



**Ngari v Republic (Criminal Appeal E035 of 2024)
[2025] KEHC 6986 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6986 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E035 OF 2024
JK NG'ARNG'AR, J
MAY 28, 2025**

BETWEEN

ELIJAH MITHAMO NGARI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant, Elijah Mithamo Ngari, was charged with the offence of stealing stock contrary to section 278 of the *Penal Code*. The particulars of the offence were that on 10th September 2022 at 1500 hours in Riagithiga village Kiamiciri sub-location Kabare West location Kirinyaga East sub county within Kirinyanga County, the appellant stole one goat valued at Kshs. 6,000.00 the property of Geoffrey Mugo Marui. When the appellant was arraigned in court, he pleaded not guilty to the offence. After full trial, the appellant was convicted of the offence and sentenced to serve 14 years imprisonment.
2. The appellant is dissatisfied with those findings. He filed his grounds of appeal dated 7th October 2024 and amended grounds of appeal dated 10th March 2025. The appellant prayed that his appeal be allowed on account of the following reasons: the trial court failed to firstly establish whether the appellant had a case to answer upon the close of the prosecution's case; the appellant was sentenced without being given an opportunity to mitigate his sentence; his defence was not considered; the prosecution failed to discharge its burden of proof to the required standard; and the sentence meted out was harsh and excessive taking into account the fact that he was convicted for stealing one goat. Going by those grounds, the appellant contended that his right to fair trial guaranteed in Article 50 of *the Constitution* was infringed. For those reasons, he supplicated that his conviction be quashed and his sentence be set aside so that he is set at liberty.
3. The appeal was heard on the basis of the parties rival written submissions. In his written submissions dated 10th March 2025, the appellant contended that the stolen goat was not adduced in evidence. Furthermore, he purchased the goat from one Anthony Munene; a fact that was not contested. He



- submitted that since the complainant stated that the stolen goat was returned to him, there was nothing to charge in the first place. For those reasons, the ingredients to the offence were not proved beyond reasonable doubt.
4. On the sentence meted out, the appellant submitted that it was harsh and excessive stating that he ought to have benefitted from the award of a fine or in the alternative, a lenient sentence. He then argued that the trial court violated Articles 25 (c) and 50 (2) of *the Constitution* when it allowed witnesses to proceed to give evidence in his absence. As a consequence, he was not given the right to cross examine the witnesses or adduce evidence to challenge the evidence of the prosecution. In addition, he was not proffered an opportunity to mitigate before sentencing. He prayed that his appeal be allowed.
 5. The respondent filed its written submissions dated 12th March 2025. Opposing the appeal in totality, the respondent submitted that the appellant was granted bail but absconded. The matter was mentioned 10 times in his absence after which the court directed that the matter does proceed. The court remarked that the appellant was not interested in pursuing the matter. It submitted thus that he was therefore estopped from claiming that his constitutional rights were not safeguarded. In fact, the respondent submitted that the applicant had abrogated his rights therein. In the circumstances, the respondent maintained that the appellant was afforded a fair trial.
 6. On whether the prosecution discharged its burden of proof to the required standard, the respondent submitted that all the ingredients to the offence of stealing stock were proved beyond any shadow of a doubt. The stolen goat was found tied in the appellant's home a day after it had been stolen. Finally, on the sentence, the respondent submitted that the same was lawful and beyond reproach. It prayed that the appeal be dismissed.
 7. This is a first appeal. As a first appellate court, my duty is to re-evaluate, re-analyze and re-consider the evidence afresh and draw my own conclusions bearing in mind that I did not have the advantage of seeing the demeanor of the witnesses and give due allowance for that. [See *Mandaa vs. Republic* [2025] KECA 674 (KLR)]
 8. The prosecution marshaled four witnesses in a bid to establish that the appellant committed the offence that he was charged with. The complainant PW1 Geoffrey Mugo testified that on 10th September 2022 at about 6:00 p.m., he was grazing his goat near the road; approximately 20 metres away from his home. He recalled having tied 3 goats earlier at 7:00 a.m. and on going to untie them, he discovered that one female goat was missing with its rope cut.
 9. PW1 conducted his investigations to establish the whereabouts of that goat. It was then that he was informed by PW2 John Muriuki that he had seen a vehicle nearby carrying tied goats. PW2 identified the driver as the appellant. On 11th September 2022, PW1 reported this incident to the police station and the area chief. The appellant was called by the sub chief who informed him that he had a goat in his home and placed it in his goat pen tied with a rope. PW1 maintained that he did not know the appellant prior to the incident. He stated that the goat was given back to him. He further stated that he did not know that the appellant had purchased the goat from Anthony Munene.
 10. PW2 recalled that on 10th September 2022, while at his shamba doing some work with his cart, a vehicle registration number KAJ 0X2Q approached him from behind. It hooted asking him to move aside. He then talked to the driver and moved his cart. He recognized the driver as his friend and an area mechanic. He was the only one aboard that vehicle. It passed him thrice going and coming back. He then saw the vehicle stop near PW1's goats. The driver alighted, cut the rope that tied the goat and took the goat. He would later learn that PW1's goat had been stolen. PW2 informed PW1 and the matter was reported to the police station and the chief. The appellant denied knowing them.



11. Assistant chief PW3 Shadrack Nyaga confirmed that on 12th September 2022 at 7:00 a.m., he was called by his colleague concerning the offence. He called the appellant whom he knew very well. He denied that he knew PW1 and PW2. When they went to the appellant's home, they found a goat that PW1 identified as belonging to him. He was emphatic that the goat could not have gone astray as the distance between the appellant's home and PW1's home was quite a distance under different sublocations. On inquiring from the appellant, he told PW3 that he would settle the matter out of court. He maintained that the appellant did not state that he had purchased the goat at that juncture.
12. PW4 PC Martin Ng'ang'a, the investigating officer, testified that on 10th September 2022 at 4:00 p.m., they received a report that PW1's goat had been stolen. The OCS was later informed by the chief at around 6:00 p.m., that the goat had been found with the appellant. The appellant was arrested and interrogated. He informed PW4 that the goat had been sold to him but did not disclose the name of the seller. PW4 took pictures of the goat which photographs were marked for identification as Pexh1 (a) – (d). He also produced the exhibit memo and certificate marked Pexh2 and Pexh3 respectively. He disclosed that the appellant was now in Bura.
13. On 27th October, at the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was placed on his defence. Since he was absent, the matter was adjourned to 20th November 2023 where he was again absent. The appellant was subsequently absent on 9th February 2024 and on 8th March 2024 when judgment was delivered.
14. Section 278 of the *Penal Code* provides that:

“If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.”
15. Section 268 (1) of the *Penal Code* defines stealing to mean the following:

“A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.”
16. The evidence of PW1 was that he discovered that his goat had been stolen on 10th September 2022. He then reported the matter to the police station and the area sub chief. On raising the alarm, PW2 informed him that he saw the appellant taking the goat. At that time, he was not aware that the appellant was committing the offence.
17. PW2 gave a detailed account as follows: that on 10th September 2022, while at his shamba doing some work with his cart, the appellant approached him driving his motor vehicle registration number KAJ 0X2Q. The appellant was known to him as his friend and area mechanic. He was the only one aboard that vehicle. After passing him thrice, the appellant stopped near PW1's goats, alighted, cut the rope that tied the goat and took it.
18. The appellant was well known to PW2 who was the eye witness. He gave a vivid description of what transpired leading up to the offence. PW2's evidence was not cast in doubt and when cross examined, he was emphatic that indeed the appellant had stolen the goat. The offence took place during the day and there is no mistaken identity. Additionally, the appellant was found in possession of the stolen goat. The appellant cross examined the first three witnesses. It is possible that he concluded for himself that he would be convicted of the offence and as will be highlighted in the forthcoming paragraphs, on several occasions, the appellant failed to appear in court.



19. It is also instructive to note that while the appellant put it to PW1 that he had purchased the goat from Anthony Munene, the appellant elected not to expound further on this. This is because he did not put a defence having instead elected to abscond his presence and participation in the matter. I say this while cautioning myself that the burden of proof in criminal cases never shifts to the accused person.
20. After the close of PW3's evidence, the matter was mentioned on 9th February 2023, 21st February 2023, 13th March 2023, 30th March 2023, 20th April 2023, 11th May 2023, 5th June 2023, 24th July 2023 and 21st September 2023. On all these days, the appellant was absent and the police were unable to trace his whereabouts except the 5th day of June 2023.
21. When the matter was called out on 5th June 2023, the investigating officer informed the court that the appellant had been traced in Tana River County in Ngura. He confirmed his presence through a call to the appellant's neighbour. In the circumstances, the prosecution made an application to have the case proceed in his absence on account of unavailable resources to arrest him. He urged that the warrants of arrest be taken to the nearest police station in order for him to be arrested. Following that application, the court directed the matter to proceed in his absence.
22. On account of this procedure, the appellant decried that his constitutional rights enshrined in Article 25 (c) and 50 (2) of *the Constitution* had been infringed as he was not afforded an opportunity to cross examine his witnesses, put a defence, and make submissions during mitigation.
23. It cannot be wished away that the appellant jumped bail on several occasions. If he was a law-abiding citizen, he would have attended court on all occasions. He failed to do that. How can he plead that he was not afforded a fair hearing when he was the author of his own misfortune? Constitutional rights are available to people who respect the rule of law and the principles of natural justice; not the breachers.
24. The trial magistrate was caught between a rock and a hard place: continuously entertain the appellant's absence and eventually hope that he will show up so that his right to a fair hearing is not infringed upon or risk a remonstrance from the appellant and proceed with the matter in his absence in the spirit of expeditious disposal of a criminal offence and in the process, justice is not only done but seen to be done? I do not think the learned magistrate can be faulted for arriving at the conclusion made. It was carefully thought out and considered all factors. Ultimately, it is my finding that the appeal against the conviction lacks merit and it is dismissed.
25. On sentencing, section 278 of the *Penal Code* gives a trial court jurisdiction to mete out a determinate sentence of up to 14 years imprisonment. Contrary to the appellant's submissions, there is no option for a fine. The appellant was absent during mitigation and sentencing. In arriving at the sentence, the learned magistrate stated:

“The accused is sentenced to serve the maximum sentence provided in law which is 14 years as he absconded court and he has not given the court any mitigation to lower the years of imprisonment. Right of appeal within 14 days from the date of arrest. Sentence shall start to run from the date of the arrest.”
26. The record bespeaks that the appellant was arrested by 23rd September 2024. The magistrate thus ordered the sentence to start running from that day.
27. I have considered the mitigation and the sentiments of the court which are by no shadow of a doubt fair. The appellant indeed failed to offer mitigating circumstances in his own volition because he elected to be absent. He was a no show during the trial on several occasions. In fact, he converted from a flight risk to an absconder. He is not remorseful. Certainly, he deserves the full force of the law. However,



it is also instructive to note that the goat, valued at Kshs. 6,000.00, and stolen by the appellant, was recovered by PW1, the complainant herein. There were no aggravating circumstances in the manner the offence took place.

28. Taking the above into account, it is my finding that the exercise of discretion under section 278 of the *Penal Code* ought to favor the appellant. I therefore interfere with the sentence by setting aside the sentence of 14 years and substituting the same with a sentence of 8 years. The sentence shall run from 23rd September 2024.

It is so ordered.

JUDGEMENT DATED AND SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY, 2025.

J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of Ndungu for the Appellant and Mamba for the Respondent. Siele/Mark (Court Assistants).

