

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 150 of 2006

(From original conviction and sentence of the Senior Resident Magistrate's Court at Maralal in Criminal Case No. 71 of 2006 [S. N. Mbungu {S.R.M})

JOSEPH LENAWAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Joseph Lenawat was charged with the offence of **killing an animal with the intent to steal contrary to Section 289** of the **Penal Code**. The particulars of the offence were that on the 13th March 2006 at Embakasi village, Wamba in Samburu District, the appellant jointly with others, killed two sheep valued at Ksh.2,700/=, the property of Joseph Lenalakiti with the intent to steal the skins and carcasses. The appellant pleaded not guilty to the charge. After full trial, the appellant was convicted as charged and sentenced to serve seven years imprisonment with hard labour. The appellant was aggrieved by his conviction and sentence and appealed to this court.

In his petition of appeal, the appellant raised grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial magistrate had convicted him on the basis of insufficient evidence of the prosecution witnesses. He was further aggrieved that the trial magistrate had failed to consider that his co-accused in the subordinate court had admitted the offence and therefore his conviction in the circumstances could not have been sustained. He was aggrieved that the trial magistrate had failed to consider "*his side of the story*" before reaching the decision convicting him. He pleaded with the court to consider a reduction of the sentence in view of the fact that he was the sole breadwinner of his family who were young and of the school going age.

At the hearing of the appeal, the appellant reiterated the contents of his petition of appeal. He submitted that it was his co-accused in the lower court who was rightly convicted for stealing the sheep. He denied that he had been involved with the theft. He maintained that the person who stole the sheep was his co-accused in the lower court who pleaded guilty to the charge. Mr. Mugambi for the State submitted that the appellant was properly convicted by the trial magistrate. On the issue of sentence, he left it to the discretion of the court.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced by the prosecution witnesses before the trial 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 into account the fact it neither saw nor heard the witnesses as they testified. (*See Njoroge vs Republic [1987] KLR 19*). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the appellant on the offence charged to the required standard of proof.

In the present case, PW1 Joseph Lenalakiti testified that on the 13th March 2006 at about 6.00 p.m., he realised that two of his sheep were lost. The said two sheep were lost when they were being herded by PW1's child. He mobilised his neighbours who included PW2 Raphael Letele and followed the footprints

of the sheep. He was able to trace the said sheep to a place where they had been slaughtered. There was no one at the scene but they were able to follow blood stains to the house of the appellant. He found the appellant with some of the meat and the head of the sheep. PW1 identified the head of the sheep as that of his sheep which apparently had been stolen. The appellant was arrested and taken to Wamba Police Station where he was later charged and taken to court. When the appellant was put on his defence he chose to say nothing.

It was therefore clear from the foregoing evidence that the prosecution proved to the required standard of proof beyond reasonable doubt that it was the appellant and his co-accused in the lower court that stole the sheep of the complainant and later slaughtered them. The appellant was found in possession of the skin and the head of the slaughtered sheep which the complainant positively identified. Although no one saw the appellant steal the said sheep, in the present case, the doctrine of recent possession applied. The appellant was found in possession of the carcasses of the two sheep that were stolen from the complainant so soon after the said theft. The appellant offered no reasonable explanation to discount the inference that he was the one who participated in the theft of the said two sheep. I find no merit with his appeal. I dismiss his appeal on conviction.

On sentence, the appellant stated that he was the sole breadwinner of his family who were of school going age. I have considered that the appellant has been in lawful custody since the 21st March 2006 when he was arrested and arraigned before the trial magistrate's court. Taking into consideration the value of the stolen item and further taking into consideration that the appellant was a first offender, this court is of the view that the appellant has been sufficiently punished for the offence that he committed.

I will therefore exercise my discretion and allow the appeal on sentence. The custodial sentence imposed by the trial magistrate is hereby set aside and substituted by an appropriate sentence of this court. The sentence of the appellant is commuted 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 13th December 2007

L. KIMARU

JUDGE