



REPUBLIC OF KENYA



**Langat v Republic (Criminal Appeal E039 of 2021)
[2022] KEHC 3052 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3052 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E039 OF 2021**

RL KORIR, J

JUNE 21, 2022

BETWEEN

ALFRED LANGAT APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the conviction and sentence in Criminal Case No. E011 of 2020 by the Hon. J. Omwange, Senior Resident Magistrate in Sotik's Principal Magistrate's Court.)

JUDGMENT

1. The Appellant was charged with the offence of stealing stock contrary to section 278 of the [Penal Code](#). Particulars were that during the night of 3rd and October 4, 2020, at Abosi village in Sotik sub-county within Bomet County, jointly with others not before court stole one sheep valued at Kshs. 4,000/= the property of Bernard Chepkwony.
2. He was also charged with an alternative charge of handling stolen goods contrary to section 322 (1) as read with section 322(2) of the [Penal Code](#). Particulars were that on October 4, 2020, at Kisobei Village in Sotik sub-county within Bomet county jointly with others not before the court, otherwise than in the course of stealing, dishonestly handled one sheep of merino type valued at Kshs. 4,000/= the property of Bernard Chepkwony, knowing or having reason to believe it to be a stolen good.
3. A second count was brought against him of stealing stock contrary to section 278 of the [Penal Code](#). Particulars were that during the night of 3rd and 4th October 2020 at Abosi village in Sotik sub-c ounty within Bomet County, jointly with others not before the court, stole one male merino sheep valued at Kshs. 4,000/= the property of Mary Ruto.
4. The alternative charge to the above main charge was handling stolen goods contrary to section 322(1) as read with section 322(2) of the [Penal Code](#). Particulars were that on October 4, 2020 at Kibsabei



village in Sotik sub-county within Bomet County, jointly with others not before the court, otherwise than in course of stealing, dishonestly handled one male merino sheep valued at Kshs. 4,000/=, the property of Mary Ruto knowing or having reason to believe it to be stolen good.

5. The Appellant pleaded not guilty to all the charges and the matter proceeded to trial in which the prosecution called six (6) witnesses. At the close of their case, the Accused was placed on his defense and directions taken under section 211. He elected to give sworn evidence. His proposed witness never showed up. At the close of the defence case, the trial court convicted the Appellant under section 215 of the *Criminal Procedure Code* by judgment delivered on July 21, 2021 and sentenced him to serve three (3) years in jail for each count.
6. Being aggrieved and dissatisfied by the trial court's decision, the Appellant brought this Appeal by way of Petition dated November 16, 2021. The Appeal was filed out of time by leave of the Court and admitted for hearing on November 19, 2021.
7. The Appellant raised the following grounds in the Appeal:
 - (1) THAT the learned magistrate erred in law and fact by holding that the Prosecution proved their case beyond reasonable doubt.
 - (2) THAT the learned magistrate erred in law and fact by convicting and sentencing the Appellant based on inconsistent and contradictory evidence that was marred with discrepancies.
 - (3) THAT the learned magistrate erred in his sentence when he failed to indicate whether the sentence passed against the Appellant was to run consecutively or concurrently.
 - (4) THAT the learned magistrate failed to take into consideration the defence by the Appellant.
 - (5) THAT the learned magistrate erred in law and fact by convicting and sentencing the Appellant which sentence was harsh, unlawful, unsafe and excessive in the circumstances.
 - (6) THAT the learned magistrate erred in law and fact by convicting and sentencing the Appellant yet no evidence was produced to prove that the Complainants were the respective owners of the things allegedly stolen.
 - (7) THAT the learned magistrate erred in law and fact by convicting and sentencing the Appellant without taking into consideration the mitigation by the Appellant.
 - (8) It was his prayer that the Appeal be allowed, conviction quashed and sentence set aside. By Court directions given on March 16, 2022, the parties were directed to canvass the appeal by way of written submissions.

Appellant's Submissions

9. The Appellant submitted on grounds 1, 2, 4 and 6 together and grounds 3, 5 and 7 together. The Appellant submitted that there was only evidence of stolen sheep but no evidence that the Appellant was the one who actually stole them. They cited the case of *Omar Dube Madero v Republic* [2018] eKLR. They pointed out that there was glaring contradiction in the testimony of PW2, 3 and 4 in respect of the actual dates when they realized their sheep were missing. It was also their submission that the evidence adduced in respect of the stolen sheep was merely circumstantial and none of it placed the Appellant at the scenes of the crime. That because none of the witnesses in the trial court admitted to seeing the Appellant, then a reasonable doubt arose in favour of the Appellant. They cited the case of *Anthony Mativo Kioko v Republic* [2018] eKLR.



10. The Appellant further submitted that the court ought to have considered that the Appellant was a boda-boda rider who was conducting his usual business and that he did not run when caught carrying the other two pillion passengers who managed to escape arrest and who were the actual thieves.
11. On sentencing, the Appellant submitted that the guiding principles for altering a sentence were enshrined under section 354 (3) (b) of the [Criminal Procedure Code](#) and in the case of *Ogalo s/o Owuor v Republic* [1954] EACA 270. They submitted that a concurrent sentence should be met if an accused person was convicted of a series of offences that occurred in one transaction. In this regard they submitted that the Appellant was allegedly found with two sheep on the same date and that the alleged offence occurred in the same place hence the court ought to have imposed a concurrent sentence. They relied on the case of [Philip Kinyamal Soit v Republic](#) [2016] eKLR, *Ng'ang'a v Republic* [1981] KLR 530 and *Ondieki v Republic* [1981] KLR 430
12. Lastly, learned counsel for the Appellant submitted that though the offence attracted a maximum sentence of 14 years imprisonment, a sentence of 3 years was harsh and manifestly excessive since the Appellant was a first offender and the stolen sheep had been recovered. Further, there was a possibility that the Appellant was merely transporting the thieves who had stolen the sheep and therefore it would be unfair to impose a harsh sentence on him. They placed reliance on the case of *Dube Omar Madero (supra)* and urged the court to reduce the sentence if the conviction was upheld.

Respondent's Submissions

13. The Respondent submitted that they had established their case to the required standard and that because the Appellant was arrested at night with no explanation of his business at the said locality, his motive could only be deduced from the motorbike which had been parked at a safe distance alongside his accomplices.
14. On sentencing, the Respondent submitted that section 333(2) of the [Criminal Procedure Code](#) gave guidance on whether the sentences were to run concurrently. They also submitted that a sentence of 3 years was not excessive and that the ambiguity of how the sentences should run ought to be read in favour of the Appellant. They relied on the case of [George Mwangi Chege & 2 others v Republic](#) [2004] eKLR, *Ondiek v Republic* [1981] KLR 430 and *Ng'ang'a v Republic* [1981] KLR 530.

Issues for Determination

15. From my perusal of the trial Record, the grounds raised in the Appeal and the respective submissions of the parties, the main issue for my consideration and determination is whether the two counts of stealing stock were proven to the required threshold.

Whether the two counts of stealing stock were proven to the required threshold.

16. The duty of the first appellate court is to subject the evidence from a lower court to a fresh analysis and careful examination in order to draw its own conclusion. (See *Pandya v Republic* [1957] EA 336 and [Kiilu & another v Republic](#) [2005] 1 KLR, 174).
17. The charge of stealing stock is provided under section 278 of the Penal Code which states 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.



18. Section 278 is read together with section 268 of the *Penal Code* which provides as follows: -

Definition of stealing

- (1) 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.
 - (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—
 - (a) an intent permanently to deprive the general or special owner of the thing of it;
 - (b) an intent to use the thing as a pledge or security;
 - (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
 - (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.
 - (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.
 - (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner and believes on reasonable grounds that the owner cannot be discovered.
 - (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.”
19. In his judgment, the learned trial magistrate stated that the Appellant’s defence was too weak to shake the prosecution’s case and arrived at a conclusion that the presence of a motorbike parked at a safe distance demonstrated the motive of the accused person and his accomplices.
20. Looking at the evidence on Record, it is only PW5, Richard Koech the Nyumba-Kumi chairman whose evidence seems to point to the Appellant. He testified that he saw the Appellant and his accomplices approach the junction on the material night carrying sheep. It is however not clear whether the sheep were two or just one because in his testimony, he first stated that three people were approaching with a sheep. Later he stated that the people had 2 sheep. It is also unclear whether he saw the Appellant being in possession of the sheep. His evidence is general in nature, that he saw three



people approaching with sheep, one was arrested and the other two escaped. PW3 stated that she did not know or see who stole her sheep. PW5's testimony is general, that three people were seen with two sheep, one was arrested and the other two escaped.

21. PW1, Edna Chelangat who was the area chief testified that it was the members of the public who had informed her that 2 people were ferrying 2 sheep, prompting her to send the Nyumba-Kumi chairman to confirm the same. Her testimony sets the pace for this case. According to her, the members of the public reported two people stealing two sheep. There is no third person from the report. It is PW5's evidence that introduces the aspect of 3 people. Further, this evidence does not actually confirm that the Appellant was found holding or being in possession of any of the stolen sheep. There is also no evidence on Record establishing that the Appellant was actually seen taking the sheep from their owners or demonstrating that the Appellant was found in possession of either of them. PW2, the first victim merely testified that he was told that his sheep was recovered from the Appellant while PW3 had no idea who the thief was.
22. The standard of proof in a criminal trial cannot be overemphasized. Lord Denning aptly explained that it must be beyond reasonable doubt in the infamous case of *Miller v Minister of Pensions* [1942] AC thus: -

“It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”
23. The Supreme Court in Nigeria also explained the rationale for this standard in the case of *Bakare v State* [1985] 2NWLR at page 465 as follows: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says, it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.
24. From the Prosecution, it was reported that two people were seen stealing sheep and that PW5 spotted three men at the junction carrying sheep but only one was arrested. While it is not in doubt that PW2 and PW3's sheep were stolen, none of the Prosecution witnesses testified to having seen the Appellant at the scene of the crime or actually committing the crime. The evidence tendered by the prosecution was circumstantial in nature and not overwhelming as stated by the trial Magistrate.
25. From my careful consideration of the presenting evidence, it is doubtful whether the third person who was arrested (the Appellant) was actually an accomplice of the two who escaped or was an innocent party caught in the middle of a theft transaction.
26. In his submissions, learned counsel for the Appellant stated that the trial court ought to have considered the Appellant's defence and that he did not run away when confronted by the crowd because he was innocent. In the same manner I find that there may have been numerous other explanations for the Appellant being found in the area on the said date.



27. In the case of *Pius Arap Maina v Republic* [2013] eKLR, the Court stated inter alia that: -

“It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution’s case raising material doubts must be in favour of the accused.”

28. It is therefore my conclusion that the doubts and questions that arise from my analysis of the Prosecution’s case ought to be construed in favour of the Appellant in line with the presumption of innocence. A criminal conviction cannot be based on mere suspicion no matter how strong it may be. Suspicion in this case arises from the Appellant being found in the locality with no explanation and that his motorbike was recovered a safe distance from the scene of crime. In summary, the Prosecution is not cogent enough to persuade this Court to arrive at a conviction. The evidence presented raises a strong suspicion that the Appellant was an accomplice in the theft of stock. That suspicion alone is however insufficient to arrive at a conviction. (See *Sawe v Republic* [2003] eKLR.)

29. It is my finding that the Prosecution did not establish their case beyond reasonable doubt, and that under the circumstances, the learned trial Magistrate erred in arriving at a conviction.

30. Consequently, I quash the conviction and set aside the sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.

31. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 21ST DAY OF JUNE, 2022.

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of;

Mugumya holding brief Mr. Langat for the Appellant, Mr. Murithi for the Respondent, and Kiprotich (Court Assistant).

