



**REPUBLIC OF KENYA**

**High Court at Garissa**

**Criminal Appeal 19 of 2012**

**Appeal from the original conviction and sentence in Criminal Case No. 134 of 2011**

**in the Senior Resident Magistrate's Court at Hola (Mr. M. O. Obiero).**

**SIYAT ADAN NOOR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. In his amended grounds of appeal (with leave of the court) filed in court on 6<sup>th</sup> December 2012 Mr. Siyat Adan Noor (the Appellant) claims that he was not conversant with the language of the trial court and that the charges were not read to him in the language that he understands. He states that it is not clear what language the trial court used whether Kiswahili or Somali and therefore he was prejudiced. He claims that the recovered sheep were not the same ones produced in court as exhibits. In his submissions on this point he stated that the sheep produced in court were said to be worth Kshs 15,000 while the stolen sheep were worth Kshs 12,000 and that the sheep taken to the police station had no mark. The appellant further claims that the prosecution evidence was contradictory and inconsistent to which he submitted that there are contradictions regarding whether the sheep had a mark or not; that the other two sheep were not found in his custody but in the bushes and that the alleged woman who found the two sheep in the bushes did not testify. He also claims that the sentence is harsh and excessive considering that he did not commit the offence.

2. The appellant was tried, convicted and sentenced by Hola Senior Resident Magistrate to a seven years jail term for the offence of stock theft contrary to section 278 of the Penal Code. The stolen animals were three sheep belonging to Ginda Walali Maalik (PW1).

3. PW1 left his three sheep near his home on 31<sup>st</sup> May 2011 at about 4.00pm when he went to the mosque for evening prayers. He had seen the appellant outside his compound and sought to know what he was doing around the place. The appellant has responded that he was herding some cows although PW1 did not see any cows at the place. On returning from the mosque PW1 found his three sheep missing. He looked for them in vain. He reported the matter at Masalani Police Station and also alerted the slaughter house. On 1<sup>st</sup> June 2011 he received information from one Hussein Maalim Farah (PW4) that the appellant had been arrested in connection with the sheep and the sheep recovered. PW1 went to the Masalani Police Station and saw the recovered sheep which he identified as his stolen sheep.

4. The prosecution case in the lower court was supported by the evidence of five witnesses. The circumstances surrounding the recovery of the sheep are that on 1<sup>st</sup> of June 2011 at around 10.00am the appellant took one sheep to Ahmed Abdalla Noor, PW5, a butcher man at Masalani intending to sell it to him. PW5 described the sheep as female (ewe) with black head and white body with mark 'M' on the

right ear. They negotiated the price and agreed at Kshs 1,950. PW5 did not take the sheep because he did not have money to pay for it. He first went to his butchery to confirm whether the meat had been sold out. PW5 did not mention in his evidence that he informed PW4 about the sheep. However, according to the evidence of PW4 he had been informed by PW1 about his (PW1's) lost sheep. When PW5 went to PW4 with information of a sheep being sold to him by the appellant, PW4 sought to see the sheep. PW4 went to PW5's house and saw the sheep. He confirmed the sheep had a black head and white body and had an 'M' mark. PW4 suspected the sheep to be the one stolen from PW1. He told PW5 to detain the sheep.

5. Further evidence by PW4 is that as he was leaving the home of PW5 he met a certain old woman who informed him that she had seen some two sheep tethered in the bushes. She led him to the place and saw the two sheep tied together. One was male (ram) and the other female (ewe) and both had white bodies and black heads. PW4 untied the sheep and went with them to PW5's house where he took in his custody the other sheep. He took them to Masalani Police Station and reported that he suspected the sheep had been stolen. PW4 testified that he had earlier taken the appellant who is his nephew to the police station. By this time the police had received a report from PW1 of the stolen sheep. PW1 was summoned to identify the sheep.

6. Police Corporal Nicholas Muthenji, PW2, from Masalani Police Station confirmed receiving the appellant at the Station on 1<sup>st</sup> June 2011 at 12.00pm. The appellant was taken to the Station by members of public on allegations of theft of three sheep. He also confirmed receiving three sheep. The appellant and the sheep were collected on 2<sup>nd</sup> June 2011 by police from Hola Police Station whose jurisdiction the offence occurred. Police Constable Richard Kipyegon, PW3, of Hola Police Station confirmed collecting the appellant and three sheep from Masalani Police Station on 2<sup>nd</sup> June 2011. He also had the sheep photographed, recorded statements from witnesses and preferred the charges against the appellant.

7. The appellant gave a sworn statement in his defence and stated that on 31<sup>st</sup> May 2011 he went to Masalani market to sell a sheep; that he sold it to PW5 who told him to collect the money later; that when he went to collect the money PW5 changed his mind and told him that he would pay him less than they had agreed to which he refused and demanded his sheep back; that PW5 said he (appellant) was a thief; that he (appellant) went to the police station and while there two old men went and told police that he was a thief; that he was arrested and placed in the cells. In cross examination, he claimed that the sheep belonged to him. The trial court considered all the materials placed before it and found the charge proved and convicted the appellant.

8. On the issue of language, I have perused the trial court record of proceedings and noted that there was interpretation into Somali language all through the proceedings. However, the plea was read and explained in Kiswahili and it is indicated that the appellant replied in Kiswahili denying the charges. While I fault the trial magistrate for not having the charge translated to the appellant, I have no doubt that the appellant understood what charges he was facing, participated in the trial and cross examined the witnesses. By reading the cross examination and his sworn defence, it is clear in my mind that these are in conformity with his plea of not guilty. To my mind, the anomaly in reading and explaining the charges to the appellant in Kiswahili has been vindicated by the fact that the rest of the proceedings were conducted in the language that the appellant understood. In my view the appellant has not been prejudiced.

9. It is true that the investigating officer PW3 testified that the sheep did not have any mark during cross examination. PW1 too did not testify in regard to the mark 'M' on the sheep but he gave the description of his sheep as having black head and white body. However, I have no doubt that the sheep were positively identified by PW1 as belonging to him. All the three had black heads and white body, the description given by the complainant. I have also noted that in the charge sheet the sheep are valued at Kshs 12,000 while in his evidence PW1 placed the value at Kshs 15,000. This does not make the prosecution case doubtful especially where the rest of the evidence is strong. My view is that both values are estimates and could vary. These discrepancies in evidence do not render the case weak given that there is ample evidence against the appellant.

10. The appellant is raising issue with the other two sheep recovered from the bush. It is true these were not found in his possession. He also claims the sheep he was selling to PW5 was his and that after they

differed on the price, PW5 claimed the appellant was a thief. I have considered these issues. The appellant was not seen stealing the sheep and the evidence is circumstantial. The appellant was seen by PW1 outside his compound and alleged to be herding his cows. There were no cows in the area and PW1 left his three sheep outside his compound and found them missing when he returned. One sheep was found with the appellant and the other two were found tethered in the bushes.

11. Out of this evidence, two issues require addressing by this court; firstly the issue of circumstantial evidence in respect of the two recovered sheep and secondly the doctrine of recent possession in respect of the recovered one sheep. The Court of Appeal in Erick Otieno Arum v. Republic [2006] eKLR stated that:

***“In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant”.***

12. I have no doubt that the one sheep was stolen from PW1 and that it was found with the appellant. My view is that it cannot be true that the sheep belonged to the appellant. The sheep also was positively identified as the property of the PW1. The appellant has not established that the sheep belonged to him as is expected in such a situation. He has also not established how he came by the possession of the sheep. The doctrine is applicable in respect of the one sheep found with the appellant.

13. As regards the other two sheep, I will examine the circumstantial evidence surrounding how they were stolen and recovered and determine if this evidence proves that the appellant is implicated and therefore guilty. Circumstantial evidence is the evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. Circumstantial evidence is said to be the best evidence (see Taylor Weaver & Donovan 21 Cr App R 20 and 21 as well as R v. Kipkering Arap Koske (1949) EACA). Courts are however cautioned to examine circumstantial evidence carefully in order to be alive to the fact that such evidence may be fabricated to cast suspicion. The circumstances of this case are that the appellant went to sell one sheep which has been identified by PW1 as one of his three stolen sheep. The two sheep were found tethered in the bushes. The three sheep belonged to PW1 and he positively identified them. The inference to be drawn here is that since the three sheep were left together at the home of PW1 before they were stolen and since the appellant was seen at the same place and the three sheep were stolen and one of them found with the appellant and the other two found tethered in the bushes, the only logical conclusion is that it is the appellant who had stolen them; that he was either alone or in company of unknown people; that he tethered the two sheep in the bushes and went to sell one at the market.

14. In Martin v Osborne [1936] 55 CLR 367 at 375, Dixon J said:

***If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability by the occurrence of the facts proved would be accompanied by the occurrence of the facts to be proved is so high that the contrary cannot be supposed.***

15. I have taken note of the fact that the woman who saw the two sheep tethered in the bushes did not testify. I however do not doubt the evidence of PW4 who received this information from her and accompanied her to the place where the two sheep were recovered. The only rational inference I can draw from this evidence is that it is the appellant who had stolen the three sheep. Even if I were to be wrong on this point, there is ample evidence establishing that the appellant had possession of the one sheep that had been stolen together with the other two sheep tethered in the bush and therefore he must be the one who had stolen them.

16. I find the petition of appeal and the grounds supporting it without merit. There is ample evidence as explained in this judgement that the appellant is implicated by the evidence. His defence that he was the owner of the one sheep he was selling cannot be true and the trial magistrate was correct in rejecting it. The sentence prescribed under section 278 of the Penal Code is a maximum of fourteen (14) years. The appellant was sentenced to seven (7) years. There is nothing illegal about that sentence. I however consider that all the three sheep were recovered and returned to the rightful owner PW1. For this reason this court will give the appellant some reprieve and reduce the sentence to four (4) years imprisonment. It is my belief that by the time he completes this sentence he will have learned a lesson that crime does not pay. This appeal therefore fails save for the reduction of the sentence. The appellant will continue serving the balance of the reduced sentence until completion. Those are the orders of this court.

**S. N. Mutuku**  
**Judge**

Dated, signed and delivered this 20<sup>th</sup> March 2013 in open court in the presence of the appellant and Mr. Mulama for the State.