



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL 141 OF 2006**

**(From original conviction and sentence of the Resident Magistrate's Court at Maralal in Criminal Case No. 196 of 2005 – S, Mbungi [R.M.]**

**RICHARD LENGURO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, Richard Lenguro 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 29<sup>th</sup> October 2005 at Lolmolok area in Samburu District, the appellant, jointly with another, stole ten sheep valued at Ksh.12,000/=, the property of Jackson Londungokiok. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged 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 several grounds of appeal challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted for the offence of theft yet the evidence adduced established that it was his brother who had stolen the sheep. He was aggrieved that the trial magistrate had not considered the totality of the evidence adduced including the fact that the appellant was arrested after a mob had falsely implicated him with the offence. He was finally aggrieved that the trial magistrate had not considered his alibi defence and thus had erroneously convicted him for an offence which he had not committed. He faulted the trial magistrate for not considering his mitigation before sentencing him to serve a custodial sentence which, according to him, was harsh and excessive.

At the hearing of the appeal, Mr. Ogonda for the appellant submitted that the plea which was taken was equivocal. He submitted that the evidence adduced by the prosecution was at variance with the particulars of the charge. He maintained that the trial magistrate ignored the alibi defence adduced by the appellant and thus reached the erroneous decision convicting the appellant. He submitted that the trial magistrate put undue emphasis on the conduct of the appellant after arrest and not on the evidence which was adduced before court. He complained that the proceedings before the subordinate court were conducted in Kiswahili, a language which the appellant did not understand. He submitted that the proceedings ought to have conducted in Samburu language, a language which the appellant understood.

Mr. Ogonda explained that the evidence adduced by the prosecution did not establish to the required standard that the appellant was found in possession of the stolen sheep. He submitted that there was a

discrepancy between the charge brought against the appellant, and the evidence adduced in support of the charge. He stated that, whereas the charge spoke of ten sheep which had been allegedly been stolen, the evidence adduced in court only mention four sheep. He submitted that the trial magistrate erred when he failed to properly evaluate the totality of the evidence adduced which could have exonerated the appellant from the charge. He urged the court to allow the appeal.

Mr. Mugambi for the State opposed the appeal. He submitted that the plea which was taken was unequivocal. He further submitted that the trial was conducted in a language that the appellant understood. He explained that the appellant cross-examined the prosecution witnesses without any difficulty. He maintained that the appellant understood the charge and the nature of the proceedings that he was facing. He submitted that there was no variance between the charge and the particulars of the charge. He maintained that the evidence which was adduced proved the charge to the required standard of proof. He submitted that the prosecution proved that the appellant was found in possession of sheep which had been stolen from the complainant. He submitted that the trial magistrate properly assessed the evidence adduced and properly reached the conclusion that the prosecution had established its case on application of the doctrine of recent possession. He urged the court to dismiss the appeal.

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 of the appellant. 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 is whether the prosecution proved to the required standard of proof beyond reasonable doubt that it was the appellant who stole the sheep of the complainant.

The appellant was convicted by the trial magistrate based on the evidence of recent possession. According to the complainant (*PW1 Jackson Londungokiok*) and his witnesses, the complainant, on the 29<sup>th</sup> November 2005, realised that his ten sheep had been stolen. He reported the theft to the area chief *PW3 Payo Longuyo*. On the 1<sup>st</sup> December 2005, the complainant accompanied by *PW2 Fred Londukiok* went to the Maralal Livestock Market. They found the appellant and his brother in possession of four sheep which they intended to offer for sale. The complainant identified the four sheep to be among the sheep which were stolen from him, two days earlier. With the assistance of the members of the public, the complainant apprehended the appellant and escorted him to Maralal Police Station. The appellant however managed to escape before he was handed over to the police. He was later arrested and charged. When the appellant was put on his defence, he did not give any reasonable explanation of how he came to be in possession of the sheep. He insisted that the sheep was found in possession of his brother and not in his actual possession. He further alleged that there existed a grudge between him and the complainant.

I have carefully re-evaluated the evidence adduced before the trial magistrate in light of the submissions made before this court. On the issue whether the plea that was taken was equivocal, in the present case, the appellant pleaded not guilty to the charge. The case proceeded to full hearing. The appellant participated in the trial and vigorously cross-examined the prosecution witnesses. When he was put on his defence, the appellant offered evidence in his bid to exonerate himself from the charge. It was therefore clear that the appellant understood the language in which the proceedings in court were conducted. The fact that he offered his defence in Samburu language, did not vitiate the proceedings previous thereto which were conducted in Kiswahili. The appellant did not raise the issue of language in his petition of appeal. This issue was therefore raised as an afterthought. It has no merit. I hereby disallow it.

The appellant did not rebut the presumption placed on him by the law when he failed to explain how he came to be in possession of the sheep which were stolen from the complainant, two days prior thereto. My analysis of the evidence adduced clearly leads me to no other conclusion other than the fact that it was the appellant who stole the sheep from the complainant and later took it to the Maralal livestock market in a bid to sell them. I therefore hold that the prosecution, established, on application of the doctrine of recent possession, that it was the appellant and his accomplice who stole the sheep. I find no merit with his appeal against conviction. I therefore dismiss the appeal against conviction.

On sentence, the appellant was sentenced on the 25<sup>th</sup> April 2006 to serve a term of seven years imprisonment. The appellant has been in prison for a period of one year and eight months. Taking into consideration the value of the stolen item, this court is of the view that the appellant has been sufficiently punished. Although the sentence that was imposed by the trial magistrate on the appellant was lawful, in the circumstances of this case, having considered the totality of the facts of this case, I will set aside the sentence imposed by the trial magistrate and substitute it with an appropriate sentence of this court commuting the sentence of the appellant to the period already served.

The appellant is ordered released from prison and set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**DATED at NAKURU this 17<sup>th</sup> day of December 2007**

**L. KIMARU**

**JUDGE**