



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. E014 OF 2021

(From original conviction and sentence in Butali PMCCRC No. E049 of 2021,

Hon. ZJ Nyakundi, Senior Principal Magistrate, of 18th January 2021)

DAVID SHAPAYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appeal herein arises from proceedings that were conducted in Butali SPMCCRC No. E049 of 2021, where the appellant, David Shapaya, was charged with stock theft, contrary to section 278 of the Penal Code, Cap 63, Laws of Kenya. According to the trial court record, he pleaded guilty and was convicted and sentenced to 2 years' imprisonment.

2. The appellant was aggrieved, hence the appeal. He has listed three grounds, in his petition of appeal, dated 16th April 2021. He avers that the facts did not disclose the offence of stock theft, the plea was not unequivocal, and the conviction was contrary to section 207 of the Criminal Procedure Code, Cap 75, Laws of Kenya.

3. The facts, as recorded by the trial court, are as follows:

“On 1/9/2020 the complainant was at Kambi market selling livestock, the accused went to the market to sell a bull worthy Ksh. 19,000/- and the money was to be sent to the complainant.

The accused did not want the money, the complainant reported the matter to Kabras Police Station.

The accused was arrested, the accused accepted that he was given the money but did not want the money.”

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.

5. The facts as recorded by the trial court make no sense to me at all, and I do not think they should have been basis of convicting anyone of the offence of stock theft. It would appear, from the facts, that the bull belonged to Caleb Luchembai, the complainant. Both the complainant and the appellant are alleged to have been at the market selling livestock. The appellant was there selling a bull, but it is not stated to whom the bull belonged. Stock theft is about taking, possession and conversion. The facts do not allege or disclose that the appellant took a bull belonging to the complainant, and that he had possession of a bull or he converted it to his own use or purposes. The stock in question is the bull. For the offence to be established, it has to be demonstrated that the appellant took possession of it or converted it to his own use. There is not mention of him taking it or having possession of it or even converting it to his own purposes. Without proof of these facts, the offence cannot be established, even if the accused purports to concede to the facts.

6. They facts, as narrated, appear to have more to do with the money than the bull. Even then, what happened to the money is recorded in the vaguest of languages. It is said that the money was to be sent to the complainant, presumably by the appellant, but the appellant did not want the money. Just what does that mean? Did the appellant receive the money? Does it mean the he accepted to receive the money? It is said he accepted that he received the money, but he did not want the money, again what does this mean exactly? The facts, as narrated, are incredibly vague, they are so uncertain that it would be unjust to found a conviction on them. The court should have reflected on whether the facts, as narrated, made any sense, and, if found that they did not, then go on to record a plea of not guilty, so that evidence could be taken to shed light on them.

7. The case, therefore, as said above, is less about the bull allegedly stolen, and more about the money that the appellant did not want to receive. Perhaps the appellant should have been charged with some offence relating to the money, for there is absolutely no material on record to which points to stock theft.

8. This is a case where a trial court should not convict an accused person merely because they have pleaded guilty to the charge as put or read to them, or have stated that the facts as read to them are correct. The facts as narrated must be aligned to the charge. If they are not, then they cannot be the basis for the charge. They must also make sense. If they make no sense at all, like in this case, then the court should not convict on a guilty plea.

9. I am persuaded that the appeal has merit. I shall allow it. The conviction of the appellant by the trial court is hereby quashed, and the sentence set aside. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF FEBRUARY, 2022

W. MUSYOKA

JUDGE

MR. ERICK ZALO, COURT ASSISTANT.

MR. MWANGI, INSTRUCTED BY THE DIRECTOR OF PUBLIC PROSECUTIONS, FOR THE REPUBLIC.

MR. MUNYENDO, INSTRUCTED BY MESSRS. OSCAR WACHILONGA & ASSOCIATES, ADVOCATES, FOR THE APPELLANT.