

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 137 of 2006

**(From original conviction and sentence of the Senior Resident Magistrate's Court at
Maralal in Criminal Case No. 49 of 2006 – S. Mbungi {S.R.M.})**

LEMAINO LEKURAA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Lemaino Lekuraa was charged with the offence of **Stealing stock contrary to Section 278** of the **Penal Code**. The particulars of the offence were that on the 26th February 2006 at Longewan Manyata in Samburu District, the appellant stole one sheep valued at Ksh.900/=, the property of Piruni Lebarleiya. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the appellant was convicted and sentenced to serve seven years imprisonment. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised three grounds of appeal challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted based on insufficient evidence of the prosecution. He faulted the trial magistrate for failing to consider his evidence which had established that the alleged stolen sheep had in fact strayed into his own herd. He was aggrieved that the trial magistrate had failed to consider that he had in fact made a report informing the members of the community that he had in his possession a sheep whose owner was unknown to him. He took issue with the fact that the trial magistrate had failed to consider his defence and therefore arrived at an erroneous decision convicting him. He was finally aggrieved that he had been sentenced to serve a custodial sentence that was harsh and excessive in the circumstances.

At the hearing of the appeal, the appellant reiterated his grounds of appeal. He submitted that on the 26th February 2006, a sheep strayed into his compound. He kept custody of the sheep. He sent word around the village for the owner to go to his homestead and collect the lost sheep. He explained that he was surprised when the owner of the sheep reported to the police and later went to his compound and had him arrested on the allegation that he had stolen the sheep. He maintained that he had not stolen the sheep. He pleaded with the court to re-evaluate the evidence and reach an appropriate determination exonerating him from the offence. He urged the court to allow his appeal.

Mr. Mugambi for the State opposed the appeal. He submitted that the appellant had been found in possession of the sheep. He submitted that the appellant stole the sheep from the daughter of the complainant who was herding it. He explained that the evidence adduced by the prosecution witnesses was cogent and corroborated each other. He maintained that the prosecution had established that it was the appellant who stole the sheep because it was found in his possession. He submitted that the appellant was unwilling to part with possession of the sheep when the complainant went to his house to retrieve the same. The appellant threatened to stab the complainant with a knife. He urged the court to uphold the conviction and sentence of the appellant.

This being a first appeal, this court is mandated to re-evaluate and re-consider the evidence adduced in the trial before the magistrate's court so as to reach its own independent determination whether or not to

uphold the conviction. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any finding as regard the demeanour of witnesses (*See Okeno –vs- Republic [1972] E.A. 32*). The issue for determination by this court was whether the prosecution proved its case against the appellant on the charge of theft to the required standard of proof beyond reasonable doubt. I have considered the evidence that was adduced before the trial magistrate's court and the submission made before me on this appeal.

That the appellant was found in possession of the sheep was not in doubt. It was the prosecution's case that the appellant stole the said sheep and unlawfully retained it. On his part, the appellant explained that the sheep in question had strayed into his compound. He had kept the sheep as he made inquiries of its owner within his village. What was the evidence offered by the prosecution in support of its case? PW1 Piruni Lemaleiya testified that on the 26th February 2006 at about 6.00 p.m., he was informed by his daughter that one of the sheep that she was herding got stolen by the appellant. PW1 accompanied by PW2 Stephen Sainteno went to the house of the appellant. They found the appellant tying the sheep on his bicycle. PW1 identified the sheep. The appellant refused to give back the sheep to PW1. PW1 was assisted by other members of the village to arrest the appellant. The appellant was later taken to Suguta Marmar Police Post where he was detained. He was later charged with the theft of the sheep.

Having re-evaluated the evidence adduced by the prosecution witnesses, it was clear to this court that the appellant stole the said sheep. The story that he put forward in his defence does not hold water. If indeed the story of the appellant were to be believed (*that the sheep had strayed into his compound and that he had retained it for safe keeping*), then once the complainant identified himself as the owner of the sheep, the appellant should have released the sheep to the complainant. The behaviour of the appellant when the complainant sought to retrieve the sheep was not typical of someone who had the intention of returning the sheep to the owner. The appellant became violent when the complainant attempted to take possession of his sheep. The prosecution therefore established to the required standard of proof beyond reasonable doubt that the appellant stole the sheep in question. It was apparent that the appellant intended to unlawfully convert the ownership of the said sheep. He intended to ferry the said sheep to a different location to conceal the fact that he had stolen it from the complainant. I find no merit with his appeal on conviction. His appeal against conviction is hereby dismissed.

On sentence, the appellant was sentenced on the 15th May 2006 to serve a custodial sentence. He has been in prison for eighteen months. The appellant is a first offender. The sheep which was stolen by the appellant was restored to the possession of the complainant. Taking into account the totality of the facts of this case, including the value of the stolen item, this court is of the view that the appellant has been sufficiently punished. His appeal on sentence is therefore allowed. The sentence of the trial magistrate is hereby set aside and substituted by an appropriate sentence of this court. The custodial sentence of the appellant is commuted to the period already served. The appellant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 20th day of December 2007

L. KIMARU

JUDGE