



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 84 of 2008

(From original conviction and sentence in criminal case No. 183 of 2006 of the Senior

Resident Magistrate's Court at Maralal)

LETILE LOLKURIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of **stealing stock contrary to section 278 of the Penal Code**. The particulars of the offence stated that, on the 6<sup>th</sup> day of July 2006, at Ngari village in Samburu District within Rift Valley Province, jointly with others not before court stole twenty sheep valued at Kshs 30,000/- the property of CHARLES LEITORE. The appellant pleaded not guilty to the charge and after a full trial, he was found guilty, upon conviction, he was sentenced to seven (7) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant appealed. The grounds of appeal are that the complainant did not see the appellant commit the offence. The quality and quantity of the evidence that led to the conviction of the appellant was also challenged. This appeal was opposed by the State. The learned State Counsel Mr. Njogu submitted that there was overwhelming evidence which led to the conviction of the appellant. The complainant testified that he recognized the appellant during the commission of the offence.

**Tyrus Likaso** PW2, also testified that he knew the appellant and on the material date, he met with the appellant together with two other people, one of them armed with a gun driving about 20 heads of sheep. PW2 was able to recognize one of the complainant's sheep. The accused person was arrested by members of the public when he was spotted by PW1 at Maralal town and escorted to the police station where he was re-arrested by **PC Bonface Onyango** PW3 and charged with the present offence. On the sentence counsel was in agreement that the sentence of seven years was excessive. He urged the court to pass an appropriate sentence.

This being a first appeal this court is mandated to reconsider and re-evaluate the evidence before the trial court in order to arrive at its own independent determination on whether or not to uphold the conviction. 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**.

Briefly stated, the evidence that led to the conviction and sentence of the appellant was given by

**Charles Leitore PW1.** He is also the complainant. He testified that on the 5<sup>th</sup> day of July 2006, he heard noise from his sheep pen. When he opened the door, he saw three people. One of them armed with a gun. He flashed the torch and was able to recognize the appellant. The assailants threatened PW1 that if he got out of the house, they would kill him. He retreated to the house and lay on the floor. After two hours he went to the sheep boma and found his 20 sheep missing. He alerted the neighbours, they mounted a search and went to the home of the appellant but found he was not there.

After one month they were able to arrest the appellant at Maralal town. Tyrus Lekeso PW2 testified that on the 6<sup>th</sup> July 2007 he was driving cattle to Maralal town. He met with the appellant in the company of two men. One of them was armed with a gun, a G3 rifle. PW2 was able to recognise the appellant. They were driving about 20 sheep in number. He was also able to identify one big male sheep that belonged to PW1 because they are neighbours. Later PW2 was called to the police station to record a statement. The appellant was arrested by **PC Boniface Onyango PW3** after he had been apprehended by members of the public and taken to the police station.

Put on his defence, the appellant denied having committed the offence. The learned trial magistrate found the charge against the appellant was proved by PW1 and PW2 who were able to recognise the appellant. He was convicted and sentenced to seven (7) years imprisonment.

The evidence against the appellant was by PW1 and PW2 who were able to identify the appellant through recognition. They said that the appellant was a neighbour. PW1 looked through the window and was able to identify him. PW2 met with the appellant in the company of two others, they were driving about 20 sheep. He was able to recognise one big male sheep which belonged to the complainant.

The appellant was convicted based on the evidence of recognition. In the case of **Anjononi & others – vs. - Republic [1980] KLR 59** the Court of Appeal held that:

***“Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”***

The evidence of recognition is more reliable than identification. I find the appellant’s conviction was safe from error; it was based on evidence of two witnesses who recognized him. On the issue of sentence, the appellant pleaded for leniency on the grounds that he was the sole bread winner of his family. That mitigation does not seem to have been taken into account. I will accordingly reduce the sentence of seven (7) years to four (4) years imprisonment. The appeal on conviction is dismissed but the sentence is reduced to four (4) years.

It is so ordered.

**Judgment read and signed on 23<sup>rd</sup> October, 2008**

**M. KOOME**

**JUDGE**