



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

HCCRA NO. 99 OF 2015

(FORMERLY NAKURU CRIMINAL APPEAL NO. 186 OF 14)

(Being an appeal against Conviction and sentence in Narok Criminal Case No. 1476/2013- Z. ABDUL RM)

JULIUS RATIAN KAYONI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein was convicted for the offence of Stealing Stock contrary to section 278 of the Penal Code. The particulars state that on diverse dates between 1st April, 2013 and 20th October, 2013 at **OLDEREKESI** area in Narok South District within Narok County he stole 220 sheep valued at Ksh.770,000/= the property of **KAMAMIA OLE KAYONI**. Initially he was charged jointly with one **Mashati Ole Yenko**

2. The Appellant denied the charge. Following a full trial the Appellant was found guilty, convicted and sentenced to serve 7 years imprisonment. His Amended grounds of appeal challenge the adequacy of the evidence adduced at the trial (grounds 2 & 3); the propriety of the charge sheet (ground 1) and the alleged unlawful shifting of the burden of proof on the Appellant (Ground 4).

3. The Appellant filed written submissions in support of his grounds. He submitted on the first ground that there was variance between the charge sheet and the evidence adduced regarding the number of sheep stolen from the complainant’s farm, rendering the charge sheet defective.

He argued regarding the 2nd and 3rd grounds that his conviction was based on suspicion. He takes issue with the evidence of the eye witness PW2 and the fact that the prosecution did not call the complainant’s children with whom he was herding the sheep, to testify.

4. With regard to one **Mashati Ole Yenko** the Appellant faulted the prosecution’s failure to call him as a witness after the withdrawal of charges against him, or to bring proof of the alleged debt complaint made against him (**Yenko**) by the Appellant. The Appellant submits further that the trial court introduced its own theories and relied on unproved allegations while wrongly dismissing the Appellant’s defence. Some of the issues raised in submissions do not correspond with the amended grounds, in particular the submissions regarding the legal competence of the police prosecutor **PC Ihaji**. Section 85 & 88 of the Criminal Procedure Code were amended and hence the submissions had no substance.

5. On a first appeal, the Appellant is entitled to a fresh evaluation of the evidence by the appellate court, which should also draw its own conclusions (**See Okeno –vs- Republic 1973 E.A. 32**). The prosecution evidence in the lower court was that the Appellant was a relative of the Complainant and that between 1/4/13 and 10/10/13 he was hosted as a guest by the complainant. In the said period the Appellant lost 220 sheep out of his heard of 1300 sheep. He suspected the Appellant who, according to the Complainant’s neighbor **Salankat Leronka (PW2)** had been spotted on 18/9/13 driving away some 20 sheep from the Complainant’s grazing field. At the time, the Appellant was accompanied by one **Mashati Ole Yenke** (the co-accused who settled the case with the complainant before the hearing).

6. It would seem that subsequently to 10/10/13 when the Appellant was asked by the complainant to leave his home, he approached **APC Simon Lempasi (PW3)** on 19/10/13 at Ewaso Nyiro Administration Police Post. He reported that **Mashati Ole Yenke** had failed to pay him the sum of Ksh.63,000/= being proceeds for the sale of 15 sheep he gave Yenke to sell on his behalf in Nairobi. The said Yenke was arrested and escorted to Narok police station and handed over to **PC Obade (PW4)**. When the complainant got wind of the complaint lodged by the Appellant, he contacted Narok police station. He obtained a letter from the said station and travelled to Mau. A police officer at Ol kurto police post accompanied the complainant to the Appellant’s home at Olposimoru and he arrested the Appellant.

7. In his unsworn defence statement the Appellant stated that he was going about his own farm activities when police came to his home and arrested him. He denied the charges.

8. Having perused the record of appeal, I note that there were two accused persons jointly charged in lower court. These are **Mashati Ole Yenke** and the Appellant herein. Before this only one accused, namely **Mashati Ole Yenke** had been charged in Criminal case No. 1476/13. The said charge sheet indicated that the accused was charged with theft by agent and the Complainant was **Ratian Ole Kayioni** (Accused herein). On 22/10/13 the plea was taken but a fresh charge against the two men was filed on 6/2/14. The complainant in the said case is PW1. However after consolidation, PW1 withdrew the complaint against Yenke on 18/3/14 stating that he had been compensated.

9. The record of the trial court file tends to confirm the evidence by PW1, 3 and 4 that the Appellant herein was the first to raise a complaint against Yenke regarding the theft of proceeds from the sale of sheep. This particular person, Yenke, a local resident was identified by PW2 as the man he saw with the Appellant on 18/9/13 driving away sheep from PW1’s grazing field. PW2 maintained this evidence during cross-examination. The event occurred in the day, and even though PW1 may not have been suspicious at the time, he knew the Appellant as a guest at PW1’s. He told the court that he assumed that the sheep were being taken to the market at Naikarra.

10. It is true that the Complainant’s children who were present at the time were not called as witnesses. This omission however does not detract from the evidence of PW2. It did not appear that there was any bad blood between him and the Appellant. There is no requirement that all eye witnesses to an incident be called as witnesses (See section 143 of the Evidence Act). Possibly, PW2 did not count the exact number of sheep taken away, but the fact that the Appellant reported to PW3 on 19/10/13 that he had given 15 sheep to **Mashati Ole Yenke** to sell on his behalf goes to confirm the evidence of PW2. More so because the Appellant apparently abandoned his claims against Yenke upon his own arrest.

11. The proximity of the Appellant’s complaint to PW3 to the date of removal of sheep from PW1’s grazing field on 18/9/13 tends to suggest that the sheep in question were those taken from PW1’s farm. Equally, the involvement of Yenke in both transactions firms up the conclusion. The Appellant in his defence was silent regarding his alleged dealings with Yenke.

12. His present complaint that Yenke was not called as a prosecution witness does not advance his appeal. But as I will indicate later on, the prosecution probably needed the evidence of Yenke to prove the loss of 220 sheep. I do not fault the trial magistrate for believing the evidence of the prosecution, and particularly the eye witness PW2. The evidence effectively dislodged the Appellant’s denials. However, regarding the number of sheep stolen by the Appellant, I do not think that firm evidence was placed before the court to prove that PW1 lost 220 sheep to the Appellant. That is a large number of sheep and it

was necessary for the prosecution to prove that apart from the 20 sheep PW2 referred to, the Appellant was responsible for the loss of the extra 200. The prosecution appears to have relied on circumstantial evidence in that regard.

13. However the evidence by PW1- Pw4 does not rise up to the threshold required in proof of the theft of 200 other sheep. In other words, the fact that PW2 had seen the Appellant drive away 20 of PW1's sheep does not in the circumstances of this case, lead to a conclusion that he also stole 200 more. This is not the same as saying that there was variance between the evidence and the charge, as the Appellant has argued. Rather, that the evidence is inadequate as regards the theft of a total 220 sheep.

14. In order for a conviction to be based upon circumstantial evidence, the inculpatory facts proved must be incompatible with the innocence of and point to the guilt of the accused person.

The Court of Appeal observed in **Republic –V- Kipkering Arap Koskei [1949] 16EACA 135** that:

“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

15. And in *Simoni Musoke -vs- Uganda (1958 E.A.)715* that;

“It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

16. In my considered view, the inculpatory facts laid before the court with regard to the theft of the extra 200 sheep raise only suspicion against the Appellant. It may be that persons other than the Appellant had access to, and stole the 200 other sheep from the complainant. It is therefore my considered view that with regard to the said 200 sheep the evidence relied on was not water tight. Perhaps, the gaps in the prosecution evidence could have been filled by calling Yenko as a witness, regarding the balance of 200 sheep. Be that as it may, the trial court would have arrived at a different conclusion in this regard had it applied the test outlined above to the evidence.

17. With regard to the loss of 20 sheep however, there was in my view credible evidence through PW1 & PW2 that the Appellant stole the same. The conviction for theft of 220 sheep is set aside and substituted with a conviction for Stock theft contrary to section 278 of the Penal Code, in relation to 20 sheep, on 18/9/13. To that extent, the appeal on conviction succeeds.

18. It follows that the sentence of 7 years imprisonment imposed on the Appellant is no doubt excessive and liable to revision. The Appellant was sentenced on 1/8/14. He has therefore served 1 year and 9 months. The sentence is hereby reduced to the period served. The Appellant is to be set at liberty forthwith, unless otherwise lawfully held.

Delivered and signed at Naivasha, this 3rd day of **June, 2016.**

In the presence of:-

For the DPP : Mrs. Waweru

For the Appellant : In person

Court Clerk : Barasa

Appellant :

C. MEOLI

JUDGE