



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 85 OF 2018**

**GLETUS KEMBOI BAIENGO.....APPELLANT**

**- VRS -**

**THE REPUBLIC.....RESPONDENT**

**{Being an Appeal against the Conviction and Sentence of Hon. H. M. Nyaberi– SPM Iten dated and delivered**

**on the 1<sup>st</sup> day of October 2018 in the original Iten Senior Principal Magistrate’s Court Criminal Case No. 170 of 2016}**

**JUDGEMENT**

The appellant was on 2<sup>nd</sup> October 2018 sentenced to a term of imprisonment for three years for the offence of stealing stock contrary to Section 278 of the Penal Code.

The particulars of the offence were that on 11<sup>th</sup> December 2016 at Kapsiren village, Terikeyo Sub-location within Elgeyo Marakwet County, jointly with others not before court he stole three goats valued at Kshs. 18,000/= the property of Ernest Kipchumba Cheboi.

His appeal which is against the conviction and the sentence is premised on grounds that: -

- “1. I did not plead guilty at the trial.**
- 2. the alleged offence of stealing stock was a result of a grudge.**
- 3. Being a first offender I humbly pray for non-custodial sentence.**
- 4. I promise to be a law abiding citizen when pardoned.”**

The written submissions upon which the appellant relied at the hearing of the appeal are however predicated on completely new grounds. Be that as it may I have fully considered the submissions and those of Learned Prosecution Counsel Miss Busienei. I have also as is my duty reanalysed the evidence in the court below while keeping in mind that I did not see or hear the witnesses testify.

The complainant testified that on the material day he left his seventeen goats in the grazing field and went for lunch but when he returned three were missing. He reported the matter to the Chief who advised him to continue searching for them. Two days later on 13<sup>th</sup> December 2016 he learnt from the Chief that a goat fitting the description of one of his stolen goats had been recovered at a place called Chesongoch and it was at Tot Police Station. He went to the Police Station and when he saw the black she-goat he identified it as his. It turned out that the appellant had taken the goat to a hotel at Chesongoch Trading Center intending to sell it to Pw2’s husband – a hotel operator – and had been asked to tie it to the fence as Pw2’s husband was not there. It was there that the goat was found by police officers who impounded it and also arrested Pw2’s husband.

In his defence the accused admitted having taken the goat to Pw2’s hotel. He however denied that he stole it and stated it had been given to him by his father. He called his brother (Dw2) who similarly stated the goat had been gifted to the appellant by their father. Their evidence did not however add up because according to Dw2 all of the goats belonging to their father had been stolen during inter clan fighting in April 2015 and it is unbelievable that only this one goat returned home in December 2016 more than one year later. Like the trial Magistrate I did not find the defence convincing. Instead I find that Dw2’s account matches what the appellant is alleged to have told the police – that he had happened on the goat drinking water and taken it. His conduct amounted to stealing because he had taken it fraudulently and without claim

of right with an intention to permanently deprive the complainant of it as indeed he had offered to sell it to Pw2's husband (**see Section 268 of the Penal Code**). It is my finding that the charge against him was proved beyond reasonable doubt and the appeal on conviction therefore has no merit.

In regard to the sentence, I find the three years imposed lenient as he was liable to imprisonment for a term of fourteen years. Moreover, he expressed no remorse for the offence. In the upshot the appeal is dismissed in its entirety.

In his submissions he alleged to have been detained at a police station for two days before he was taken to court. It is now trite that even were that true it would not entitle him to an acquittal but a right to sue for damages.

The issue of witness statements was not raised at the trial and given the robust manner in which he conducted his defence during the trial it is clear that he very well understood the charges facing him and he did not suffer any prejudice. The trial Magistrate considered his defence and found as I have in this appeal that it was not convincing at all. The prosecution needed not to call the Chief to prove its case as the Chief's role was merely that he received a report from the complainant a fact which was not in issue. The complainant had not seen the person who had taken his goat and it would have been unreasonable to expect him to give the identity of the thief in the first report. The defence was well choreographed but it was not true. The appeal is dismissed.

**Signed and dated this 15<sup>th</sup> day of January 2020.**

**E. N. MAINA**

**JUDGE**

**Dated and delivered in Eldoret this 21<sup>st</sup> day of January 2020.**

**H. A. OMONDI**

**JUDGE**