



REPUBLIC OF KENYA



**Wanjiru v Republic (Criminal Appeal E028 of 2021)
[2023] KEHC 22152 (KLR) (29 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 22152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E028 OF 2021
GL NZIOKA, J
AUGUST 29, 2023**

BETWEEN

PETER MWANGI WANJIRU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence in the decision of; Hon. Liluma Musiega, Resident Magistrate, delivered on, 27th September, 2021, vide Criminal Case No. E088 of 2020, at the Senior Principal Magistrate's Court at Engineer)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate's Court at Engineer on October 12, 2020, charged with the offence of stealing stock contrary to section 278 of the *Penal Code*.
2. The particulars of the charge are that on the 23rd day of September 2020 at Yanga, Kinangop Sub-County, within Nyandarua County, he stole nine (9) cows valued at Kshs 900,000 the property of Grace Wairimu.
3. He pleaded not guilty and the case proceeded to full hearing where the prosecution called a total of three (3) witnesses. The prosecution case in brief is that, (PW1) Grace Wairimu, (herein "the complainant"), kept several livestock including the nineteen (19) cows on her farm in Kinangop. She had employed the appellant and (PW2) Judith Wangari to look after the farm since she resided in Nairobi.
4. On September 23, 2020, PW2 called and informed her that her the cows and the appellant were missing. She then called Gideon, the appellant's co-accused and who had recommended the appellant to her as an employee. She was informed that the appellant was at his home and they could go and get him.



5. That they travelled to Solai where they learnt that the appellant had been arrested on suspicion of having stolen other things. The complainant also reported matter and subsequently, the appellant was transferred to Njabini Police Station and charged accordingly after investigations.
6. At the close of the prosecution case, the trial magistrate held that the appellant had a case to answer and placed him on his defence. He elected to give a sworn statement and denied committing the offence. He stated that, he was employed on August 26, 2020 and between 11th and September 13, 2020 he assisted to fix a door of a school and transfer items from the said school.
7. That, on September 18, 2020, the employer informed him that a new worker was coming to join him and the manager asked him to vacate the house and leave it for the new worker. However, he disagreed with the manager and left the homestead after he was paid all his dues.
8. That, on September 26, 2020, he was connecting electricity at his house when he was arrested and taken to the Police Station where he was informed that cows were missing. He denied the offence but was transferred to Haraka Police Station and later to Njabini Police Station and charged.
9. At the conclusion of the trial, the trial Magistrate held that the prosecution had proved its case beyond reasonable doubt convicted the appellant and sentenced him to serve a term of seven (7) years imprisonment.
10. However, the appellant is aggrieved by the decision of the trial court and has appealed against it based on the grounds in his petition of appeal as herein below reproduced verbatim that:
 - a. That, the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence were not conclusively proved.
 - b. That the learned trial magistrate erred in law and fact by failing to consider that the prosecution did not prove their case beyond reasonable doubt as required by the law
 - c. That, the learned trial magistrate erred in law and fact by failing to consider that the conviction was against the merits of the prosecution case.
 - d. That, the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that prosecution did not discharge the burden of proof.
 - e. That, the learned trial magistrate erred in law and fact by relying on incredible and incontinent prosecution's evidence.
 - f. That, the honourable magistrate erred in law and fact by failing to consider no cogent reasons linking I the appellant to the alleged offence
 - g. That, the pundit trial magistrate erred in law and facts by failing to adequately consider my defence.
11. The appellant also filed amended grounds of appeal alongside submissions albeit without the leave of the court on the grounds herein:
 - a. That the learned trial magistrate erred in law and fact by failing to consider that the prosecution did not prove their case beyond any reasonable doubt as required by the law.
 - b. The pundit trial magistrate erred in law and fact by failing to adequately consider my defence.
 - c. No exhibit was recovered from him.
 - d. The evidence tendered by the prosecution had inconsistencies and contradictions.



- e. No one witnessed him committing the offence.
 - f. The sentence imposed was too harsh and excessive.
12. However, the respondent opposed the appeal and filed grounds of opposition dated October 21, 2022 to the effect:
- a. That, the offence was sufficiently proved as provided under section 278 of the *Penal Code*. The complainant (PW1) was proved to be the owners of the cows.
 - b. That, the appellant was the one who stole the cows which was proved through the evidence of PW1, PW2 and PW3.
 - c. That, the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with section 215 of the *Criminal Procedure Code*.
 - d. That, the sentence imposed was proper and in line with the *Penal Code*.
 - e. That, the Honourable court be pleased to dismiss the appeal and uphold both the conviction and sentence.
13. The appeal was disposed of by way of written submissions. The appellant in his undated submissions filed on October 12, 2022, denied committing the offence and reiterated that the prosecution did not prove the case to the required standard. That, he was arrested for the offence of climbing an electricity pole but was charged with the offence herein.
14. Further, the complainant reported the offence after five (5) days which was unexplainable. That, Gacheru Kanyore, a Nyumba Kumi member was arrested on suspicion of committing the offence but was released without reason by a police officer.
15. The appellant faulted the investigations arguing that the investigation officer failed to investigate the complainant's former employees despite the complainant stating in cross-examination that there had been earlier incidents of stock theft. Further, the investigating officer was unaware of the circumstances of his arrest and no exhibits were recovered from him.
16. Further, there were no witnesses that saw him commit the offence. He faulted the court for relying on circumstantial evidence that was weak. He placed reliance on the case of *Abanga alias Onyango v R Cr Appl, No 32 of 1990* where the court laid out the test to be satisfied to rely on circumstantial evidence.
17. He argued that, his alibi defence weakened the inference of guilt in the prosecution case and that, the prosecution case was based on suspicion which cannot be a basis for inference of guilt as stated in the case of; *Joan Chbichii Sawe v Republic* [2003] eKLR and *Mary Wanjiku Gichara v Republic* Criminal Appeal No 17 of 1998.
18. Lastly, he submitted that the sentence meted out by the trial court was too severe considering that he was a first offender and urged the court to find that he was unreasonably and unlawfully prejudiced. He prayed the appeal be allowed.
19. However, the respondent in their submissions dated, November 21, 2022, argued that the evidence adduced by the prosecution witnesses indicated that the cows were stolen by the appellant who had been hired by the complainant and who conveniently went missing after they were stolen. Reliance was placed on the case *Republic vs Richard Itweka Wabiti* [2020] eKLR on the probative value of circumstantial evidence stating that, it is the best evidence but should be closely examined before making it the basis of the conviction.



20. The respondent submitted that sentencing is discretionary under section 26 (2) of the *Penal Code*, and cited the case of *Arthur Muya Muriuki vs Republic* [2015] eKLR where the Court of Appeal stated that a court will only interfere with the sentence of the trial court if it is shown that in passing the sentence, the court took into account irrelevant factors or a wrong principle was applied, or the sentence was too harsh and excessive.
21. That, in this case the trial court considered the circumstances of the case and mitigation before imposing the sentence which was lawful. The respondent urged the court to uphold both conviction and sentence.
22. Having considered the appeal, I first note that, as held by the Court of Appeal in the case of; *Okeno vs Republic* (1972) EA 32, the role of the first appellate court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.
23. The court thus observed: -
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) 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”
24. Be that as it were, the appellant was convicted of the offence of; stealing stock contrary to section 278 of the *Penal Code*, which states as follows:
- “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, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.”
25. Stealing is defined under section 268 of the *Penal Code* as:-
- (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
- (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—
- (a) an intent permanently to deprive the general or special owner of the thing of it;
- (b) an intent to use the thing as a pledge or security;
- (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;



- (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.
- (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.
 - (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.
 - (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.”

26. Indeed, the elements of the offence of stealing stock were laid out in the case of *David Shapaya v Republic* [2022] eKLR where the court stated that:-

“4. Stock theft is about stealing stock, domestic animals or livestock basically. The animals capable of being stolen, for the purposes of section 278 of the Penal Code, are a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig. Under section 267(1) of Penal Code, camel or domesticated animals are also capable of being stolen. The critical element of the offence would be ownership, the taking of the animal, possession and conversion of the thing stolen.” (Emphasis added)

27. On whether the prosecution evidence amounted to circumstantial evidence, the Court of Appeal in *Chiragu & another v Republic* (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR) (Crim) (17 December 2021) (Judgment) discussed the issue in detail and stated that:-

“The prosecution case on this aspect therefore hinged on circumstantial evidence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, this Court had this to say on circumstantial evidence:

“However, it is a truism 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 a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr App R 21: -‘It has been said that the evidence against



the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’

“Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Suffice to mention *Abanga alias Onyango v Republic* CR App No 32 of 1990(UR) in which this court held as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy 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 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.”

And in *Sawe Vs Republic* [2003] KLR 364, the Court of Appeal amplified on the above thus:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

28. To revert back to the matter herein, PW2 testified that the complainant hired her as a casual labourer while the appellant was hired to take care of the animals and he used to live on the farm. On September 23, 2020 when she arrived at the complainant’s farm she noticed that the cow shed had been broken and the cows and the appellant were missing and she reported the matter to the complainant.
29. The complainant and the appellants co-accused in the trial court confirmed that the appellant was employed to take care of the stolen cows and disappeared alongside the same. Therefore, there is corroborative evidence that, the appellant disappeared the day the cows were stolen.
30. As such his evidence in defence about movements of things in the school does not hold water. Furthermore the fact that there might have been previous thefts in the homestead does not offer him a defence or exonerate him from the offence. It is the finding of the court taking into account the aforesaid on circumstantial evidence the conviction was safe. I decline to quash it.
31. On sentence, I note that section 278 of the *Code* provide for a maximum period of imprisonment of fourteen (14) years. Therefore, sentence of seven (7) years meted out is lawful. However, taking into account the fact that, the was treated as a first offender, the sentence is rather prolonged. I am inclined to reduce it to five (5) years with effect from October 20, 2020.
32. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 29TH DAY OF AUGUST 2023

GRACE L. NZIOKA

JUDGE



In the presence of:

The appellant present, virtually

Mr. Ndiema for the respondent

Ms Ogutu: court assistant

