



**Kiptoo & another v Republic (Criminal Appeal E008 of 2024)  
[2025] KEHC 6788 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6788 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CRIMINAL APPEAL E008 OF 2024  
RPV WENDOH, J  
MAY 27, 2025**

**BETWEEN**

**HILLARY KIPTOO ..... 1<sup>ST</sup> APPELLANT**

**BRIAN ROTICH ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The two appellants, Hillary Kiptoo and Brian Rotich were jointly charged with the offence of Stealing Stock contrary to Section 278 of the [Penal Code](#)
2. They are alleged to have jointly with others not before court, stolen four (4) sheep worth Kshs.27,000/=, the property of Leah Nyangari on 14/2/2024.
3. In the alternative, they were charged with the offence of handling stolen property contrary to section 322 (1) of the [Penal Code](#), in that, on 15/2/2024 at Kesogon Market, other than in the count of stealing, jointly with others not before the court, dishonestly received four (4) sheep knowing or having reason to believe that they were stolen.
4. At first, both appellants denied the offence but later, the 1<sup>st</sup> appellant, Hillary pleaded guilty to the charge, was convicted and sentenced to serve ten (10) years imprisonment.
5. As regards the 2<sup>nd</sup> appellant, the matter proceeded to full trial with the prosecution calling a total of six (6) witnesses. Upon being placed on his defence, Accused gave unsworn evidence but did not call any witnesses he was convicted for the offence of stealing stock and was also sentenced to serve (10) ten years imprisonment.
6. Being dissatisfied with both conviction and sentence, each filed their individual appeals. The 1<sup>st</sup> appellant Hillary Kiptoo filed his appeal CR.A.E.008/2024 based on the following grounds;



7.
  - i. that the appellant's fundamental rights under Article 50(2) (a) (k) and (q) were violated;
  - ii. that the evidence was marred with irregularities;
  - iii. that the prosecution failed to prove its case.
8. On his part the 2<sup>nd</sup> appellant Brian Rotich in CR.A. E014/2024, complained as hereunder;
  - i. that the trial court failed to consider the appellant's defence;
  - ii. that the sentence of ten (10) years imprisonment is too harsh;
  - iii. that he was never supplied with witness statements;
  - iv. that the offence was not proved;
  - v. that the court failed to comply with the Article on fair trial.
9. He therefore prayed for reduction of the sentence.
10. At the hearing, the appeals were consolidated to proceed in CR.A. E008/2021 because they arise from the same case in the lower court.
11. This being a first appeal, this court is under a duty to re-examine all the evidence tendered in the trial court, analyze it and arrive at its own conclusions. The court however bears in mind that it neither saw nor heard the witnesses testify. The court is guided by the decision of *Okeno v Republic* [1972] EA 32.
12. I will first deal with the 1<sup>st</sup> appellant's appeal. Section 348 of the [Criminal Procedure Code](#) bars any appeal. It provides as follows:-

“Section 348. No appeal on plea of guilty, nor in petty cases;

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence”.
13. In the case of *Olel v Republic* [1989] KLR 444, the court held as follows: -

“Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the [Criminal Procedure Code](#) does not merely limit the right of appeal in such cases but bars it completely”.
14. It means that if the plea is equivocal, then the court can intervene on appeal. The Court of Appeal in *Alexander Lukoye Malika v Republic* (2015) eKLR held that;

“A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also, where upon admitted facts, the appellant could not in law have been convicted of the offence charged.”



15. The appellant has not alleged that the plea was imperfect or equivocal. A perusal of the record shows that the charge was read to the 1<sup>st</sup> appellant on 19/2/2024 when he denied the offence. It is not until 16/5/2024 that he requested the court to read the charge to him again. He pleaded guilty. The facts were read to him. He confirmed that he had understood the charge and that the facts were true after which a plea of guilty was entered and conviction was entered. He then gave his mitigation. I find that the plea was properly taken and is unequivocal, as guided by the court in the case of Adan -V - Republic.
16. The 1<sup>st</sup> appellant also alleges breach of Article 50(2)(a)(k) & (q) of *the Constitution*. The said provisions provide as follows:- Article 50(2)- “50(2) Every Accused person has the right to a fair trial, which includes the right;
  17.
    - (a) to be presumed innocent until the contrary is proved;
    - (k) to adduce and challenge evidence;
    - (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
  18. I have considered the 1<sup>st</sup> appellants submissions and he has not alluded to how his rights under the above Sub Articles were breached. As to the complaint that the evidence was marred with
  19. contradictions, that cannot have arisen because the case did not proceed to full trial. Only facts were read to the 1<sup>st</sup> appellant to which he admitted as correct. That ground has no basis.
  20. The 1<sup>st</sup> appellant also complained that the prosecution failed to prove its case but again, that could not have arisen since he pleaded guilty and the facts disclosed an offence of stock theft.
  21. As to the ground that one of the witnesses’ names was not disclosed i.e., PW2, that evidence does not affect the 1<sup>st</sup> appellants case because he pleaded guilty to the charge. It may only affect the 2<sup>nd</sup> appellant’s case.
  22. I find all the grounds of appeal adduced by the 1<sup>st</sup> appellant to be hopeless and having no substance at all. They lack merit and are dismissed. The conviction is sound and I affirm it.
  23. In respect to the sentence, the 1<sup>st</sup> appellant was found to be a second offender having been convicted for a similar offence by a Kitale court. Under Section 278 of the *Penal Code*, upon conviction, one is liable to not more than fourteen (14) years imprisonment. In my view, the sentence is fair and should serve as a deterrence.
  24. I find no merit in the 1<sup>st</sup> appellants appeal and it is hereby dismissed in its entirety.
  25. The case proceeded to full trial in respect of the 2<sup>nd</sup> appellant. The prosecution called a total of five (5) witnesses.
  26. PW1 Leah Nyakaki (Nyagari) of Ngombe Moja recalled the 14/2/2023. She took her cattle to the river. She went back to get the sheep but did not find them. Efforts to trace them bore no fruits. Next day, she received information that some sheep had been recovered. She went and found the sheep recovered and the sheep identified her and ran to her. The police showed her the suspects at the police station and the sheep were photographed.
  27. PW2, whose names were not captured by the court told the court that PW1 told him about her lost sheep and they went in search and were referred to Kesogon Police Station, then Kapenguria Police Station where they found two people who had been arrested with sheep which the complainant identified as hers.



28. PW3 Joel Juma recalled that he came back home and was informed that his mother (PW1), had gone to look for her sheep which had been stolen. He joined the search and later received information that the sheep had been recovered and were at Kesogon Police Station. He went to the police station, saw the recovered sheep and two people who had been arrested one of whom was the 2<sup>nd</sup> appellant.
29. PW4 PC Kevin Ouma of Kapenguria Police Station recalled 10/2/2024 when he was instructed by his boss to go to Kesogon Police Station to pick two suspects with two sheep. One of the suspects was the 2<sup>nd</sup> appellant
30. PW5, PC Danton Mugisa of Kesogon Police Station recalled the 14/2/2024, he received a call from a member of public informing him that he had seen three (3) people with four (4) sheep going towards Aruba trading centre. He went and found (3) three people with four (4) sheep and one person ran away and with help of the public, arrested two (2) who include the 2<sup>nd</sup> appellant. The owner of the sheep Leah, was traced and she identified the sheep.
31. PW6 Sgt. Simon was the Investigating Officer in the matter and charged the suspects with the offence after the sheep were identified by the owner.
32. The 2<sup>nd</sup> appellant made an unsworn statement in his defence; that on 14/2/2024, he had come to Hospital in the Psychiatric Clinic; that he was a motorcycle rider. On the way home, he met Hillary (1<sup>st</sup> appellant) who hiked a lift. He dropped them at Kesogon and when asking for payment, members of public arrested them alleging they were thieves.; that one person ran off and he was detained till the one who ran off was found; that he told Hillary to tell the court the truth and he did by pleading guilty.
33. The 2<sup>nd</sup> appellant filed submissions, and reiterated his grounds of appeal in his submissions; that his defence that he was a motorcycle rider, was not considered yet the culprit pleaded guilty to the charge; that the court failed to comply with Article (j) hence denied him a fair trial. He wondered why the Prosecution would declare him a first offender yet the probation officer claims that he is not a first offender; that if it were true that he was serving eight (8) years in Cr.C 1162/2021, then he would have been in prison at the time the offence was allegedly committed.  
The Respondent opposed the appeal but mixed up the submissions.
34. The appellant alleged that his rights to fair hearing were violated. However, he was not specific as to which of his rights under Articles 50(2) of *the Constitution* that guarantees an accused's right to fair trial, was violated. He should have been specific on which right and how it was violated.
35. PW1 testified to how her sheep were stolen. It is PW5 who acted on a tip off and stopped three (3) suspects with the sheep. By then, PW5 did not even know of the theft. He is the only witness who was present when the sheep were recovered. It was in broad daylight.
36. Although the 2<sup>nd</sup> appellant claims to have been a motorcycle rider, there was no reference made to a motorcycle rider when PW5 testified, nor was any question of that kind put to him.
37. The trial court when considering the 2<sup>nd</sup> appellants defence said; “..... I note that the doctrine of recent possession is applicable in this case as the sheep were found within a short or reasonable period after they were stolen contrary to what he was saying. He was caught red handed driving the sheep....”
38. The appellant's defence was considered and dismissed as untrue. I also find, like the trial court did, that the 2<sup>nd</sup> appellant with others were caught red handed with the sheep a few hours after they were stolen. The sheep were positively identified by PW 1 and 3. The offence of stock theft was proved as required.



39. The 2<sup>nd</sup> appellant also complained that witness statements were not supplied to him. I have read the court record. On 7/3/2024, the prosecutor informed the court that he was going to supply the witness statements on that day and the court recorded that the witness statements would indeed be supplied that day and fixed the case for hearing and a mention date. After that, the 1<sup>st</sup> Appellant pleaded guilty to the charge and was convicted and the case proceeded to hearing in respect of the 2<sup>nd</sup> appellant. At no stage did the 2<sup>nd</sup> appellant complain that he had not been issued with the witness statements. This court is convinced that the 2<sup>nd</sup> appellant was issued with witness statements before the hearing commenced, as recorded by the court.
40. I must point out that the failure by the court to disclose PW2's names was not fatal to the case because PW2 was not a key witness in the case. PW2's testimony was basically hearsay. In any event, PW2's testimony is therefore not taken into account. I find the conviction of the 2<sup>nd</sup> appellant to be sound and I affirm it.
41. Lastly, the appellant complained that the sentence is too harsh. Under Section 278 of the Penal Code, upon conviction, one is liable to imprisonment for a term not exceeding fourteen (14) years imprisonment. Upon conviction, the court asked for a pre-sentence report to be prepared by the Probation Officer. The report indicated that the 2<sup>nd</sup> appellant had been convicted in CRC. 1167/2021 for stock theft and sentenced to three (3) years imprisonment by Chief Magistrate's Court Kitale and on 11/4/2022, the SPM'S Court at Kapenguria had sentenced him to eight (8) months imprisonment in CR.C. E1167/2021 where he used the name Victor Kibet. Infact, the report indicated that the 2<sup>nd</sup> appellant is a habitual offender using different names in different cases. The appellant alleged that the court confused the sentence with that of his co-accused. That is however not the case, the appellant is alleged to have been sentenced in CR.C 1167/2021
42. while the 1<sup>st</sup> appellant was serving sentence in Cr.C 822/2023. Although the trial court indicated that he was sentenced eight (8) years in Cr.C.E.1167/2021, the pre-sentence report indicated that it is eight (8) months.
43. The trial court took into account the fact that the 2<sup>nd</sup> appellant is a habitual offender and meted a deterrent sentence. It is obvious that the previous sentences had not had any effect of reforming the appellant. I find the sentence to be lawful and fair in the circumstances and the court will not interfere.
43. In the end, I find that both appeals by the 1<sup>st</sup> and 2<sup>nd</sup> appellant are not merited. They are dismissed in their entirety, save that the sentences will take effect from the 19/2/2024 when they took plea.

**DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 27<sup>TH</sup> DAY OF MAY, 2025**

**R. WENDOH**

**JUDGE**

Judgment delivered in the presence of:-

Mr. Majale for the State

Appellant - present

Juma/Hellen – Court Assistants

