his defence stated that he is engaged in the business of digging wells. That in early January around 7<sup>th</sup>, 2025 he left Hindi and went to Witu for some work. He stayed there for 2 months after which he returned to Hindi. He found the house where he had been occupying being inhabited by another tenant. He inquired for his goods that had been in the house and he was told that the police had taken them away. He decided to go to the police station. On the way he met with a police vehicle. The policemen who in the vehicle knew him. They asked him to board the vehicle. He did so. They went to the police station. On getting there, he was told that he was a suspect in a case where goats had been stolen. He was arraigned in court. He denied the charges.

13. The appeal was canvassed by way of written submission.

### **Appellant`s submission**

14. The appellant submitted he was charged in court 2 with injuring an animal but the particulars were that of killing an animal. That the trial court convicted him of injuring an animal. He submitted that the trial court

convicted him of a different offence than that stated in the charge sheet.

15. The appellant submitted that the trial magistrate in his judgment stated that the appellant and his accomplice were found in possession of the stolen slaughtered goats while there was no such evidence adduced before the trial court. It was submitted that the trial court misapprehended the prosecution evidence as none of the witnesses called by the prosecution saw him steal the goats and neither was he found with stolen goats or their meat.

### **Respondent submission**

16. The Respondent submitted that the evidence showed that the Appellant and his accomplice killed the animals and they were found in possession of their carcasses. That the charge against the Appellant was proved beyond reasonable doubt.
17. On the sentence imposed on the Appellant it was submitted that the maximum sentence for the offence of stealing stock is 14 years imprisonment yet the Appellant was sentenced to 5 years imprisonment.

### **Analysis and determination**

18. This being a first appeal, the duty of this court to analyze and re-evaluate a fresh the evidence adduced before the trial court and draw its own independent conclusion while at the same time bearing in mind the trial court had the advantage of seeing and hearing the

witnesses testify and therefore give credit for that, see [Kiilu & another v Republic](#) [2005]1 KLR 174.

19. The appellant was convicted in count 1 of the offence of stealing stock and count 2 of injuring animals. The appellant submitted that the particulars of the offence in count 2 were different from the offence he was convicted of.

20. The offence of injuring an animal is established under Section 338 of the Penal Code that states as follows:

**“Any person who willfully and unlawfully kills animals or wounds any animal capable of being stolen is guilty of a felony and is liable, if the animal is an animal such as is referred to a Section 278, to imprisonment for fourteen years and in any other case, to imprisonment for three years.”**

21. It is clear from the wording of the Section that any person who willfully kills an animal referred to in section 278 of the Penal code is guilty of the offence termed as injuring an animal. The appellant was charged with killing 2 goats. A goat is an animal capable of being stolen and is referred to Section 278 of the Penal Code. The charge under Section 338 of the penal code was therefore proper.

22. The trial court in this case convicted the appellant of the two counts on the ground that he and an accomplice known as Nahashon were found in possession of the slaughtered goats.

23. The prosecution witnesses who tended to connect the appellant with the slaughtered goats were Benard Kiseu PW4 and Moses Nyutu PW3. It was the evidence of Kiseu PW4 that he climbed a tree and saw 2 people coming from a shamba heading towards a thicket. The people were carrying a sack. He informed PW3 who called him and they jumped onto his (PW3's) motor cycle and went after the people. That on getting to them they jumped on Nahashon while the other one escaped. That PW3 told him that he knew the person who escaped as he was their tenant. During his evidence in court he, PW3, identified the Appellant as the person who had escaped when they arrested Nahashon.
24. Moses PW3 on the other hand told the court that Kiseu PW3 climbed a tree and told him that he had seen the people who were heading towards where he, PW3, was. That once the people got into the road, he and Kiseu followed them on his PW3's motor cycle. That on getting to them they jumped off and managed to arrest one of them called Nahashon while the other one whom he identified as Solomon, the appellant escaped. He said that the appellant was well known to him. That Nahashon took them to the place they had slaughtered the goats.
25. There was no doubt from the evidence adduced by the prosecution witnesses that the complainant's goats were stolen. They were found slaughtered in the bush. There was no doubt a person called Nahashon was arrested by PW3 and PW4 and he took them to the scene

where the goats were slaughtered. Pw3 and PW4 alleged that the appellant was the person who was in the company of Nahashon when Nahashon was arrested.

26. Kiseu PW4 did not seem to know the appellant before as he told the trial court that it is Moses PW3 who knew him as he was one of their tenants. He all the same said that the appellant is the person who escaped when they arrested Nahashon.

27. It is trite that before a court can convict on evidence of identification the court must be satisfied that the evidence of identification is devoid of any possibility error. PW4 not having known the appellant before did not tell the trial court as to how he identified the appellant as the person who escaped when they arrested Nahashon. He did not tell the court which part of his body he was that would have enabled him to identify him if he saw him thereafter.

28. After the arrest of the appellant the police did not conduct any identification parade to test whether he, PW4 could identify the appellant. The evidence of the PW4 was therefore based on dock identification. It is trite law that dock identification is generally worthless evidence - see **Fredrick Ajode Ajode v Republic** [2004] eKLR. I am thereby not satisfied that Benard Kiseu PW4 identified the appellant as the person who escaped when they arrested Nahashon.

29. Similarly, Moses Nyutu PW3 did not tell the trial court how he managed to identify the appellant when they arrested Nahashon. He did not tell the court which part of

his body he saw that enabled him to identify him as the appellant. Though he said that he knew him well, he did not give the court the details of how he knew him. It was not enough for him just to say that he identified the appellant as the person who escaped without adducing evidence on how he identified him. There was no evidence that PW3 gave the name of the Appellant to the police immediately after Nahashon was arrested. The investigating officer of the case PW5 never gave evidence as to how the appellant was connected with the case apart from saying he was on the run. I am not satisfied that Moses PW3 identified the appellant as the person who escaped when they arrested Nahashon.

30. Whereas the trial court said that the appellant was found with the stolen slaughtered goats, there was no such evidence adduced before the court.
31. In view of is foregoing, I am not satisfied that the appellant was identified as one of the people who stole the complainant`s goats.
32. It is therefore my finding that the prosecution had not proved beyond reasonable doubt the charge against the appellant. The trial court erred in convicting him of the offence.
33. The upshot is that I find the appeal to be merited. Consequently, the conviction entered on the appellant by the trial court is quashed and the sentence therefore set aside. I order the appellant be set at liberty forthwith unless lawfully held.

**Delivered virtually, dated and signed at GARSEN this 28<sup>th</sup> day of April 2026.**

**J. N. NJAGI**

**JUDGE**

**In the presence of:**

**Miss Mkongo for Respondent**

**Appellant - present in person- GK Prison Malindi**

Court Assistant - Mwero

Original