



REPUBLIC OF KENYA



**Ndonye v Republic (Criminal Appeal E030 of 2022)
[2024] KEHC 1818 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1818 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E030 OF 2022
TM MATHEKA, J
FEBRUARY 28, 2024**

BETWEEN

ALBANUS KIOKO NDONYE APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence of Hon. Otieno J (RM) in Makueni Resident Magistrate's Court Criminal Case No. E0196 of 2021 delivered on 28th December 2021)

JUDGMENT

1. The appellant was charged in Makueni CM Criminal Case no E196 of 2021 with two counts: Stock Theft contrary to section 278 of the *Penal Code*. The particulars of the offence were that on the 12th day of July 2021 at unknown time in Kimeeni Village, Kimeeni Sub-Location, Kalawa Location in Mbooni East Sub-County within Makueni County, the appellant, he stole one she goat valued at Kshs 3000/= the property of Eunice Mueni Maethia.
2. In the alternative, he was charged with handling stolen property contrary to Section 322(1) as read with Sub-Section (2) of the *Penal Code*. The particulars being that on the 13th day of July 2021 at about 1300 hours at Kimeeni Village, Kimeeni Sub-Location, Kalawa Location in Mbooni East Sub-County within Makueni County, otherwise than in the course of stealing, he dishonestly handled one she-goat having reason to believe to be stolen, the property of Eunice Mueni Maethia.
3. In Count II, he was charged with Stealing contrary to section 268 as read with 275 of the *Penal Code*. The particulars of the offence were that on the 12th day of July 2021 at unknown time in Kimeeni Village, Kimeeni Sub-Location, Kalawa Location in Mbooni East Sub-County within Makueni County, he stole 4 corrugated iron sheets and 2 pieces of iron sheets valued at Kshs 5,200/= the property of Dominic Ndonye Mbai.



4. In the alternative II, he was charged with handling stolen property contrary to Section 322(1) as read with Sub-Section (2) of the *Penal Code*. The particulars being that on the 13th day of July 2021 at about 14.00 hours at Kimeeni Village, Kimeeni Sub-Location, Kalawa Location in Mbooni East Sub-County within Makueni County, therwise than in the course of stealing, he dishonestly handled 4 corrugated iron sheets and 2 pieces of iron sheets having reason to believe them to be stolen property.
5. He pleaded not guilty, was tried, convicted on both main counts and sentenced on count 1, to a fine of Kshs 30,000/= in default to serve four years' imprisonment, and on count II, to imprisonment for 2 years and nine months.
6. The appellant was aggrieved by the decision and filed his appeal on the following grounds; That
 - a. The learned trial magistrate erred in both law and fact by relying on contradictory and inconsistent evidence to convict him.
 - b. The learned trial magistrate erred in both law and fact by failing to peruse the file and find that the case was pre meditated plan by people gathered to victimize him.
 - c. The learned trial magistrate erred in both law and fact by failing to observe that all the witnesses were coached as well and hence evidence tailored to suit the case to defeat justice.
7. The hearing started on the 10th August 2021. Just before PW1 testified the prosecutor told the court that the exhibit, a live goat had been brought to court but had jumped and fled. That the disappearance had been reported and upon its recovery it would be brought to court for identification.
8. The case for the prosecution on count one was that PW1, Eunice Mueni Maethia, the complainant owned 60 goats. On 12/07/2021, she was sleeping when her brother in law called her to the gate. He told her that they had a goat which they wanted her to identify. She went to the gate and saw a goat she recognized as hers, and which she testified had disappeared during grazing. She told the court when she opened the goat shed the goat ran to its mother who started licking it. PW2 told her that it was the Albanus Kioko who had taken the goat and sold it to one Isika. They went to the chief only to find that the appellant had a pending case of stealing iron sheets. She confirmed that the goat jumped and disappeared. That it was a white she goat valued at Kshs 5000. She said that Isika had bought it at Kshs 3000.
9. PW2 Patrick Mulwa Nyamai was the brother in law who called PW1. His testimony was that it was the wife of the appellant who had called him on the 12th July 2021 to tell him that the appellant had come home with a goat that looked like the goats from his home. She also told him that the appellant had sold the goat to one Isika.
10. He rang Isika who confirmed having purchased the goat from Albanus Kioko. He, in the company of a village elder went to the home of Isika, took the goat to PW1 who recognized it as hers, and it ran to its mother. He stated that the appellant used to be a livestock broker like him but stopped. He too told the court that the goat had fled.
11. PW3 Dominic Ndonye Nyamai was the appellant's father. He testified that the appellant was married to one Zipporah Nthenya and they all lived on the same compound. He told the court that on 13th July 2021 the appellant demanded Kshs 1800 from him. He told the appellant he did not have the money. The appellant told him he would remove the iron sheets from the roof and sell them. He thought the appellant was joking and left for the market. when he came back the iron sheets had been removed. He reported to the assistant chief. He was arrested and took the Nyumba Kumi to the bushes where he



- had hidden the iron sheets. he told the court that the appellant was always demanding for things from him, had threatened to beat him severally but this was his first stealing offence
12. PW4 the Assistant Chief testified he met PW3 on 12th July 2021 and he met PW3 who told him that his son had removed iron sheets from the roof. He visited the home on 13th July 2021, found the son who admitted to removing the iron sheets and took nyumba kumi to where he had hidden them in a terrace near the home. They were 4 iron sheets and 2 small pieces. While there a village elder arrived with a story about the appellant having stolen a goat and sold it to Isika. The goat was availed and both the exhibits were handed over to the police. He added that the appellant had several cases of insulting, threatening, abusive conduct and stock theft and that the Assistant chief's efforts to reform him had failed.
 13. PW5 was no 259539 PC Peter Nakaya from Kalawa Police Station. On 13th July 2021 he received a call from his OCS to re arrest a suspect who had been arrested at Kimeeni village. He went there, found the appellant, a goat and iron sheets. He picked them to the police station. The goat was photographed and returned to the owner. He also returned the iron sheets to the owner. The goat fled on its way to court. He produced iron sheets as exhibits. He testified that the appellant admitted to selling the goat to Isika. He later produced some photos of a goat, and confirmed that most of the goats in that home stead were white.
 14. PW6 was Thomas Isika Kithome who told the court that on 12th July 2021 he was at Kiloo Market when one Kioko Ndonge sought to buy a goat from the appellant. He later purchased the goat at Kshs 3000. Later one Kamunde went to him and told him not to sell the goat because it belonged to his brother, He gave over the goat to the said Kamunde. Next day he went to Kioko's home. Kioko told him that the goat was his. He testified that he bought the goat from the home of the appellant and that the family of the appellant witnessed the sale
 15. Appellant had his father and the assistant chief recalled for cross examination. His father told the court that the appellant had threatened to cut him to pieces. The assistant chief told the court that there was no likelihood that his father could have removed the iron sheets and hidden them.
 16. The court found that the appellant had a case to answer and he was put on his defence. He gave an unsworn statement and said that on 12/07/2021, he was taken to the station. That upon his arrest, no evidence was produced until 28/07/2021. That the goat owner never reported theft immediately until the following day in the evening and she did not identify/know if the goat was hers. That the goat was taken to the complainant's home but was not recovered from him. That there is no evidence of ownership and the purchaser did not produce any proof. That the owner of iron sheets did not produce any evidence purchasing them. That PW3 fabricated the case as there was an active dispute between them.
 17. The appeal was canvassed through written submissions.

The Appellant's Submissions

18. The appellant urged this court to allow his sentence to run concurrently and not consecutively.
19. He submitted that the case was fabricated on him by PW1 who had been wooing him to become his intimate friend and commit adultery. That he could not accept because of the respect he has for her husband who is his best friend and immediate neighbor. He urged the court to dismiss the case and set him at liberty.
20. The appellant urged the court to reduce his sentence of six years to time already served or to be given a non-custodial sentence. He submitted that he is a young person who needs to start a family and spending all those years in prison will cause him to be far much behind his age mates in life.



The Respondent's Submissions

21. The State, through prosecution Counsel Vincent Maina, submitted that all the ingredients of the offence were established during trial. That the offence of stealing stock was proved through the evidence of PW1, 2 and 6.
22. He submitted that count II was proved beyond reasonable doubt through the evidence of PW3, 4 and 5.
23. Relying on section 14 of the *Criminal Procedure Code* (CPC), he submitted that the consecutive sentences were proper in regard to how the offences happened. He also relied on the case of *Peter Mbugua Kabui v R* [2016] eKLR where the Court of Appeal stated;

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction, a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.
24. He submitted that the offences herein were committed at different times against different complainants and as such, the court did not err in ordering consecutive terms for the two counts.
25. On appeal “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] E. A. 424.” the East Africa Court of Appeal *Okeno v Republic* [1972] EA 32 at 36:
26. From the fore going and properly guided by the cited authority the following issues arise for determination;
 - a. Whether the offence of stock theft was proved beyond reasonable doubt.
 - b. Whether the offence of stealing was proved beyond reasonable doubt.

Whether the offence of stock theft was proved beyond reasonable doubt.

27. Section 278 of the *Penal Code* provides that;

“If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.”
28. The offence of stealing is provided for in section 268 as follows;

“A person who fraudulently and without claim of right takes anything capable of being stolen or fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property.



29. Handling stolen property is provided for under s. 322(1) as read with 322(2)

Handling stolen goods (1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

30. It is in the back ground of these provisions that the evidence must be analysed.

31. According to the prosecution the whole story about the stolen goat began with the wife of the appellant calling PW2 at 7:00pm on 12th July 2021 to tell him that her husband had brought home a goat that looked like the goats in their home and had sold it to Isika PW6. This same man told the court that he bought the goat in the presence of the Appellant's family. The PW4 the only person to testify from the family of the appellant never said any word about the alleged goat, yet he told the court that he and the appellant and his wife live in the same compound.

32. The goat was allegedly sold to Isika on 12th July at 5:00pm. Isika says he was told by one Kamunde whom we do not know from the record, that the goat belonged to his (Kamunde's) brother. The person who ended up as a complainant is not the alleged brother to Kamunde but one Eunice PW1. This Kamunde did not testify and we have no idea how he identified that goat as belonging to his brother.

33. There is no evidence to support the alleged sale by the appellant to the said Isika. There is no evidence that the alleged goat ever stepped in the home of the appellant as the only other person who could have established that was his father, PW3 but he never testified to the issue of the goat. The members of appellant's family who allegedly witnessed the sale were not named nor called as witnesses.

34. Hence the story begins falling apart at the beginning.

35. The assistant chief told the court that he visited the home of the appellant on the 13th of July 2021, the day after the goat stolen goat was allegedly recovered and ownership established. According to PW2 the assistant chief had received their report on the 13th of July 2021. However, by the time the he went to the appellant's home and found him at home he was not aware of this report. He dealt only with the issue of the alleged stolen iron sheets. It is noteworthy that his testimony is that he had no idea about the stolen goat at the time of arresting the appellant from his home. It is when he was waiting to transport appellant to the police station that he received the story from an unnamed village elder, took over the appellant and the alleged goat and handed over to the police. This raises issues with the credibility of such evidence, and the safety of relying on it.

36. The exhibit 'jumped and fled' on its way to court. The complainant never identified the goat in the photo produced by the police officer. She however said that she had not noticed the missing goat, there was mark except that its mother was in the goat shed. Hence it cannot be said with certainty that the alleged goat belonged to the complainant or that she had lost a goat.

37. In *Philip Nzaka Watu v Republic* [2016] eKLR the Court of Appeal had this to say:

“It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.”



38. Further, it is a fact from the evidence that the appellant was not arrested with the goat. It is also a fact that the owner (PW1) had not noticed that it was missing until she was informed by PW2. It is also clear from the evidence that PW1 and 2 are relatives. It is also interesting to note that the said goat was not presented to court as it is said to have fled on its way. The evidence also shows that the appellant and the buyer (PW6) were involved in livestock trade but the appellant had stopped the business. Consequently, business rivalry cannot be ruled out. In my view, looking at all these happenings critically means that the appellant's complaint about fabricated evidence is not idle. It is trite that any doubt in the mind of the court should be resolved in favor of the accused person.
39. In convicting the appellant, the trial magistrate stated as follows;
- “I considered the witness's testimonies and found them consistent and firmly established. There was no appearance of a plan to frame the accused person, in fact PW1, PW2, PW4 & PW6 corroborate PW2's testimony that PW6 was found in possession of the goat after purchasing it from the accused person.”
40. Respectfully, there was nothing to show that pW6 had purchased the goat from the appellant. Had the trial magistrate applied her mind to the totality of the evidence on record it would have been evident that no one established to the required standard that the appellant was ever in possession of the said goat or that such a goat ever got to his home. His own father who lived in the same compound never noticed it, had not heard about it by the time the appellant telling him that he was going to sell iron sheets.
41. The upshot, in my view, is that the offence of stock theft was not proved beyond reasonable doubt.

Whether the offence of stealing was proved beyond reasonable doubt.

42. The record shows that the PW3 told the court that the appellant told him he would take the iron sheets and sell them. He told him he would take the iron sheets. The record does not show his response.
- Did he tell him not to? Did they agree or disagree? No one in the home saw the appellant take the iron sheets from the roof? It is noteworthy that it is alleged that it is after his arrest that the iron sheets were recovered. The appellant denied removing them. What if someone else heard the argument and removed them? Why would the appellant need to hide something he had already said he would take and sell?
43. One can read the effort to paint the appellant as a bad person, quarrelsome, disrespectful, full of threats, thief- but there were no such charges brought against him. No charge of threatening to kill, no charge of creating disturbance, no other charge of stock theft- none at all. How then would the court accept this when not a single OB report supports any of these other allegations?
44. Further, the particulars in the charge sheet are that the offence happened on 12/07/2021 at an unknown time. PW3's evidence was that the appellant removed the iron sheets on 13/07/2021 and he reported to the Assistant Chief (PW4) on 14/07/2021. On his part, PW4 testified that he met with PW3 on 12/07/2021 and PW3 told him that the appellant had removed iron sheets from his house. It is therefore clear that the evidence of the key witness (PW3) is at variance with the particulars hence making the evidence doubtful.

His prosecution does not inspire confidence that it was solely done in the interests of justice. Further, the fact that the evidence of PW3 and 4 is not corroborative leaves a lot to be desired because they are the key witnesses in this particular count.



45. Also notable in the evidence of PW3 is that after the appellant's arrest, he (appellant) took nyumba kumi to where he had hidden the iron sheets in the bush but none of the nyumba kumi members were called as a witness. While the prosecution has discretion on which witnesses to call, in some cases like this one, failure to call some witnesses may lead to the inference that either they are non-existent or their evidence would have been adverse. In the famous case of *Bukenya v Uganda* (1972) EA, 349, it was held that;

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witness would have tended to be averse to the prosecution.”

46. Having re-evaluated the evidence, my view is that the appellant's father was not a truthful witness. In addition to the discrepancy on the date of offence, he testified that after returning from the market, he found that the appellant had indeed removed the iron sheets. On cross examination, he said that he heard the appellant removing the mabati and when he arrived, the appellant fled. It should have been one or the other. Either the mabati was already removed or was in the process of being removed but not both. Having said that, the evidence by the I.O (PW5), that he visited the home and found an open space on the front roof, is neither here nor there. Also, it does not make a lot of sense that the appellant would remove the mabati and then be found asleep in the same home as per PW4's account.

47. The upshot, in my view, is that the offence was not proved beyond reasonable doubt.

48. There is the issue whether the sentence was harsh/ lawful.

49. The offender was sentenced to pay a fine of 30000 in default to serve 4 years' imprisonment on the first count and on the second count 2 years 9 months' imprisonment.

50. There was a pre-sentence report that clearly revealed that he offender was victim of a lot of suspicion. It was alleged he had two previous charges but no evidence was placed before the court. The prosecution's position was that he is a first offender. The Probation and after care services (PACs) officer ought to refrain from providing reports that are not supported by evidence especially something as serious as a previous record.

51. In addition, a PACs officer is akin a social worker and ought to give the court options based on the findings on the ground. In this case the offender is the father of children who were very young, his complainants were his father and a close neighbor , if the goat was stolen, it was recovered, and so were the iron sheets, which case in any event, it was a family dispute, a 4 year team of imprisonment would not improve these family relations and the justice of the case would require the court to craft a sentence that would not only be punitive but also restore relations , and rehabilitate and reintegrate the offender without creating other criminogenic opportunities in the family . If the appellant's problem was drug abuse, as highlighted in the PACs report, then a sentence that would aid in rehabilitation. The father's claim that the son had made his life unbearable is not a good reason to give him a long term of imprisonment when that was not the charge before court. What if the whole plan was to use the criminal justice system to get rid of him? We must always be wary of the power we wield through our pens lest it end up bearing injustice. The [Constitution](#) mandates us in all cases to strive to ensure justice with the ultimate goal of triggering social transformation. That can only be when the people understand that the Criminal Justice system as it is now cannot be the panacea of our social problems. Those of us privileged to be in the positions of wielding judicial power must make that clear in our determinations, and those offering support services like probation and after care services must reinvent themselves to fit in this new dispensation.



52. Section 28 of the *Penal Code* provides for fines. S. 278 provides for a maximum term of imprisonment of 14 years, and does not provide for fines, hence where a fine is imposed, in determining the default period the applicable section is s. 28 of the *Penal Code*. It provides that the default for any fine exceeding Kshs 50,000 is 12 months. Hence the period of 4 years in default of paying a fine of 30,000 was unlawful. Two years 9 months' imprisonment for the theft of iron sheets worth Kshs 5,200 is harsh to say the least, yet the maximum sentence is three years' imprisonment and especially in the circumstances of this case where it is evident that there was no theft, and the appellant had been in custody already for 5 months.
53. In the end the appeal succeeds. The conviction was unsafe. The sentences were harsh and one of them was unlawful.
54. The conviction is quashed, the sentence is set aside, the appellant be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH FEBRUARY 2024

.....
MUMBUA T MATHEKA

JUDGE

CA Nelima

Appellant

Mr. Tanui for State

