



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 545 of 2006**

**PETER KANGARA KIMANI.....APPELLANT**

**-AND-**

**REPUBLIC .....RESPONDENT**

***(An appeal from the Judgement of Resident Magistrate A.O. Aming'a dated 14<sup>th</sup> September, 2006 in Criminal Case No. 870 of 2006 at***

***Limuru Law Courts)***

**JUDGEMENT**

The appellant was charged with the offence of burglary contrary to s.304(2) and stealing contrary to s.279(b) of the Penal Code (Cap.63, Laws of Kenya). To this first count there was an alternative charge: handling stolen goods contrary to s.332(2) of the Penal Code. In a second count, the appellant was charged with the offence of stealing stock contrary to s.278 of the Penal Code. And in a third count he was charged with theft of farm produce contrary to s.8(1) of the Farm Produce Act (Cap.355, Laws of Kenya).

PW1, Police Force No. 84223 *Josephat Masya* of Tigoni Police Station produced before the Court perishable goods, namely tomatoes and mutton, being the subject of one of the counts of the charge against the appellant herein.

PW2, *Gabriel Wang'ombe Waimburi*, a farmer at Thigio, testified that he visited his farm on 10<sup>th</sup> June, 2006 at about 11.00 a.m., and found that his crop of tomatoes had been harvested by an unknown person. When PW2 went to report the matter to the area Chief, he learned that a suspect had already been arrested in connection with the theft. The said tomatoes were affected by a certain infection, and so when he saw two bags full of tomatoes in Court, he was able to say that these were the very tomatoes he had for some time, been treating against the said infection.

PW3, *Martha Muthoni Gichuki*, testified that she was a farmer at Thigio, and that on 13<sup>th</sup> June, 2006 at 8.30 pm, a thief had entered her goat enclosure and stolen a she-goat. When PW3 searched on the following day, and reported the incident to the Assistant Chief, she learned that a suspect had been caught with goat-meat; and she was able to go and see the wastes left behind – the head and the hooves. PW3 recognised these items as remains from her stolen she-goat – and she was able to identify the same in Court. On cross-examination, PW3 stated that the goat-meat had been recovered from the appellant's house.

PW4, *Erick Ngugi Gitau*, the Assistant Chief of Thigio Sub-Location, testified that he was on patrol with *A.P.C. Kimani* and *A.P.C. Ndirangu*, on 14<sup>th</sup> June, 2006 around 3.00a.m., when he received reports of a suspected stolen goat which had been slaughtered. PW4 and the Police officers went into a single-room mud-house, where the occupant was busy boiling meat in a cooking pan, set over a firewood-hearth. The meat being cooked was ribby, and appeared to be from a goat or sheep. The discarded head and legs lay at the corner of the hut.

PW4 and the officers accompanying him, arrested the appellant herein, and escorted him with the meat to Thigio Police post. On the following day, PW4 sent for one of the complainants, PW3, who came along and identified the signalling wastes from the goat-meat, as marks of her goat which had been stolen.

On 12<sup>th</sup> June, 2006 PW4 had already received a report of theft of household items including cooking pans and other utensils. His Administration Police officers recovered two cooking pans, certain items of clothing, and two bags of tomatoes, and the person associated with those items, in terms of possession, was the appellant herein. PW4 said he had known the appellant since childhood, and that he had no grudge with the appellant.

PW5, *Ann Njambi Kihihu*, a farmer at Thigio, testified that she had locked her house on 11<sup>th</sup> June, 2006 at 5.00 pm and had gone out. On returning at 8.00 pm, PW5 found that her house had been broken into. She entered the house, and found her utensils and items of clothing missing; and she now identified in Court her said utensils, and items of clothing. PW5 reported this house-breaking and theft at Thigio Police Post; and three days later she learned of the arrest of a suspect; she was able to identify her effects at the Police station.

PW6, Police Force No.8807103 *A.P.C. Benson Ndirangu* of Thigio Administration Police Camp, testified that he was at the camp with one *A.P.C. Kimani* on 14<sup>th</sup> June, 2006 at 2.00 pm, when the local Assistant Chief came to report a case of goat theft. The three decided to visit the suspect's house in the dark of night, and they did so, finding the appellant herein cooking meat at 3.00 a.m., in his mud-walled hut. The meat was being cooked in a large cooking pan; and a goat's head and legs lay on a sack at a corner of the hut. PW6 and his colleagues arrested the appellant, and escorted him, with the meat, to the Administration Police Post. On the following morning, a lady came along and identified the slaughtered goat as hers; she identified it by the features of the discarded head and legs. And several days later, another lady came and identified the large cooking pan as hers.

PW6 and his colleagues later returned to the appellant's hut, and recovered still more stolen items. The appellant's brother, on that occasion, opened up the hut, for inspection; and further recovery was made in the form of tomatoes which were being claimed by PW2, another complainant. The appellant was later escorted to Tigoni Police Station, with the stolen items. In response to cross-examination, PW6 testified that the said tomatoes were not recovered from any place other than the appellant's house.

When put to his defence, the appellant said he was a businessman involved in the sale of cakes; and that he was, on 12<sup>th</sup> June, 2006 asleep in his hut when strangers came along and ordered him to open up. Some of these strangers were Administration Police Officers; they arrested him and took him to the Police Post, before taking him to the Police Station where he was charged. He said he knew nothing about the incidents which were the subject of the charges brought against him.

The learned Magistrate conducted his final assessment of all the evidence as follows:

"I have considered the prosecution evidence *vis-a-vis* the defence. There is no doubt that PW3's goat got stolen; she identified the head and legs [of her goat] produced as exhibits 2 and 3...The accused appears to have claimed ownership of the goat. Indeed he wanted to have the exhibits including the [goat-meat] which was going bad...released to him...The accused has, however, not indicated how he came to be in possession of the goat and, if he bought it, from whom. His act of slaughtering and cooking the entire goat in the ungodly hours of the night, while all alone in the house, is not a normal thing. I believe the witnesses who arrested him [while he was] in the act of boiling the meat. I reject the defence in this

regard.”

With regard to the first and the third count of the charge, the learned Magistrate thus assessed the evidence:

“...PW2’s evidence is also credible...This witness positively identified the tomatoes as his. The same applies to the complainant in the first count who equally positively identified the utensils and clothes.”

The trial Court found the evidence sufficient to convict, and it rejected the appellant’s evidence as untrue. The Court found that the prosecution case had been proved beyond any reasonable doubt, in respect of all the three counts.

The appellant did not, in the submissions, contest his conviction, but asked that the several terms of imprisonment imposed, three years each for two counts, and one year for a third count, be made to run concurrently instead of consecutively. His reason was that he was suffering in jail and was yearning for freedom.

Learned counsel *Ms. Gateru* noted that, unlike in the submissions, the appellant had, in his grounds of appeal, contested even the conviction itself. As regards sentence, learned counsel noted that in the first count of the charge, which was for burglary and stealing, the penalty imposed was three years’ imprisonment, where maximum sentence would have been 14 years imprisonment; on count 2, for stealing stock, a penalty of three years’ imprisonment had been imposed, where the maximum was three years. The incident covered by the 1<sup>st</sup> count took place on 11<sup>th</sup> June, 2006; that covered by the 2<sup>nd</sup> count took place on 13<sup>th</sup> June, 2006; and that covered by the 3<sup>rd</sup> count took place on 13<sup>th</sup> June, 2006.

The discretion of the trial Court to impose sentences that run concurrently is provided for in s.14(1) of the Criminal Procedure Code (Cap.75, Laws of Kenya) which provides:

*“Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.”*

Learned counsel *Ms. Gateru* urged that in view of the circumstances of the offences charged, the cumulative penalty of seven years’ imprisonment appeared to be on the higher side, and a shorter term might be substituted.

The detailed and gripping testimonies of the prosecution witnesses in this case, in my opinion, leave no doubts that the appellant did commit the offences charged, and, consequently, he was rightly convicted. That the appellant too recognised this position, is clear from the fact that he did not in his submissions contest the conviction, in the three counts.

As regards sentence, s.14(3) of the Criminal Procedure Code (Cap.75) provides:

*“For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case [of] convictions for several offences at one trial shall be deemed to be a single sentence.”*

On that basis, the “single sentence” for the purpose of the instant appeal is the seven-year *aggregate term* of imprisonment. Is this a fair sentence for the offences in question, taking into account all the accompanying circumstances? I am in agreement that a seven-year term in jail appears too severe, for the offences set out in the charge sheet.

Consequently, I hereby substitute the aggregate term of seven years’ imprisonment, as imposed by the trial Court, with a shorter aggregate term of imprisonment of four (4) years. Upon completion of the said term of four years, the appellant shall be released from prison custody, unless otherwise held for some

lawful cause.

*Orders accordingly.*

**DATED** and **DELIVERED** at Nairobi this 10<sup>th</sup> day of November, 2008.

**J.B. OJWANG**

**JUDGE**

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Ms. Gateru

**Appellant in person**