



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Appeal 66 of 2009

KOMOLE MAIWA LOONIRKO APPELLANT
=VERSUS=
REPUBLIC RESPONDENT

(Appeal from the decision of Hon. H.M. Nyaga ESQ. Senior Resident Magistrate delivered on 21st April, 2009 at the Senior Resident Magistrate's Court at Kabarnet in Kabarnet SRM.CRC. No. 425 of 2008 on conviction and sentence)

JUDGMENT

I. Background

1. In this Criminal Appeal, the Appellant appeared before the Senior Magistrate's Courts at Kabarnet and was charged with the offence of :

I. **Robbery With Violence**

Contrary to Section 296 (2) of the Penal Code

The Particulars of offence being:

That on the 22nd November 2007 at Kaiabata Location, in Baringo District within the Rift Valley Province jointly with others not before Court while armed with a dangerous weapon namely an AK 47 rifle robbed Rael Reriki Rotich of 83 goats all valued at Kshs 100,000/= and at immediately before or immediately after the time of such robbery wounded Michael Komen.

2. A Second Count was preferred being:

II. **Stealing of Stock**

Contrary to Section 278 of the Penal Code.

The Particulars of Offence being:

On the 5th day of June 2008 at Loiwat Location Baringo East District within the Rift Valley Province, jointly with others not before Court stole one goat valued at Kshs 2,000/= the property of Tapegwang Lokomolia

3. The Appellant Original Accused, pleaded not guilty to both counts on 22nd July 2008. His case was set down for trial in which evidence was disclosed how the Complainant P.W.4 had hired the Appellant as a herds boy. On the night of 21/22 November 2007, she heard noises coming from the goat pen. She kept quiet till the noise ceased. After an

hour, she went out only to find all 83 goats had been stolen.

4. The Assistant Chief P.W.3 on receiving this information notified the police who gave pursuit. One of the police P.W.1 saw the Appellant who shot at him then fled leaving the goats behind.
5. The Appellant was arrested and charged.
6. In his defence the Appellant stated that he was at the market centre to buy flour. He was informed that he was wanted at the police station. He was questioned and charged with the offence. He denied that he was a robber.
7. The Trial Magistrate found that according to the Gathuri Njuguna – vrs Republic (1965) EA 583 Case that to prove Robbery it must be committed openly and in the presence of others. The case in question showed that the Appellant ought to be charged with stock theft. The Appellant was convicted on Count II for stock theft Contrary to Section 278 of the Penal Code and Sentenced to 10 years imprisonment.

II. Appeal

8. Being dissatisfied with the conviction and sentence the Appellant appealed on grounds that:
 - (i) **He pleaded not guilty to the offence**
 - (ii) **The trial Magistrate erred in convicting him for stock theft instead of convicting and or charging him for Robbery with Violence Contrary to Section 276 (2) Penal Code**
 - (iii) **The Trial Magistrate erred in rejecting his defence**
- (iv) **Failing to call witnesses.**
9. In his submissions before Osiero J, the Appellant claims he was tried and convicted for a lesser offence of Robbery with Violence Contrary to Section 296(1) penal Code and sentenced to 10 years imprisonment. He prayed that the sentence be reduced.
10. The State most certainly objected to the said request of reducing the sentence stating the maximum sentence was that of 14 years imprisonment.

III. Opinion

11. The Appellant faced two Counts before the Senior Magistrate's Court, that is:

- (i) **Robbery With Violence Contrary to Section 296 (2) Penal Code that carries a Death Penalty**
- (ii) **Stock Theft Contrary to Section 278 Penal Code that carries 14 years imprisonment**

12. It therefore is not correct that the Appellant's case was a conviction of simple Robbery duly reduced? By the Court. The Appellant in fact was acquitted on the offence of Robbery with violence Contrary to Section 296 (2) Penal Code but convicted on the issue of **Stock Theft** relied on.

12. The issue of conviction, apart from the petition of appeal was never dealt with in submissions by the Appellant. The Petition of Appeal relied on the issue that the defence was rejected and not relied on.

13. To this end, the Appellant may not have brought out this point in his submissions. He was recognized by those whom he is alleged to have attacked.

14. At the appeal stage the Appellant's prayer only for the reduction of his sentence from 10 years imprisonment.

15. I find herein on the issue of conviction that the Appellant had abandoned this. On the issue of sentence, the same was within the law. I am not inclined to interfere with this case.

16. The Appeal is dismissed.

Dated this 1st day of September 2010 at ELDORET

M.A. ANG'AWA
JUDGE.

Advocate

- (i) J.K. Chirchir, Senior State Counsel, instructed by the Office of the Attorney General for the State - Present
- (ii) Komole Maiwa Loonirko, Appellant in person - Present

