



**Khamala & another v Republic (Criminal Appeal E006 of 2024)  
[2024] KEHC 15283 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15283 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL E006 OF 2024  
RPV WENDOH, J  
NOVEMBER 28, 2024**

**BETWEEN**

**PETER WAMALWA KHAMALA ..... 1<sup>ST</sup> APPELLANT**

**CHARLES WANJALA KHAMALA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of conviction and sentence of Hon. M.W.Magwi  
(Resident Magistrate) in Kitale Chief Magistrate's Court Criminal  
Case E3527 of 2023 delivered on 20<sup>th</sup> December, 2023)*

**JUDGMENT**

1. Peter Wamalwa Khamala and Charles Wanjala Khamala, the appellants herein, were convicted by the Resident Magistrate's Court Kitale, for the offence of stock theft contrary to section 278 of the Penal Code.
2. The particulars of the charge were that on 11/10/2023, at Kaliwa Village in Mabonde Location, Trans-Nzoia County, stole an Asian heifer valued at Kshs.18,000/- the property of Everline Nekesa.
3. They faced an alternative charge of handling stolen property contrary to section 322(1) as read with section 322(2) of the Penal Code. It was alleged that on 11/10/2023 at Kaliwa Village, they were found in possession of the Asian heifer, the property of Everline Nekesa knowing or having reason to believe that it was stolen.
4. Upon conviction the appellants were sentenced to serve three (3) years imprisonment each. They are aggrieved by both the conviction and sentences and filed appeals No.E006/2024 and E005/2024 which were consolidated with the lead file being E006/2024.

The appellants' grounds of appeal were similar and are as follows:-



5.
  - a. That the offence was not proved to the required standard;
  - b. That the sentence is harsh and excessive.
- 6 They pray that this sentences be revised. It is therefore not clear whether they were only appealing against sentence only. However, the court will go ahead to consider the issue of conviction and sentence.
- 7 Both appellants filed submissions which are also similar. The appellants submitted that the evidence of PW1 and 2 were contradictory as to where the heifer was recovered and whether or not it was dead, that PW1's testimony was not truthful as it is not clear whether the theft was on 11<sup>th</sup> October 2023 or 12<sup>th</sup> October 2022. They urged the court to consider that the first report made by complainant was important as held in the case of Terrekali and Anor V Republic (1952)EACA and Kioko Kilonzo V Republic CR APP 82/2011.
- 8 The respondent was allowed seven days to file their submissions but it is over two weeks since the prosecution counsel was supposed to file the same. The court has proceeded to write the judgment without the Respondents submissions.
- 9 This is a first appeal and it is the duty of this court to re-examine all the evidence tendered in the trial court, analyse and evaluate it and come up with its own determinations. The court is guided by the findings in the decision of Okeno V Republic (1972)EA 32.
- 10 The prosecution case was that PW1 Everline Nekesa kept her cows where they were normally kept but on 12/10/2023 morning, she could not see her cows and went in search of them. She reported at Tulwet police station and at 5.30pm, some children informed her that they had seen the cow in a hole where the same had fallen into. The children took her to a neighbour's place where she saw the cow in the hole and called the chief and village elder; that on 13/10/2023, police came to remove the cow from the hole and took photographs of it. In cross-examination, PW1 told the court that the hole was near the appellants' homestead and was covered with grass.
- 11 PW2 Jacinta Waswa, recalled the morning of 12/10/2023. She was informed that the complainant's cow was missing and they went in search for it; that about 2.30pm it started to rain till 4.00pm. after when she was told to go back home because the cow had been found in a hole covered with grass.
- 12 PW3 PC Lucas Rono of Nyayo Police Post, the investigating officer in this matter, recalled that on 12/10/2023, PW1 reported that her cow got lost on the night of 11/10/2023 and they commenced investigations; that the chief called him on the same evening to report that the cow had been found. Since it was raining, they waited till 13/10/2023. He went and found the cow in the appellants compound and the complainant recognised the cow as hers.
- 13 When called upon to defend themselves, the 1<sup>st</sup> appellant Peter Wamalwa stated that the complainant who had lost her cow found him at 5.00pm. He denied stealing the cow but admitted that the cow was found in their compound.
- 14 The 2<sup>nd</sup> appellant, Charles Wanjala stated that he is the one who sent the children to inform PW1 of the cow being in the hole because she had complained in the morning that it was lost; that the cow was found in his father's compound.
15. I have considered the evidence on record, the grounds of appeal and submissions filed by the appellants. Nobody witnessed the theft. However, it is admitted by the first appellant that the cow was found



between his house and the father's, while the 2<sup>nd</sup> appellant said it was found in the father's compound. Since the prosecution relied on circumstantial evidence, it had to ensure that the following criteria were met, as held in *Abang'a alias Onyango V Republic* CRA 32/1990.

“It is settled that when a case rests entirely on

circumstantial evidence, such evidence must satisfy

the three tests;

- i. the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.
- iii. the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else”.

- 16 In the case of *Ahmad Abulfathi Mohammed and Anor V Republic* (2018)eKLR, the Court of Appeal had this to say of circumstantial evidence.

“However, it is altruism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence”.

1. In the instant case, the stolen heifer was allegedly found in the appellants' homestead. The investigating officer never established who lives in that homestead, was it only the two appellants and their old father? Secondly, no evidence was adduced as regards the hole in which the heifer was found. Was it a newly dug hole or old and had the grass been intentionally used to cover the hole or had grass grown over the hole? The appellants are neighbours to the complainant. The complainant did not tell the court where her heifer was kept on 11/10/2023 and if there was no possibility of the heifer leaving the place it was kept. Another concern is whether the heifer was so well secured that it could not have left the complainant's compound unless somebody released it. Lastly, the heifer was found dead. Did it die due to a fall or had it been killed. Could it be that the heifer fell in the hole? The evidence of the veterinary doctor was key. For unknown reason, the said doctor was not called as a witness.
18. No doubt the heifer was found in a hole in the appellants' homestead but that makes them only suspects. The circumstantial evidence does not meet the three tests stated above. The prosecution evidence was very vague. It should have given more details as I have observed above. Suspicion alone, however strong, has never been a basis for a conviction. The trial court should have found doubt in the prosecution case and resolved it in favour of the appellants.
19. In the end, I agree with the appellants that the offence of stock theft and handling stolen property were not proved to the required standard. I find the conviction to be unsafe and is hereby quashed. The sentence is hereby set aside. The appellants are set at liberty forthwith unless otherwise lawfully held.

PARA 20

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2024.**



**R.WENDOHI**

**JUDGE**

Judgment delivered virtually and in the presence of:

Miss Kiptoo – Prosecution Counsel (virtual)

Appellants – present (virtual)

Court Assistants - Juma/Hellen

