



**Nyamue & another v Republic (Criminal Appeal E037 & E038 of 2021
(Consolidated)) [2024] KEHC 14937 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14937 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E037 & E038 OF 2021 (CONSOLIDATED)**

**WM MUSYOKA, J
NOVEMBER 28, 2024**

BETWEEN

DAVID NYAMUE 1ST APPELLANT

RODGERS KARANI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeals from the conviction by Hon. TA Madowo, Resident Magistrate,
RM, in Busia CMCCRC No. 349 of 2020, on 2nd December 2021)*

JUDGMENT

1. The appellants, David Nyamue and Rodgers Karani, had been charged before and convicted by the primary court, of the offence of stealing, contrary to section 268(1), as read with section 275, of the Penal Code, Cap 63, Laws of Kenya.
2. The case by the respondent was that the complainant, PW1, Maurice Odeke, woke up to find his chickens missing, and he was informed, by a Joseph Odake, to check with PW2. He found his chickens there, and PW2 explained that he had snatched them from 2 men that morning. A village meeting was held, presided over by local Government officials, and a vote was passed, identifying the appellants as the persons responsible for the theft. The appellants elected to keep silent, in defence. At the end of it, the trial court was satisfied that a case had been made out against them, and the 2 were convicted, in a judgment delivered on 2nd December 2021. They were sentenced to pay a fine of Kshs. 10,000.00 each, or, in default, to spent 3 months in prison.
3. The appellants were aggrieved, and brought the instant appeals. The grounds of appeal revolve around the trial court relying on inadmissible evidence, being photographs; the trial court drew erroneous points for determination; the burden of proof being shifted to the appellants; and the trial court relying on the evidence of a single witness without corroboration.



4. Directions were given, on 14th May 2024, for canvassing of the appeals, by way of written submissions. The only written submissions that I have seen on record are by the appellants.
5. It is submitted that the prosecution evidence was insufficient and contradictory. It is pointed out that the photographs relied upon were taken by a person not authorised by the law. It is submitted that there was no evidence that the appellants took or converted the chickens in question, as none of the witnesses saw them take the chickens from PW1, nor handle them, knowing them to be stolen. The only alleged eyewitness was PW2, whose testimony is dismissed as shaky. It is submitted that the case was not proved beyond reasonable doubt, and that the same was founded on suspicion. *John Mutua Munyoki vs. Republic* [2017] KECA 376 (KLR)(Makhandia, Ouko & Murgor, JJA) and *Mary Wanjiku Gichira vs. Republic* CRA No. 17 of 1998 are cited. It is submitted that the contradictions and inconsistencies in the evidence should have been resolved in favour of the appellants. It is further submitted that the appellants were justified to remain silent in defence, and Article 50 of *the Constitution*, section 210 of the Criminal Procedure Code, Cap 75, Laws of Kenya, *Sekitoleko vs. Uganda* [1967] EA (Sir Udo Udoma, CJ) and *Michael Mumo Nzioka* [2019] eKLR (Odunga, J), are cited.
6. There is only 1 issue for determination, whether the case against the appellants was proved to the required standard, beyond reasonable doubt.
7. There was only 1 charge, that of stealing.
8. The charge was simple theft. What needed to be proved was that something was stolen. There must be proof that the thing alleged to have been stolen existed, and that it belonged to the complainant. Theft is the taking of property, by the alleged offender, from the owner or his agent, with an intention of permanently depriving the owner of it. See *Joseph Kariuki vs. Republic* [1985] KLR 507 (Kneller JA, Platt & Gachuhi, Ag JJA). It can also take the form of conversion. In conversion, there would be no unlawful taking, for the property would have gotten into the possession or custody of the offender lawfully, but the person in lawful custody decides to convert the property to their own use, in a manner inconsistent with the rights of the owner. See *R vs. Burns* [1958] EA 142 (Sir Ronald Sinclair, CJ & Templeton, J). These are the elements that the prosecution needed to establish, for there to be proof, beyond reasonable doubt, that the respondents stole or handled stolen property.
9. The question then is whether there was proof beyond reasonable doubt of all the elements of the charge.
10. Let me start with the issue of existence of the chickens and its ownership. The property in question was said to be chickens, that belonged to the complainant, PW1. Did PW1 own chickens at the material time, which could be stolen? PW1 claimed that he found his chickens missing from his home in the morning of 14th October 2020. It is a common thing that in rural Kenya households have lots of chicken. It would be plausible to presume that PW1 owned chickens, that could be stolen. It would appear that those chickens actually existed, for they were recovered from PW2, Vincent Odeke, and no one else, apart from PW1, claimed them.
11. The second thing should be about the theft. As indicated above, theft usually takes 2 forms, it could be a taking or a conversion. The facts presented in this case point to a case of taking. PW1 alleged that he found his chickens missing from their pen or chicken house, and the presumption then must have been that someone took them. He did not allege that he had given them to someone, who thereafter converted them to his own use. So, the trial court was handling a case of theft by taking.
12. So, who took the chickens from the home of PW1. The person found in possession of the chickens was PW2. He claimed that he met the 2 appellants early that morning conveying the chickens, and when he confronted them, they ran away, leaving the chickens behind. So, there was no direct evidence, of



- the appellants taking the chickens from PW1. The person found in possession of the chickens, claimed that he got them from the appellants. So, the presumption could be that PW2 either took the chickens, as they were found in his possession, or the appellants took them, if PW2 was to be believed.
13. The appellants were brought into the picture by PW2. Let me examine the case presented with regard to PW2, given that he was the key witness. After PW1 found that his chickens were missing, he was informed by a person who did not testify, that he could check with PW2, for he had heard him scream at night. So, PW1 went to the home of PW2, and found his chickens there. The explanation given to him, by PW2, was that he had snatched the chickens from some 2 men. PW1 did not mention that PW2 gave him the names of the 2 men. PW2 then directed him to where the 2 men were when the snatching happened. After that a meeting was convened by local leaders, where those present were asked to write down the names of known thieves, and the names of the appellants came up, after which they were arrested.
 14. Let me now come to PW2 himself. He testified that it was early morning, towards 6.00 AM, and he was going to work, when he met 2 men carrying chickens. He confronted them, and they fled, leaving the chickens. He screamed, and villagers came to the scene, and he surrendered the chickens to the Chief. A meeting was called, where the Chief asked those present to write down the names of the thieves, and both appellants were identified as such. He said that he did not know where the appellants lived, and that he only knew them by face. He then went on to say that he gave the names of the appellants to the Chief. He then contradicted PW1, by saying that PW1 never came to his home, and that he, PW1, found the chickens at the scene, where he, PW2, had allegedly met and confronted the appellants.
 15. PW3, the Assistant Chief, was the other key witness. He said that PW2 reported to him, that he had caught a thief near his home. He went to the home of PW2, where he found the chickens, and he was told, by PW2, that the chickens were left by the appellants after a struggle. A baraza was called, because there was rampant thievery in the area, and the attendees were asked to write the names of suspected thieves, and the 2 appellants were named, and that was how they came to be arrested. PW4 was the investigating officer. He carried out no investigations. The appellants were brought to him, after their respective arrests, accused of stealing chicken, and he charged and prosecuted them, based on the information that he got from PW2 and PW3.
 16. Was that material adequate for purposes of convicting the appellants? Was there proof beyond reasonable doubt that the appellants stole the chickens? I doubt it. Firstly, none of the witnesses witnessed the theft of the chickens by the appellants. None of the witnesses saw the appellants at the compound of PW1, from where the chickens were stolen. Thirdly, the whole case was built around the testimony of PW2, the man who allegedly saw the appellants with the chickens. Was he a reliable or trustworthy witness?
 17. His narrative of the events differed from that of PW1 and PW3, witnesses who had interacted with shortly after the allegedly confrontation or interaction between him and the appellants. PW1 and PW3 said that they found the chickens at the home of PW2, with PW1 adding that PW2 directed him to the scene or the spot where he had met the appellants, and PW3 saying that he left the chickens in the custody of PW2 as he convened the baraza. PW2 sought to distance himself from that, by saying that PW1 never went to his home, and that he, PW1, found his chickens at the spot where the appellants left them. His case was that he screamed, and a group of people came to the scene, who included PW1 and PW3, and that was when PW1 saw his chickens, and that was when he handed over the chickens to PW3. So, where was the truth? PW2 was the sole witness who brought the appellants into the picture. Could his word be trusted? Especially, as the chickens were found in his hands, and not those of the appellants?



18. Fourthly, PW2 prevaricated, on whether he only knew the appellants physically, or by their names. Whereas PW1 did not testify to PW2 telling him the names of the 2 men who had allegedly stolen his chickens, PW2 was categorical that he gave the names of the 2 to PW3. It should be a matter of some curiosity, that PW3, as the local Chief, did not take steps to arrest the 2 after the names were allegedly given to him by PW2, and he had to convene a baraza, where the appellants were voted as notorious thieves, for him to take action. That was material that the trial court ought to have scrutinised critically, for the same ought to have created a doubt on the credibility of the evidence, on the culpability of the appellants.
19. Fifthly, it would appear that the appellants were not arrested because PW2 named them, as the men that he wrestled the chickens from, as I have alluded to above. It would appear that the decision to arrest them was made after the baraza, where the majority of attendees voted them as the most notorious thieves in the locality. It would appear that their arrest had nothing to do with their complicity in the theft, but more to do with the general perception that they were notorious thieves, and, therefore, they were the most likely culprits in that alleged theft of the chickens, and, between them and PW2, the word of PW2 carried more weight, to PW3 and other locals, with respect to believability. Yet, it was PW2 who appeared to have more explaining to do, given the inconsistencies in his narrative.
20. Sixthly, and finally, PW4 did not conduct any investigations into the matter. The arrest of the appellants had nothing to do with any investigations done by PW4, which pointed to them. The appellants were not arrested by the police., but by PW3, as local Chief, together with members of the public, and they were merely handed over to PW4, with the story from PW2, and a prosecution was mounted based only on that narrative.
21. The evidence tendered by the prosecution was the weakest possible, for the purpose of establishing the guilt of the appellants, with respect to the theft alleged. The appellants were never seen at the scene of the theft by anyone. They were not caught with the alleged stolen chickens, except for the narrative by PW2, which was shifty and inconsistent, and contradictory to the narratives by the other key witnesses, PW1 and PW3. There was no proof, beyond reasonable doubt, that they executed the theft. The inconsistencies and contradictions ought to have been resolved in favour of the appellants. Indeed, the case was so weak that the appellants ought not have been put on their defence in the first place, and they were justified not to dignify the prosecution case by making statements in defence.
22. I agree with the appellants; the prosecution did not establish its case against them to the required standard. I shall, accordingly, find and hold that the verdict of the trial court was not properly founded. The appeal herein is merited, and I hereby allow it. I, consequently, quash the conviction of the appellants, in Busia CMCCRC No. 349 of 2020, on 2nd December 2021, and set aside the sentence imposed upon them. If they paid the fine imposed, the same shall be refunded to them, and if they are in custody, in default of payment of the fine, they shall be set free forthwith. The appeal is disposed of in those terms. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 28TH DAY OF NOVEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Okutta, instructed by Ouma-Okutta & Associates, Advocates for the appellants.



Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

