



**Mukhwana v Republic (Criminal Appeal E019 of 2019)
[2023] KEHC 3841 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E019 OF 2019
REA OUGO, J
APRIL 27, 2023**

BETWEEN

GEOFFREY MUKHWANA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence of Hon G.P Omondi, SRM dated 8th January 2019 in Criminal Case No. 67 of 2017 at the Magistrate's Court at Bungoma)

JUDGMENT

1. The Appellant, Geoffrey Mukhwana, was charged before the subordinate court with the offence of stealing contrary to section 278 of the *Penal Code* and in the alternative with handling stolen property contrary to section 322 (2) of the *Penal Code*. He was convicted on the alternative count and sentenced to eight years imprisonment. The appellant dissatisfied with the finding of the trial magistrate filled his petition of appeal on grounds that the learned trial magistrate erred in law and fact when he imposed a harsh sentence to the appellant and failed to consider his mitigation and the fact that he was a first offender. The appellant also contends that the prosecution failed to prove its case to the required standard.
2. This being a first appeal, this court is under a duty to re-evaluate the evidence and draw its own inferences of fact so as to come to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained. (See *Okeno v Republic* [1972] EA 32, *Kiilu and Another v Republic* [2005] 1 KLR 174).
3. The facts that emerged before the trial court were as follows:
4. Redempta Makhanu (Pw1) testified that she was asleep on January 16, 2017 when her grandson called her at 2:00 a.m. Cornelius Wafula realized that her cow was missing. Her eldest son Ferdinand Wangila informed the assistant chief of the theft. The police were also informed and they started looking for the



cow and it was found at 4:00 a.m. She went to the police station and confirmed that the recovered cow belonged to her. On cross examination she testified that she did not know the person who stole the cow and that she had never seen the appellant before the incident. The first time she saw the appellant was at the police station.

5. Patrick Lukoye (Pw3) testified that he received a call from Ferdinand Makhanu concerning Pw1's missing cow. He called the OCS and asked him to investigate. The following day, he was informed that the cow was recovered from 2 people
6. The investigating officer, Pw2 No. 38464 PC Douglas Njoroge testified as Pw2. He received a call at around 2:00 a.m. from the area chief, Pw3, that Pw1 reported that her black and white heifer was missing. He directed that the complainant should make a report at the police station. The complainant made a report at the police station and they proceeded to the scene and started tracking the missing heifer. It had rained and they saw foot marks. They followed the foot marks that had been left behind. Following the trail, they arrived at Ngwelo area, where the appellant was found in the company of his co-accused, both in possession of the cow. Pw2 testified that they took photographs of the cow and arrested the appellant.
7. The trial magistrate put the appellant on his defence. He testified that he was Erastus Wawire Wanjala and did not know the charges levelled against him.
8. The appeal has been canvassed by way of written submissions. The appellant advanced that Pw1 did not give clear testimony regarding the timing of the alleged theft and it was also not clear who found the cow. He challenged the evidence of Pw3 on account that he talked of an incident that occurred on 18/01/2017 while the offence was reported to have occurred on 16/01/2017. The appellants submitted that the trial magistrate failed to consider the contradictions in the prosecution case.

Analysis And Determination

9. The appellant in this appeal argues that the prosecution failed to prove its case to the required standard. The trial magistrate was required to satisfy that the prosecution had proved that the goods were stolen goods; the appellant knew or had reason to believe that the goods were stolen goods; and that the appellant undertook the retention or disposal of the goods (see Court of Appeal decision in *Eddie Odongo v Republic, [1983] eKLR*).
10. Pw1 testified that her cow was stolen on 16th January 2017 and the matter was reported to the police. Pw2 corroborated the evidence of Pw1 that the theft was reported on 16th January 2017 at 2:00 a.m. and they promptly proceeded to the scene with the purpose of tracking the stolen cow. Pw1 also testified that her son reported the incident to the area chief Pw3. However, Pw3 in his testimony testified that the incident took place on January 18, 2017. The appellant's appeal is on grounds that the contradictions were grave and casts doubt on the testimony of the witnesses. In my view, the contradiction in Pw3's testimony as to the date of the incident was a minor contradiction that did not go to the root of the prosecution case. In the case of *Mangala Sombo Maricheni* Criminal Appeal No.172 of 2012 the Court of Appeal stated:

“Regarding the alleged contradiction on the time when the offence was committed, we do not think much turns on that ground of appeal. Having heard the evidence, the learned trial judge found that the offence was committed at about 6.00 pm. We do not see any basis for holding otherwise. In any event, the contradiction alleged by the appellant is not a material contradiction as it did not go to the root of the prosecution case. The Uganda court of



Appeal aptly noted in *Twehangane Alfred Vs Uganda*, Crim. App. No 139 of 2001, [2003] UGCA 6, that it is not every contradiction warrants rejection of evidence. The court stated:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

11. According to Pw2’s testimony, it had rained on the material day, and they were able to track footprints from Pw1’s home to the appellant and his accomplice, who were found in possession of the cow. The prosecution urged the court to infer guilt from the fact that the appellant was in possession of recently stolen property in unexplained circumstances. They relied on the case of *Eric Otieno Arum v Republic* KSM CA Criminal Appeal No 85 of 2005 (2006) eKLR and *Paul Mwita v Republic* KSM Criminal Appeal No 200 of 2008 where the doctrine of recent possession was applied as a basis of conviction in criminal cases. Similarly, in *Athuman Salim Athuman vs. Republic [2016]* eKLR, this Court held that:

“The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. (See *Malingi V. Republic* (1989) Klr 225 H.c And *Hassan V. Republic* (2005) 2 KLR 151). The circumstances under which the doctrine will apply were considered in *Isaac Ng’ang’a Kahiga Alias Peter Ng’ang’a Kahiga V. Republic*, CR. APP. NO. 272 of 2005, where this Court stated:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other.”

12. Pw2 gave clear evidence that the appellant was found with the cow 2 hours after it had been reported stolen. Pw1 was called to the station and she identified and confirmed that the cow was hers. They produced into evidence photographs of the black and white cow that had been stolen from the complainant 2 hours before the arrest of the appellant.
13. The appellant in his defence stated that he was Erastus Wawire Wanjala and not the accused person. According to the evidence on record, the appellant absconded trial following his release on bond. When he was later arrested, he claimed that he was Erastus Wawire Wanjala. He did not provide any evidence that he was Erastus Wawire Wanjala who is a different person from the appellant. Pw2 testified that it was the appellant that he had arrested on 16/01/2017 after he was found with the stolen cow. In fact, during the trial, when the charges were further read to the appellant during the defence hearing, he denied the charges and testified that he only heard them on the first day of his arraignment. The appellant was first arraigned as Geoffrey Mukhwana. It was therefore clear that the appellant was the person arrested by Pw1 after being found in possession of Pw1’s cow 2 hours after it was reported to be stolen.
14. The appeal also challenges the sentence meted by the trial magistrate court as he describes it to be harsh on account that he failed to consider his mitigation. The appellant was given an opportunity



to mitigate and the trial magistrate also called for a presentence report. According to the presentence report, the appellant was a repeat offender and a non-custodial sentence was recommended. On the date of sentencing the trial court made the following remarks 'I have considered the presentence report by the probation officer...the manner in which the accused conducted himself during trial'. Therefore, the 8-year sentence running from the date the appellant was re-arrested, that is, January 29, 2018 is not harsh or excessive.

15. In the end, I find that the trial court's conviction and sentence to be lawful and is hereby upheld by this court.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF APRIL 2023

R.E. OUGO

JUDGE

In the presence of:

Appellant in person

M/s Omondi for the Respondent

Wilkister C/A

