REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

CRIMINAL APPEAL CASE NO. 51 OF 2003

DAVID LEKOLOL …………………………………. APPELLANT

VERSUS

REPUBLIC ………………………………………….. RESPONDENT

(An appeal from the Judgment of The Principal Magistrate's Court at Maua (N.

Kimani,

Senior Principal Magistrate) dated 19th February 2003)

JUDGMENT OF THE COURT

The appellant, David Lekoloi, was charged with stealing stock contrary to Section 278 of the Penal Code. The particulars of the offence were as follows:-

> **"On the 9th day of January 2003 at Kalau grazing area, Kangeta Location in Meru North District within the Eastern Province, jointly with others not in court, stole 24 heads of cows, 70 goats and 5 donkeys all valued at Kshs. 200,000/= the property of Cypriano M'Mukiri."**

The appellant was tried by the Senior Principal Magistrate, Maua, (Mr. N. Kimani) who found him guilty, convicted him and sentenced him to serve 10 years imprisonment with hard labour. The appellant was also ordered to receive 7 strokes of the cane. It is against that conviction and sentence that the appellant has appealed to this court.

Briefly, the facts were that on 9th February 2003 at about 11.00am the complainant Cypriano M'Mukiri (PWI) was grazing his animals at a place called Kalau.PWI was in the company of Patrick Thiringi (PW2) and Adriano Mwingirwa (PW3) when the appellant, in the company of another came to where the complainant and his companions were, held them hostage demanding to know whether PWI and his associates had any guns. The appellant and his companion had a rifle each. When PWI and his companion answered that they had no guns, the appellant and his companion ordered them to go away, which they did leaving the animals behind. PWI and his companions went and reported the incident to the sub-chief who later reported the incident to the police at Maua Police Station, accompanied by PWI. A search for the animals led PWI and police to Isiolo but no recoveries were made. They proceeded to Archers Post some days later but still no recoveries were made. At the post, PWI spotted the appellant and identified the appellant to the police who arrested him. PWI does not say in his evidence how many of his animals were taken away, but he testified that none of them was recovered. In cross-examination PWI said that he saw the appellant well before the appellant ordered him and his companion to go away and that the appellant held his coat and that the appellant's face was not covered.

PW2, Patrick Thiringi gave similar details of what transpired on 9th February 2003 and that at Archers Post, he, together with PWI were able to identify the appellant as one of the thieves who had stolen PWI's animals and subsequently the appellant was arrested and charged. PW2 told the court that the animals which were stolen by the appellant and which animals were not recovered were 24 cows, 70 goats and 50

donkeys. PW3, Adriano Thaingirwa corroborated the evidence as given by PWI and PW2 and that the appellant and his accomplice were armed with guns. That at the time when the appellant was spotted at Archers post, he was still dressed in the same clothes that he had when he accosted the trio and drove away PWI's animals at Kalau.

PW4, AP Inspector James Mutua who was attached to DO1's office at Maua testified that on 12th January 2003, he was at Archers Post with PWI, PW2 and PW3 when PWI pointed at the appellant as one of the people who had stolen his animals, namely 24 cows, 70 goats and 5 donkeys, all of which were never recovered. PW5, PC Ronald Mukangai re-arrested the appellant from PW4 and charged him with the offence of stock theft.

In his defence, the appellant gave a brief unsworn statement stating that he was arrested at Archers Post where he had gone to buy medicine for his goats. The appellant's only witness, Joseph Lokoloi (DWI) stated that the appellant is a member of his family and that he (appellant) was arrested when he had gone to buy medicine for the goats; and that no stolen livestock was recovered from the appellant.

After due consideration of all the evidence before him, the learned trial magistrate found the appellant guilty as charged and proceeded to sentence him. It was the finding of the learned trial magistrate that the appellant was properly identified by all the first three prosecution witnesses, namely PWI, PW2 and PW3 and even PW4 who was together with the first three witnesses when PWI pointed to the appellant as one of the two persons who had stolen PWI's animals. The learned trial magistrate dismissed the appellant's evidence and that of DWI, finding as he did, that the period between the commission of the offence and the identification was so short that he had no doubt in his mind that the appellant was properly identified. It was a matter of three days in between. The appellant was dissatisfied with the judgment and proceeded to prefer this appeal. The appellant has set out seven grounds of appeal; that the learned magistrate erred in law and fact in determining the matter against the weight of evidence, that the learned trial magistrate erred in law and fact in convicting the appellant even when prosecution had failed to discharge the burden of proof fully and satisfactorily. The appellant also contended that the learned trial magistrate erred in law and fact by failing to give cognizance and recognition to the appellant's defence and that the learned trial magistrate applied the wrong principles while sentencing the appellant and thus handed the appellant a harsher sentence than was deserved. That the learned trial magistrate did not take into account the mitigating circumstances of the appellant and that he based his judgment on framed up evidence which was not only inconsistent but was also contradictory.

It was argued for the appellant that the evidence on record did not support both conviction and sentence, that the prosecution did not prove its case beyond any reasonable doubt. That there were glaring inconsistencies in the prosecution case such as the number of cattle stolen, the place where the offence was committed, and further that there was no investigation regarding allegations of guns possessed by the appellant and his alleged accomplice and also that the identification of the appellant was faulty. Finally, it was submitted that the trial magistrate took into account extraneous matters while totally disregarding the evidence adduced by the appellant, and that in the absence of any recoveries of the allegedly stolen livestock, then the prosecution had failed to prove its case beyond any reasonable doubt and that the appeal should thus be allowed.

Mr. Oluoch for the respondent submitted that he supported both conviction and sentence and especially because the only contradiction that the defence has pointed at is in the number of donkeys stolen. It was further submitted that that failure of the stolen livestock was not fatal to the prosecution's case. It was also submitted that the use of the word "we" used in relation to the identification of the appellant by the witnesses cannot be faulted since it is a normal conversational word. That the judgment of the learned trial magistrate cannot be faulted for failing to consider the defendant's defence, firstly because there was no such defence and secondly because the learned trial magistrate considered whatever was said by the appellant and his witness. That the allegation that the appellant was framed was far fetched and an afterthought since the appellant put no questions to the prosecution witnesses during cross-examination to suggest the existence of such a scheme.

On the issue of identification, Mr. Oluoch submitted that there was no mistake since the offence took place in broad day light and the appellant was seen by PWI, PW2 and PW3 from very close quarters as the appellant ordered them to leave as he and his accomplice drove away the animals. Secondly, that the identification of the appellant at Archers Post some two days after the incident left no doubt in the mind of the identifiers that the appellant was the thief who had driven away PWI's animals.

On sentence, Mr. Oluoch submitted that the sentence of 10 years was not excessive but conceded that

hard labour could not be supported in light of recent amendments to the law.

I have considered the submissions made on behalf of the appellant and also on behalf of the respondent. From those submissions, it does appear that the biggest complainant by the appellant is that the appellant was not properly and clearly identified by the prosecution witnesses. PWI and PW2 both testified that on the material day, they were at a place called Kalau where they were grazing PWI's animals. The appellant and another came to where they were and held them hostage while seeking to know whether PWI and PW2 had any guns. That the time was 11.00am and that the appellant's face was not covered and that he carried a large rifle. They also testified that the appellant ordered them to go away on establishing that they did not have guns and that the appellant and his accomplice then drove PWI's animals away. PWI was able even to give a clear description of the appellant and his accomplice. PW3 also testified to similar circumstances. Two days after the animals were driven away by the appellant and while continuing with the search at Archers Post PWI recognized the appellant and pointed him out to the police (PW4 – AP Inspector James Mutwa) who then arrested the appellant. PW2 and PW3 corroborated PWI's evidence on identification on this day at Archer's Post. PW4 testified that PWI identified the appellant from among many other Morans at Archer's Post.

I have made an independent evaluation of that evidence adduced before the trial court and would concur with the learned trial magistrate that the appellant was properly identified by the prosecution witnesses as being one of the two thieves who held the witnesses hostage and later ordered them to leave as the appellant and his accomplice drove away PWI's animals. There is no evidence on record, nor is there any suggestion that the appellant was or could have been framed. The witnesses all said that they did not know the appellant before, but because of the close contact they had with the appellant even as the appellant got hold of PWI's coat, the witnesses were able to identify the appellant two days after the incident.

Having found as I have that the identification of the appellant was watertight, were the ingredients of the offence of stock theft proved. It was been submitted on behalf of the appellant that this was not done. In light of all the evidence on record, I have no reason to find otherwise. The appellant took what was not his and drove the animals away. Even if the animals had been recovered, the appellant would still have been found guilty of the offence. I find that the other issues raised in support of the appeal are of no value to the appellant's case. I am satisfied that the learned trial magistrate considered the appellant's defence when the learned magistrate said:-

> **"Accused in his defence stated that he was at Archer's Post market where he was arrested having come to buy medicine for his goats. His witness DWI gave a similar version ………………… Accused's defence which I have carefully considered not in isolation but in totality of the evidence is a sham, mere denial and unmeritorious. I reject it as such."**

The trial court did consider the defence case and found that the evidence was a sham and proceeded to reject it. The appellant's unsworn evidence went thus:-

"I am David Lokoloi from Archers Post. My witness is Joseph Lokoloi. I was arrested at Archer's Post. I had come to buy medicine for my goats."

My own evaluation of the entire evidence is that even if the appellant had said nothing the prosecution had indeed proved its base against the appellant beyond any reasonable doubt and the conviction of the appellant was justified. I would therefore find no reason to interfere with the learned trial magistrate's conviction.

As regards sentence, apart from the hard labour and the strokes, it is my view that the sentence was not excessive in the circumstances.

For the reasons given above, I am satisfied that the appellant was convicted on well founded and overwhelming evidence and I therefore find no merit in the appeal. The appeal is therefore dismissed

except that I set aside the sentence to the extent only of quashing the aspect of hard labour and strokes of the case.

Dated and delivered at Meru this 27th day of January 2005.

RUTH N. SITATI

Ag JUDGE