



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KITALE

**CRIMINAL APPEAL 95 OF 2006**

**FRANCIS ROTICH =====APPELLANT**

**V E R S U S**

**REPUBLIC =====RESPONDENT**

**J U D G M E N T**

The appellant, FRANCIS ROTICH, was convicted for the offence of stealing stock, contrary to section 278 of the Penal Code. He was then sentenced to three years imprisonment.

In his grounds of appeal, he challenged both his conviction and sentence. However, during the hearing of the appeal, the appellant only asked this court to reduce his sentence. In the course of his submissions, the appellant said that the reason for seeking a reduction in the sentence was that he had not committed the offence for which he had been convicted.

He also pointed out that although PW2 had implicated him in the offence, on the grounds that it is he who had sold the two stolen sheep to PW2, that witness did not produce any evidence (by way of an agreement) to show that the said sheep had been sold to him by the appellant.

The appellant also submitted that the evidence of PW3 was inconsistent with that of PW2, as PW3 did not see the person who sold the sheep to PW2.

Furthermore, the appellant submitted that in the light of the failure of the arresting officer and the investigating officer giving evidence in court, there was no evidence to show how the exhibits had been recovered.

It was also the appellant's submission that after the 4<sup>th</sup> accused had been discharged, on the grounds that he was under-age, the said accused should have testified, to prove that he was a brother to the appellant.

In any event, the appellant pointed out that the 1<sup>st</sup> accused had admitted having sold the sheep which were produced as exhibits at the trial. Therefore, as there was no evidence to prove that the said sheep were sold more than once, the appellant says that he should not have been convicted.

Finally, the appellant submitted that the trial court had failed to take his defence into account. Had the court done so, the appellant believes that it would have appreciated the fact that there was a grudge between him and PW1, over a shamba.

In this case, there were four accused persons, who had been charged with the offence of stealing 15 sheep from PW1. After a full trial, the learned trial magistrate only convicted the appellant, who had been

the 3<sup>rd</sup> accused.

PW1, FRANCIS BOWEN CHELIMWAI, was the complainant. Early on the morning of 5/7/2004, he heard his livestock moving outside. He woke up and went outside to check on them. However, he found all his fifteen (15) sheep missing.

He reported the theft to the Chief and to the police.

On the next day, he went to the animal auction at Cheptuiya, to try and find his stolen animals. Whilst at the auction, PW1 found two of his sheep with PW2, who told him that he had bought the sheep from the appellant and the 4<sup>th</sup> accused.

PW1 testified that he knew both the appellant and the 4<sup>th</sup> accused, as they were his neighbours.

PW1 reported to the Administration Police, who then arrested the appellant.

PW2, REUBEN BIOS, testified that he was a livestock trader. On 5/7/2004, he attended the livestock auction at Kishaunet Trading Centre, where the appellant and the 4<sup>th</sup> accused sold him two sheep, for KShs.500/=. That transaction is said to have taken place at about 11.00 a.m.

About an hour later, PW1 appeared at the auction market, in the company of Policemen. They asked him who was the owner of the two sheep, and he told them that he was the one. At that point, PW1 told PW2 that the said sheep belonged to him, and that the same had been stolen.

According to PW2, he did ask the appellant to enter into an agreement, but the appellant left before executing the agreement. PW2 said that the appellant gave the excuse that he did not have his Identity Card. However, the 4<sup>th</sup> accused, who had been in the company of the appellant when the latter brought the sheep to the market, did provide PW2 with the names of the appellant.

During, cross-examination by the appellant, PW2 insisted that the appellant was arrested because PW2 was very sure that it was the appellant who had sold the 2 sheep to him.

PW3, STEPHEN LOKATO, was the Assistant Chief of Timbaras Sub-Location. He was told by PW2 that the said PW1 had lost his sheep. PW3 then organized a meeting, with a view to inquiring who had stolen the sheep. Later, PW1 told PW3 that he had recovered the sheep in Kishaunet, where the appellant is said to have sold them.

PW3 went to the appellant's home but the appellant was absent. Having learnt that the appellant had gone to Kapenguria, PW3 followed him there, and found that the appellant had been arrested.

When the appellant cross-examined PW3, the witness admitted that he did not see the appellant stealing the sheep. But PW3 was emphatic that he had been told that the appellant was one of the two people who sold the sheep.

PW4, DANIEL EMANKURA, was a businessman. On 5/7/2004, he was at the Kishaunet animal auction, where he met PW2. According to PW4, PW2 had bought young sheep, but the seller had left. However, the young boy who had been with the appellant gave the names of the appellant, to the two witnesses, (i.e. PW2 and PW4).

Later, when some people claimed that the two sheep belonged to them, PW4 and PW2 released the sheep to them, after informing the said people that it was the appellant and Cosmas who had sold the sheep to them.

When the appellant was put on his defence, he said that on 28/6/2004, he had taken his sick friend to Ortum Hospital, where the friend was admitted, for 10 days. It was the appellant's case that he stayed

together with his friend, at the hospital until 8/7/2004, when he was arrested.

As far as the appellant was concerned, the complainant did not see the person who stole his sheep. The appellant also said that PW2 had told the complainant that he did not know the people from whom he had bought the sheep.

Having given due consideration to the evidence on record, and after re-evaluating the same, I find that the evidence of PW2 was very clear. As at the time he was buying the two sheep, he did not know the appellant's name. However, he asked the appellant to have a sale agreement drawn up. It is at that point that the appellant explained that he did not have his Identity Card. The appellant then left before an agreement was drawn up. That explains the absence of a written agreement between PW2 and the appellant.

However, it is clear from the evidence of both PW2 and PW4, that PW2 was at the animal auction at Kishaunet Market, on 5/7/2004. It is also clear that PW2 bought two sheep. The only question is as to the identity of the person from whom PW2 bought the sheep.

To my mind, the answer lies in the fact that on the material day, the appellant had gone to the market, in the company of a young boy, named Cosmas. It is the young Cosmas who provided the names of the appellant to PW2 and PW4.

The said Cosmas was not called as a witness, according to the appellant. Therefore, in his view, there was a gap in the prosecution case.

It is noteworthy that the prosecutor had expressed the desire to call both the investigating officer and a child witness. However, after several adjournments, when the said witnesses did not show up in court, the prosecutor was forced to close the case, after the learned trial magistrate rejected his quest for yet another adjournment. Does that imply a gap in the prosecution case?

To my mind, if PW2 had not seen the appellant, and if he had only been given the appellant's name, like in the case of PW4, then there could have been some doubt whether the name given by Cosmas was of the appellant or any other person. However, in this case, PW2 talked to the appellant. The time was about 11.00 a.m, when the appellant offered to sell two sheep to the witness. The two negotiated and agreed.

In other words, PW2 had ample opportunity to talk to the appellant, and therefore he got to know him physically. It is only the appellant's name which PW2 did not know, at that stage.

As PW2 categorically stated that the appellant was arrested because PW2 was sure that it was the appellant who had sold the sheep to him, I find no room for any doubt as to the identification of the appellant.

Secondly, as the appellant had the sheep only a few hours after the same had been stolen from the complainant's home, I find, as did the learned trial magistrate, that the doctrine of recent possession was applicable to this case.

In the event, I find that the appellant's conviction was sound. It is therefore upheld.

As regards sentence, it is noted that the maximum penalty provided under section 278 of the Penal Code is imprisonment for fourteen years. In the circumstances, the three year jail term appears lenient. It is therefore upheld, as I find no reason to interfere with it.

Accordingly, the appeal is dismissed, and I uphold both conviction and sentence.

Dated and Delivered at Kitale, this 3<sup>rd</sup> day of December, 2007.

**FRED A. OCHIENG**

**JUDGE**