

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 195 of 2007

MPIPID LENYAKOPIRO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with another, with the offence of **stealing stock** contrary to **section 278** of the **Penal Code**. The particulars of the offence state that on the 16th day of April 2007 at Ldupai village Wamba Location in Samburu District within Rift Valley Province jointly stole one she goat valued at Kshs 1,500/= the property of **Stanley Lolmodon**. The appellant pleaded not guilty to the charge and after a full trial he was convicted and sentenced to seven (7) years imprisonment. Being dissatisfied with the conviction and sentence, the appellant appealed. In his supplementary petition of appeal he seeks the sentence to be altered on the grounds that he has suffered since incarceration. He has reflected on his mistakes and seeks for a chance to prove that he has changed.

The State conceded to this appeal on the grounds that the evidence against the appellant did not prove beyond reasonable doubt that the meat the appellant was arrested with belonged to the complainant's goat. This being a first appeal this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the judgment of the trial court. In so doing this court should bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **Njoroge vs. Republic [1987] KLR 19**.

I now wish to set out briefly the evidence that was before the trial court. **Stanley Lolmodon [PW1]** testified that his goats had been taken for grazing on 16th April 2007. They were brought home at about 6.00 p.m. but because it was raining heavily, he was not able to count the goats until the next day on the 17th April 2007 when he realised one goat was missing. He set out to look for the missing goat. **Julius Lolmodon [PW2]** made enquiries and established there were some people found with meat in the forest. He proceeded to the forest where he found the appellant cooking meat in a tin. When he confronted the appellant the appellant gave three versions of how he came into possession of the meat he was cooking. First, the appellant said that his parent's goat was struck by thunder and died. On further interrogation he said he was given the meat by his sister-in-law and lastly that he had bought the meat.

Both PW1 and PW2 testified that when they made enquiries from the appellant's parents they denied that their goat was struck by lightning. Also the appellant's sister in law denied having given him any meat. Upon being asked to identify where he purchased the meat the appellant declined and that is when he was taken to the Police Station where he was arrested by **PC Leonard Otiti Abuya**.

After the close of the prosecution's case, the appellant was found to have a case to answer. He gave evidence of how he was arrested on allegations that he had stolen the complainant's goat. He also relied on evidence by **Ntatian Lenyakopiro [DW3]** who testified that he was with the appellant on the 17th April 2007 at Wamba town. **Rose Lenyakopiro [DW4]** testified that they had slaughtered a goat and gave some meat to someone called Josphat to eat it in the forest. During cross-examination she admitted that she gave the 1st accused the meat to cook in the forest.

Having set out the brief summary of the evidence before the trial court, I am in agreement with the State

Counsel that this evidence is not safe to sustain the conviction. The appellant was convicted on mere suspicion that the meat found in his possession was from the complainant's goat. It is a cardinal principle in criminal law that suspicion no matter how strong cannot be the basis of a conviction. The prosecution had the burden of establishing beyond reasonable doubt that the goat meat they found the appellant cooking was that of the complainant's goat. In the absence of the skin, or any form of identification, there was no way the mere presence of the meat could be linked with the theft of stock. See the case of **Bhatt Vs. Republic [1957] EA at page 334** where the court of appeal explained what is a *prima facie* case as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggestion that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is ‘some evidence, irrespective of its credibility or weight, sufficient to put accused on his defence. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson J. said that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weightily enough to prove the case conclusively: that that determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a ‘prima facie case’ but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

No one also saw the appellant steal the goat or slaughter it. The appellant did not confess to an Inspector of Police and indeed none testified before the trial magistrate. The trial magistrate convicted the appellant merely on the circumstantial evidence that he was found cooking goat meat and did not explain how he came into possession of the meat. A closer look at the defence DW4 testified that she gave the 1st accused meat. From the records it is clear it is the 1st accused who implicated the appellant with this offence. It is also trite that the evidence of an accomplice should always be treated with care and must be corroborated. It is for the above reasons that I find no evidence to sustain the conviction against the appellant. I allow the appeal, set aside the conviction and sentence and unless otherwise lawfully held the appellant is to be set at liberty.

This judgment will also apply to **Michael Lenyakopiro** the 1st accused person who was sentenced to three years under the probation. The said sentence is also quashed and he is to be set at liberty.

Judgment read and signed on 29th day of January 2009

M. KOOME

JUDGE