REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 129 OF 2010

JOSEPH GARANG KORIR……..…….……..APPELLANT

VERSUS

REPUBLIC…….……....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1661 of 2010 Republic v Joseph Garang Korir in the Senior Resident Magistrate's Court at Eldoret by D. K. Kemei, Senior Resident Magistrate, dated 3rd September 2010)

JUDGMENT

1. The appellant was convicted for *stealing stock* contrary to section 278 of the Penal Code. He was sentenced to *three* years imprisonment.

2. The particulars were that on 15th December 2009, at Kipkenyo village, Kapsaret Division, Wareng District of the Rift Valley Province, he stole 32 sheep valued at Kshs 64,000; the property of Abraham Kiptum.

3. The appellant has appealed against the conviction and sentence. The petition of appeal was filed on 10th September 2010. There are *six* grounds of appeal. They can be abridged to *five*. First, that the appellant did not comprehend the proceedings; secondly, that the charge sheet was defective; thirdly, that the Republic did not prove the charge beyond reasonable doubt; fourthly, that the trial court disregarded the defence tendered by the appellant, and fifthly, that the sentence was harsh and excessive.

4. At the hearing of this appeal, the appellant's learned counsel relied entirely on the written submissions filed on 24th March 2015. It was submitted that the proceedings were conducted in *Kiswahili*, a language in which the appellant was not fluent; acted in person. It was submitted further that the charge sheet failed to disclose the Occurrence Book number; that the ownership of the sheep was not established; and, that the sentence failed to take into account the age of the appellant or his relationship with the complainant.

5. The appeal is contested by the Republic. The case for the State is that the appellant followed the proceedings; that failure to include the Occurrence Book number was not fatal; that the trial court considered the defence proffered by the appellant but found it to be bogus; and, lastly, that the sentence in this case was quite lenient considering that thirty two sheep were stolen. In a synopsis, learned Prosecution Counsel submitted that the conviction was safe. I was implored to dismiss the appeal.

6. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR

7. The complainant claimed he was a son-in-law of the appellant. He testified that on 15th December 2009, the appellant came to his homestead. He told the complainant that he would assist him to sell thirty two sheep at Kshs 2,000 each. A neighbour (PW2) assisted the appellant to drive the sheep to an abattoir. The next day, the appellant failed to remit the sale proceeds. he claimed that he sold the sheep on credit. After persistent demands, the appellant told him *"to go to hell"*. The complainant then lodged a report with the police.

8. PW2 confirmed that he assisted the appellant to drive the thirty two sheep from the complainant's home to the Eldoret slaughterhouse. The appellant paid him Kshs 1,000. He denied that there was a scheme to frame up the appellant. PW3 was police Sergeant Muranda. She recorded the complaint on 13th March 2010. She arrested and charged the appellant with the offence.

9. When the appellant was placed on his defence, he protested his innocence. He claimed he had bought the sheep the previous day for a consideration of Kshs 74,000; and, paid a deposit of Kshs 13,000. He did not say from whom he purchased the sheep; or, whether he ever paid the balance. He denied entering into an agreement for sale of sheep with the complainant. He denied any relationship with the complainant. He claimed the charge was driven by jealousy as the complainant was envious of his land holdings. On cross examination, he conceded that the complainant was his neighbor since 2008. He blamed his tribulations on a man called Kokwo.

10. From that evidence, I entertain *no* doubt that the appellant and complainant were neighbours. It is also clear beyond peradventure that on 15th December 2009, the appellant offered to sell 32 sheep on behalf of the complainant at Kshs 2,000 each. The appellant in his defence conceded he was in the business of buying and selling stock. PW2 was *present* when the herd of 32 sheep was driven by the appellant from the complainant's compound. True, there was no formal agreement for sale: but none was required by the law for sale of livestock. There was a witness to the transaction. The appellant is simply trying to resile from a gentleman's agreement. I am fortified in that finding because the appellant in his defence conceded to having purchased sheep worth Kshs 74,000 but never disclosed from whom. He also conceded he did not pay the full purchase price.

11. The appellant submitted that ownership of the sheep was not proved. I disagree. True, there was no *documentary* evidence that the complainant owned the sheep. I take judicial notice that unlike other chattels and immoveable assets, there is no *formal* title to sheep. In this case, the complainant proved he owned the sheep; and, that the appellant drove them away from his homestead. The appellant did not have evidence that he paid for the sheep. The decision in *Mwaura v Republic* [1984] KLR 644 cited by the appellant is *not* on point. In that case, the Republic failed to tender title documents relating to a lorry.

12. I have carefully studied the records of the trial court. I am satisfied that the proceedings were conducted in *Kiswahili.* The appellant conceded in this appeal that although not fluent in the language, he understood it. It is clear from the record that he cross-examined all the witnesses in *Kiswahili*. He never raised the matter of language. It is only when he was placed on his defence that he switched languages to *Nandi*. At page 19 of the record, the record shows the interpretation was from the *Nandi* language; and, that he was cross examined by the prosecutor. After conviction, the appellant tendered mitigation before sentence.

13. The obvious inference is that the appellant knew both *Nandi* and *Kiswahili* languages. Granted those circumstances, I am unable to hold that the trial was unfair; or, that the appellant did not understand or comprehend the proceedings. See *Abdalla v Republic* [1989] KLR 456, *Kiyato v Republic* [1986] KLR 418, *Lusiti v Republic* [1976-80] 1 KLR 585, *Desai v Republic* [1974] EA 416, *Adan v Republic* [1973] EA 445, *Kariuki v Republic* [1984] KLR 809. That ground of appeal collapses.

14. The appellant contends that the charge sheet was defective for want of an Occurrence Book number. I find that submission to be prosaic and completely unmerited. Failure to indicate the number was not material or prejudicial. The offence was properly framed; the penal provision was clear; and, the

particulars were elaborate. The police case number is provided on the charge sheet. I find that failure to cite the Ocurrence Book number (which is an internal police reference number) was a minor infraction curable under section 382 of the Criminal Procedure Code. See *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Court of Appeal, Criminal Appeal 661 of 2010 (unreported)

15. The legal burden of proof lay throughout with the prosecution. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166. The defence mounted by the appellant was spurious. The claim of petty jealousies or a vendetta is far-fetched. The lower court considered the defence but dismissed it as a red herring.

16. In the end, I find that the appellant received a fair trial; and, that he comprehended the proceedings. From my *analysis* and *re-evaluation* of all the evidence, the charge and all its elements were *proved* beyond reasonable doubt. I cannot say that the burden of proof was shifted to the appellant at any point. It follows as a corollary that the conviction was *safe*.

17. That leaves the matter of the sentence. Sentencing is at the discretion of the trial court. But power still reposes in an appellate court to review the sentence if material factors were overlooked; or, the sentence was founded on erroneous principles. See *Amolo v Republic* [1991] KLR 392, *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559.

18. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

> *"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may…….(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or….. "*

19. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

> *"The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. …The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirely before settling for any given sentence."*

20. In the present case I cannot say the learned trial Magistrate *acted upon some wrong principles or overlooked some material factors.* Section 278 of the Penal Code provides for a sentence *not* exceeding fourteen years. Despite the fresh clamour for leniency, I remain alive that stock theft is a *serious* offence against *property*. The appellant stole *thirty two* sheep valued at *Kshs 64,000*. At page 16 of the typed proceedings (page 26 of the record), the trial court took into consideration the mitigation offered by the appellant; and, that he was a first offender.

21. As stated in *Macharia v Republic* [2003] 2 E.A 559, the sentence imposed on an accused person must be *commensurate* with the *moral blameworthiness* of the offender. See also *Omuse v Republic* [1989] KLR 214. Considering the *gravity* of the offence; and, deterrence value, the sentence of *three* years was quite *lenient*. I thus decline the invitation to review the sentence.

22. In the result, I find that the appeal is devoid of merit. I uphold the conviction and sentence. The appeal is *dismissed*. The appellant, who has been out on bail, shall be returned forthwith into prison to serve the remainder of the term.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 13th day of September 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant.

No appearance by counsel for the appellant.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.