



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO 136 OF 2017

DENNIS CHIRCHIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***[An appeal from the original sentence and conviction of the
criminal case no. 732 of 2015 in the Principal Magistrate's Court
at Kabarnet delivered on the 29th day of February, 2016***

by Hon. S.O. Temu PM]

JUDGMENT

1. The appellant was convicted and sentenced to serve imprisonment for a term of seven (7) years for the offence of stealing stock contrary to section 278 of the Penal Code. Being aggrieved by the conviction and sentence the appellant appealed to this court on grounds that:

1. The trial magistrate erred in law and fact by meting a conviction and sentence on me basing on unaccomplished evidence tendered by the prosecution witnesses who were not called to the court.
2. The trial court failed to see that the prosecution evidence were full of contradictions, error, inconsistencies which would not have sustained a conviction.
3. The trial magistrate failed to see that from PW1 to PW4 all the witnesses were family members and must have planned and conspired the evidence resulting to being a mistaken identity. However, my defence also was dismissed without regard.

2. The appellant submitted that:

Ground one:

PW3 was not consistent as to the number of people they went to arrest the appellant in his home. The number is exaggerated by PW2 in his reply "we were many". The appellant cited *Olivia v. Republic* [1965] the court held that: "when a person in an indictment then such person should be availed as a witness."

Section 124 of the Evidence Act notwithstanding section 19(1) of the Oaths and Statutory Declaration Act stipulates that corroboration is necessary to strengthen or make prosecution evidence probable. Thus the person mentioned by the prosecution witnesses were crucial similarly noted in *John Chemengich Wache v. Republic consolidated with Jeane Gacheche and George Ndulu* stated that: "it is trite law that whenever there is any doubt in a prosecution case conviction cannot be sustained."

Ground Two:

The prosecution adduced evidence was contradicted, the trial magistrate should not have relied on. It is hard to put to clarity the alleged stock was a goat or a sheep. Section 6 of the Evidence Act prescribes that "facts which are though not in issue are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same place and time or at different times and places."

In *Isaac Nganga Kahiga v. Republic* [2005] unreported, it was held that: “it is trite law that before a court of law can rely on the doctrine of recent possession it must be positively proved. First that the property was found with the suspects. Secondly that the property was stolen from the complainant, lastly that the property was recent stolen from the complainant.”

Under section 212 of the CPC, the production of the photographs of the goat did not link the appellant herein for the court to reply on them.

Mwangi v. Republic [1957] E.A 104, held that; “when exhibits were not found in the possession of the accused then he is not liable for it.”

Ground three

The trial magistrate failed to see and consider that Mr. Peter Lekesio was not happy on the fact that the accused was released on probation term for a three year sentence. See *Stephen Charo Mavuo v. Republic* [2015] e KLR.

3. The DPP availed a total of five (5) witnesses who gave testimony against the appellant/accused and stated as follows:

“PW1 Esleen Samna

I am a resident of Eldume Sub-location Kabarnet. On the night of 20th – 21st of August 2015 I was at home asleep, in the morning when I woke up I went to the Kitchen when my daughter rung, she informed me that the grandfather was calling me. I talked to my son who asked me whether I had sold (our) he goat, I stated I had not. He informed me that he had found people with the goat. I asked him to have them arrested and taken to the police station. When I rung later nobody picked the phone.

I went to the place where the goats were and I confirmed that the said he goat was missing. Two goats were missing but two came home later.

I went to Marigat town on the way I met one boy at the bridge; he informed me that the person who had the goat had escaped.

We went to my daughters’ home where the goat had been left, I was able to identify it by the marks on the ears and colour which was white.

We went to Marigat police station with the goat with one Bartonjo who was with the man who had escaped. The police took photographs of the goat and I took it home. The goat was on a motor cycle when it was recovered.

I went home. Goats have been disappearing but we did not manage to arrest the person who steals.

Cross-examination by accused

My son had rung me using her sisters’ phone. You were found with the goat. When I come to court on 7/10/2015 you stated that I should forgive you so that we can resolve the matter as you had been sentenced on another case. I had asked you to refund me my money that I had spent but to date you have not.

PW2 Cornel Lekatan

I am a resident of Labai, I just finished school. The complainant is my mother. I know the accused, I see him at Marigat.

On 21/8/2015 I had slept at Marigat town and in the morning I woke up at 6am to go home on a motor cycle. When I was about a Kilometre to home I met one motor cycle registration no. KMCZ 054P carrying a goat and one passenger. I was able to identify the goat. I turned and followed the motor cycle rider, the motorcycle fell down and I was able to reach them. I asked the boy who was on the motor cycle whom the goat belonged to and he said he was.

He said that he had been sent for the goat, I asked the two to go with me to where my sister was to ask for a phone to inquire from my mother whether she had sold the goat.

Mother said that she had not sold the goat, the boy escaped. We found him but managed to escape. We went to the police station we reported and the goat was photographed.

The police asked us to look for the accused. We went to the accused’s house at night while in the company of the boda boda rider and my in-law and we arrested him.

We took him to Marigat police station where we left him.

Cross-examined by the accused

Your jacket was left when you run away, it was left at the police station. We were many when we arrested you at night it was at

11pm.

PW3 Bartonjo Raymond

I am a resident of Marigat, I am a boda boda rider. I do not know the complainant herein, the accused is known to me as a customer who gave me work on the 21/2/2015 to carry him a goat.

*On the said date I had taken the 1st customer to Eldoret area when I went back to my base my second customer **who was the accused asked me to take for him a goat to the slaughter.** The goat was at water area, he asked me to wait 5 minutes he came with a white goat, as we were going one boda boda rider came and passed, the goat had struggled and we fell, the rider asked us to stop. He moved to where we were and he asked us to who the goat was the accused stated that he was the owner, he asked again and asked the two of us to go to the police station if the goat was stolen.*

I asked the rider I will [corporate] to the end. He asked me to go with him to his sister's home to confirm whether the goat had been stolen.

When we were at the house, he rung his mother and the mother had informed him that she had not sold any goat.

PW2's in-law came out and asked where he had found the goat and he stated that he had been sent to pick the goat by one person.

We went to the police station, the accused left the goat and ran away. We chased him but we did not catch him, cornel remained with the accused's jacket.

I was locked in the police stations, later released and asked to search for the accused.

We went to Labai where the accused stayed, we were informed there was market. I went in search of him and the neighbours informed me that the accused was in and out of his house.

I looked for Cornel and Aron and we went to the accused's house at night, we went into the house, he was hiding behind the sofa; we took him to Marigat police station the following day I was given the motor cycle.

Cross-examination by accused

I had carried you once while carrying the goat, there was no sheep on the same date. You later stated that Kip sent you the goat. The jacket was whitish which was fading. We were five when we came to arrest you. We took you to the police station when people wanted to beat you, and I asked people not to beat you. It Was around 9pm. I recorded statement on 22/8/2015, the police officer Mr. Sego is the one who was recording statements.

PW4 Aron Lepasio

I am a resident of Marigat, I work at the office of youth. The complainant is my in-law. The accused stays at Marigat. On 21/8/2015 I was at home about 6.30 – 7am I heard people talking outside, my wife was outside, and I heard her talking with them. I went out and saw the accused holding the goat PW2 was there. The goat belonged to my in-law, pw2 was on a call I entered the house to change. I heard pw2 scream i went out and the accused had escaped. The rider was missing the two came back and informed me that the accused had run away and that pw2 had found him with the goat.

We went to Marigat Police station and the rider had carried the goat to the station. We asked the police to deter the motor cycle and the rider to help us trace the accused.

In the evening the rider came to my home and stated the whereabouts of the accused. We went to the accused's house and knocked, the house was open and we entered inside and we found the accused and we took him to Marigat police station, the following day we went to record our statements.

Cross-examination by accused

You held the goat outside my house, you ran away while I went inside to change.

PW5 No. 45671 CPL Wilson Waome.

I am attached at Marigat police station. On the date of the incident I was at the station when the complainant came while in the company of members of the public carrying a goat that had been stolen. The complainant stated that the accused stole the complainants' goat and he had met the complainant's son who recognized the goat.

The accused was interrogated and in the process he ran away and he left behind his jacket which was handed over to me.

The goat was photographed and it was taken to Marigat Police station.

Cross-examined by the accused

You were found with the stolen goat and you ran away. I was not there when you were arrested. The people who found you with the goat are the ones who arrested you.

4. The appellant/accused giving his defence as DW1 gave unsworn evidence and stated as follows:

DW1

On 21/8/2015 I was home, I left in the morning to work when I went back I was informed that there was a person who was looking for me.

The person came and we agreed that I was going to work for him and we went to the road with him and when I went back I was arrested.

When I was in court and released on another case, the said person Peter Lekesio had informed me that I was to see or go back to prison again.”

5. The DPP opposed the appeal on conviction and not on sentence and stated that:

“Ms. Macharia Assistant DPP

The goat stolen was valued at Ksh.8000/=, in my view the seven year sentence was on the high side I urge the court to reduce the sentence.”

6. The court noted that the appellant had served 2¹/₂ years imprisonment since sentence, in view of the response by the DPP the court requested the Probation Officer for a pre-sentence report of the appellant. Mr. Kiprono, the Probation Officer gave recommendations on the appellants as follows:

“RECOMMENDATION

*Given the negative sentiments from the complainant and the immediate neighbours coupled with the fact that the appellant’s remaining period of custodial sentence is still way above maximum period of a non-custodial sentence. It is our opinion that his case is **not eligible** for a community-based sentence and may therefore be dealt with otherwise.*

Kiprono M.K.

Probation Officer

Baringo Sub County

Dated: 8/10/2018”

Issues for Determination

7. The issue for determination are:

1. Whether the offence of theft of stock was proved;
2. Whether the appellant was shown to have been the thief; and
3. Whether the sentence of imprisonment for 7 years is excessive.

Appeal from Conviction

8. Upon review of the evidence before the trial court it is clear that the appellant committed the offence. The evidence of PW2, the son of the complainant who found the accused and a *boda boda* rider with the complainant’s stolen goat is corroborated by that of a *boda boda* rider PW3 who identified the accused as the person who had hired him to take the goat to slaughter. The accused was also properly identified by PW4, the husband to the sister of PW2 as the person who with the *boda boda* rider and PW2 had taken the goat to his home upon intervention by the PW2, after which the appellant had escaped who received the goats. The goat was properly identified by the complainant PW1 and her son PW2.

Appeal from Sentence

9. In light of the imprisonment for a term of seven (7) years, the court agrees with DPP that it was excessive having regard to the value of the

stolen item of one goat valued at Ksh.8000/=. I would consider that a sentence of imprisonment for four years would meet the justice of the case.

10. The sentence of imprisonment for four years with remission, which was available under section 46 of the Prisons Act at the time of the sentence on 29th February 2016, becomes 2 years and 8 months. The appellant has already served **two years and 9 months** as at the date of this ruling.

Orders

11. Accordingly, for the reason set out above, the court, pursuant to section 354 (3) (b) of the Criminal Procedure Code, makes the following orders:

1. The appellant's appeal from the conviction for stock theft c/s 278 of the Penal Code is dismissed.
2. The sentence of imprisonment for seven years is set aside and substituted with a sentence of imprisonment for four (4) years from the date of the sentence in the trial court.
3. As the appellant has already served the two years 8 months imprisonment with remission in full, the court makes an order that the appellant be released from custody unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 5TH DAY OF DECEMBER 2018

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person

Ms. Macharia, Assistant DPP for the Respondent.