



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. E038 OF 2020**

**REPUBLIC.....APPELLANT**

**VERSUS**

**ROSEMARY RUGURU.....RESPONDENT**

*(Being an Appeal Against Acquittal in Tigania Principal Magistrate's*

*Court Criminal No. 2120 Of 2016 By Hon.P.M Wechuli (Srm) on 18.02.2020)*

**JUDGMENT**

**The Trial**

1. Respondent was charged with stealing contrary to section 268 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence were that:

**On the 9<sup>th</sup> day of February 2016 at Maili Tatu village, Rei Sub-location, Mumui Location, Tigania West District within Meru County with others not before court jointly stole maize crop valued at Kshs. One Hundred Thousand (100,000/=) the property of Naomi Ethang'atha.**

2. By a judgment dated 18<sup>th</sup> February, 2020, the Appellant was found not guilty and was acquitted.

**The Appeal**

3. Dissatisfied with the acquittal, the state lodged the instant Appeal mainly on the ground that the Appellant's case was proved beyond any reasonable doubt.

**Analysis and determination**

4. The duty of the first Appellate Court is to carefully examine, consider and set out the evidence that was tendered before the trial court and subject the whole evidence to a fresh and exhaustive re-examination and re-evaluation so as to arrive at own independent conclusions on the appellant's guilt or otherwise. (See **Michael Muriuki Munyori v Republic [2017] eKLR**).

5. From the evidence on record, I have deduced two issues for determination.

**1. Whether the complainant owned any maize capable of being stolen**

**2. Whether the Appellant proved that Respondent stole complainant's maize**

**3. Whether the Respondent was rightly acquitted**

6. I have carefully considered the written submissions filed on behalf of Appellant and by the state.

7. From the evidence on record, it is apparent that there is a dispute as to whether the maize that was harvested belonged to the complainant or to one Mutegi Kaume Gitobu with both laying a claim to the same. The record reveals that the evidence of maize planting was that of the

complainant's 5<sup>th</sup> witness as against that of Mutegi Kaume Gitobu.

8. Faced with this evidence, I find that the trial magistrate rightly found that it had not been proved beyond any reasonable doubt that complainant owned the maize the subject of this case.

9. Section 268 of the Penal Code Chapter 63 Laws of Kenya defines stealing as follow:

**1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to 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**

10. The Appellant's 6<sup>th</sup> witness testimony is the only one who came close to implicating the Respondent with the offence. In cross-examination however, he conceded that he did not implicate the Respondent when he initially recorded his statement with the police.

11. The evidence by PW6 properly evaluated falls in the category of what the Court of Appeal described in **Ndungu Kimanyi vs. Republic [1979] KLR 282** as follows;

**“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he/she is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he/she is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”**

12. The variance between the testimony by PW6 and his statement to the police rightly created an impression in the mind of the court that the witnesses was either being economical with the truth or untruthful.

13. Further to the foregoing, *Mutegi Kaume Gitobu* stated on oath that he was the one and not the Respondent that gave instructions for the maize to be cut down.

14. The standard of proof required in a criminal case is “proof beyond reasonable doubt”. In reference to this, Lord Denning in **Miller v Ministry of Pensions, [1947] 2 All ER 372** stated:

**“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”**

15. From the evidence on record, I am persuaded as was the learned trial magistrate that the burden of proof as postulated in **Miller v Minister of Pensions case** was not discharged as to secure a verdict of guilty and therefore find that the Respondent was appropriately acquitted.

16. Accordingly, I find that this appeal has no merit and it is hereby dismissed.

**DELIVERED AT MERU THIS 24TH DAY OF FEBRUARY 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**In the presence of:**

**Court Assistant - Kinoti**

**Appellant - Ms. Mwaniki**

**For the Respondent - Mr. Mutegi**