Case Number:	Criminal Appeal 324 of 1993
Date Delivered:	29 Jul 1994
Case Class:	Criminal
Court:	High Court at Kisumu
Case Action:	Judgment
Judge:	Erastus Mwaniki Githinji
Citation:	John G. Nyakundi v Republic [1994] eKLR
Advocates:	-
Case Summary:	**Nyakundi *v* Republic** High Court, at Kisumu July 29, 1994 Githinji J Criminal Appeal No 324 of 1993 (From original conviction and sentence in Criminal Case No 176 of 1991 of the Chief Magistrate's Court at Kisumu C O Ong'udi, Esq C M:) ***Evidence*** *– standard of proof – where all evidence points to the guilt of the accused – where prosecution proves the case beyond any reasonable doubt – whether the conviction of the accused should be altered.* ***Criminal Practice and Procedure*** *– sentencing – where an accused is a young person and committed crime with others not charged – whether this should be considered when sentencing.* The appellant was convicted of four offences of stealing by a person employed in the public service contrary to section 280 of the Penal Code. He was also convicted of the offence of willfully

and unlawfully damaging a padlock contrary to section 339 (1) of the Penal Code. He was sentenced to a total of 4 years imprisonment and he lodged an appeal against conviction and sentence.

The appellant was a store clerk at Migori Depot of Nation Cereals and Produce Board when on 25.6.1991 stock taking was done and everything was found in order. On 6.9.1991 John Oketch (PW2) the Area Manager did some checking and found 530 bags missing. Later an auditor did stock taking and confirmed also that the same 530 bags of mixed *wimbi* was missing. There was substantial evidence that appellant, as store clerk was in charge. There was evidence the store was fenced, gate manned, and watertight recording system.

The appellant's case seem to suggest the audit was not correct as there were purchases and sales that were not stopped before the audit.

Held:

1. There was evidence confirmed by the records that the appellant was on duty at the store throughout the period in question dates, and further there was no evidence that anybody else could have removed the produce from the store.

2. The appellant was a young man and it seems he committed the offence with other people, a fact which should have been given weight in assessing the appropriate sentence.

Appeal allowed against conviction & sentence in count 6.

Appeal dismissed against conviction in count 1, 2, 4, 5

Appeal dismissed against the sentence in count 1, 2, 4, 5

Cases

No cases referred to.

Statutes

	Penal Code (cap 63) sections 280, 339(1)
Court Division:	Criminal
History Magistrates:	C O Ong’udi, Esq C M
County:	Kisumu
Docket Number:	-
History Docket Number:	Criminal Case 176 of 1991
Case Outcome:	Appeal allowed against conviction & sentence in count 6. Appeal dismissed against conviction in count 1, 2, 4, 5 Appeal dismissed against the sentence in count 1, 2, 4, 5
History County:	Kisumu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 324 OF 1993

JOHN G. NYAKUNDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 176 of 1991 of the Chief Magistrate's Court at Kisumu C O Ong'udi, Esq C M:)

JUDGMENT

Appellant was convicted of four offences of stealing by a person employed in the public service contrary to section 280 of the Penal Code. He was also convicted of the offence of willfully and unlawfully damaging a padlock contrary to section 339(1) of the Penal Code. He was sentenced to a total of 4 years imprisonment. He appeals against conviction and sentence.

Appellant was a store clerk at Migori depot of Nation Cereals and Produce Board during the relevant period. On 25th June, 1991, stock taking was done at the depot. Everything was found in order.

On 6th September, John Oketch (PW2) the Area Manager did some checking in the store. He found 530 bags red mixed *wimbi* missing. On 12th September, 1991 the auditor (PW3) did the stock taking in the presence of the appellant and other officials. The auditor and the appellant counted the stocks and then prepared a stock verification sheet. The auditor was relying on the manual records, completed point outs. He compared the entries on those documents with the physical galaries and found shortage as per charge sheet. There was substantial evidence to show that the appellant as the store clerk was in charge of the store. There was also evidence that the store was fenced and had a gate manned by watchmen who were recording anything being taken out of the depot. There was also substantial evidence showing that there was a watertight recording system of anything being recovered from the store. Appellant gave evidence on oath. He seems to suggest in his brief evidence that the audit was not correct comprehensive report of all sales was not there and also because the purchases and sales were not stopped before the audit.

The learned then Chief Magistrate considered all the evidence. He found that finding of PW2 was confirmed by PW3 and PW7 and that all the available documents were checked and the shortages discovered. It was argued in this appeal that appellant did not have exclusive possession of the store as other people had keys. There was however evidence confirmed by records that appellant was on duty at the store throughout the period in question dates that on one day. There was no evidence that anybody else could have recovered the produce from the store. Johnson Okwiri (PW8) a trader and Cornel Orono Haya (PW9) a messenger at the depot gave evidence tending to explain how the shortage could, was created. That evidence shows that there was some fraudulent dealings with the produce by the appellant.

The learned state counsel supports the conviction. I have evaluated the evidence and read the judgment of the learned magistrate. I have come to the conclusion that appellant was properly convicted

in respect of theft of produce. The conviction in count VI for damages the padlock was not founded. As regards that sentence, the appellant is a young man and it seems that he committed the offence with other people who were not charged. This should have been given due weight in assessing the appropriate sentence. He has also lost his job. For above reasons I dismiss appeal against convictions in counts 1, 2, 4 and 5 but allow appeal against conviction in count 6 quash the conviction and set aside the sentence of one year imprisonment. I allow the appeal against the sentence in counts 1, 2, 4, 5 to the extent that I reduce the sentence of 4 years imprisonment in count 1 to 2 years imprisonment and sentences of one year imprisonment in count 2, 4, 5 to 9 months imprisonment. The sentence in count 1, 2, 4 and 5 to run concurrently. The result is that appellant shall serve a total of 2 (two) years imprisonment.

Dated and Delivered at Kisumu this 29th day of July 1994.

E.M.GITHINJI

JUDGE