



**Omuli v Director of Public Prosecutions (Criminal Appeal 177 of 2018)  
[2022] KEHC 16942 (KLR) (23 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16942 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL 177 OF 2018  
WM MUSYOKA, J  
DECEMBER 23, 2022**

**BETWEEN**

**JOSEPH NDALE OMULI ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

*(Being an appeal out of the judgment delivered on 22nd November 2022 by Hon J.N. Maragia Senior Resident Magistrate in Kakamega CMCCR No. 3188 of 2014)*

**JUDGMENT**

1. The appellant was convicted and sentenced to 3 years' imprisonment for the offence of stock theft, contrary to section 278 of the Penal Code, Cap 63 Laws of Kenya. The particulars were that on the night of 1<sup>st</sup> October 2014 and 2<sup>nd</sup> October 2014, at Bunaywa Village, Mukongolo Sub-Location in Kakamega South District, within Kakamega County, he stole one cow and one calf, valued at kshs. 62,000.00, the property of Mary Demesi Mate. There was an alternative charge of handling stolen goods.
2. Five witnesses testified for the prosecution. PW1, was the complainant. She narrated how she traced her stolen court amongst a herd of the appellant. PW2 was the person who had sold the cow to PW1. PW3 accompanied PW1 in the search of the cow and its calf. PW4 and PW5 were the police officers involved in the investigations. The appellant was put on his defence. He claimed that the cow belonged to him, and DW2 supported his evidence. The appellant was convicted on the basis of recent possession of stolen stock, and *David Kimunge vs. Republic* [2015] eKLR was cited.
3. The appellant was aggrieved, hence he filed the appeal herein. The petition of appeal is dated 27<sup>th</sup> November 2018. The appeal revolves around the exhibit not being produced in court; there was violation of article 49 of *the constitution*; the trial court considered extraneous issues and evidence which was not before the court, and around the evidence adduced by the prosecution to prove a conviction;



- the evidence, did not reach the threshold, was inconsistent, not corroborated and had no probative value; the appellant's submissions, defence and demeanour were not considered; the case was not proved beyond doubt; and the sentence was harsh and unreasonable.
4. Directions were given on 6<sup>th</sup> July 2021, for the appeal to be canvassed by way of written submission, to be filed within 21 days. By 2<sup>nd</sup> May 2022, when I allocated the matter a date for judgment, none of the parties had filed written submissions.
  5. The first ground is that the exhibit was not produced. The subject of the theft was a cow. Production, if one goes by the ground, would entail bringing a cow to court. The procedure in cases of this nature is to produce photographic evidence. 3 photographs of the cow were put in evidence as P Exhibit No. 1, accompanied by a certificate of photographic evidence, which was produced as P Exhibit No. 2. It cannot be said, therefore, that there was no production of the exhibit of the subject of the alleged theft.
  6. The second ground is on violation of article 49 of *the Constitution*. The appellant did not file written submissions hence there is no elaboration on what this is all about. However, the trial record indicates that on October 30, 2014, when the appellant was arraigned for plea, his Advocate, Mr. Ondieki, objected to plea being taken, on grounds that he intended to apply to the High Court for interpretation of article 49(1)(c) of *the Constitution*, with respect to the pre-arraignment detention for 3 days.
  7. The rights enumerated in article 49 of *the Constitution* are in respect of an arrested person. They are not fair hearing rights, as, at that stage, no trial will have commenced. Any violations at that level would have no impact on the trial, unless the detention was prolonged, for say for a period in excess of 6 months. The violation of article 49 does not vitiate a trial, and can be disclosed by way of compensation in damages, either on a constitutional petition as the High Court, or a civil action for the tort of false imprisonment. Such civil action could very well run parallel, to the criminal proceedings.
  8. The third ground is that the trial court considered extraneous issues and evidence which was not before the court. In the absence of written submissions by the appellant, I have not had the benefit of what he is complaining about. I have carefully perused the trial record, and I see nothing suggesting that the court considered extraneous issues or evidence that had not been adduced.
  9. The fourth ground is that the evidence adduced had not reached the threshold, it was inconsistent and not corroborated. PW1 identified the cow that she claimed was stolen from her. It was amongst the herd of the appellant. It was the cow in the P Exhibit No. 1. PW2 testified that he was the one who had sold that cow to PW1. PW3 testified that she accompanied PW1 in search of her cow, and that she found it with the cattle of the appellant. The evidence of PW1 was corroborated by PW2 and PW3. I find no basis to find that the evidence did not reach the threshold for a conviction. In any event, the appellant did not deny that PW1 identified a cow in his herd, but he asserts that the cow belonged to him. After hearing both sides on the ownership, the trial court was persuaded by the position of PW1. The testimony by PW1 was strongly supported by PW2 and PW3. The testimony of PW2 was particularly more important. He identified the cow in P Exhibit No. 1 as the cow he sold to PW1. I am persuaded that the evidence adduced reached the threshold.
  10. The fifth ground is that the defence submissions, defence and demeanour were not considered. I will start with the submissions and demeanour. Submissions are just arguments on the evidence. The failure to consider submissions should not be fatal, so long as the trial court has properly analysed both the prosecution and the defence evidence, and arrived at a conclusion that is in accordance with the law.
  11. Demeanour refers to the observations that the court makes of the appearance, conduct and reactions of the accused person during trial. They can be a pointer to his guilt or otherwise, but demeanour cannot override the evidence. Observations on it can only be argument on the recorded evidence. I have



carefully gone through the record, both the testimonies of the defence and the prosecution witnesses, I have not seen any notes made by the trial court with respect of the demeanour of the appellant or his witness or the prosecution witnesses. Since the trial court did not note any observations on demeanour, there can be no basis for submitting that the demeanour of the accused was not taken into account, as no observations were made of it at any stage.

12. On the defence, I have carefully perused the judgment. I have noted that the trial court did consider the defence. It was recited at page 3 paragraph 4 and page 4 paragraph 1. It was analysed at page 6 paragraph 2 and 3 and page 7 paragraph 1. There is adequate material to demonstrate that the defence as considered. Recital of the testimonies of the appellant and his witnesses is, alone, indicative that the trial court had the defence prime in mind. But the trial court went beyond the recital of the defence, it analysed the evidence in 2 extensive paragraphs, in the following terms:

“Having found so, the next issue will be whether the explanation by accused is sufficient to rebut the presumption of recent possession. It is helpful to revisit the accused person’s defence. Accused person in his defence stated that on 13.10.2014 he was shocked by a multitude of people led by the area chief. He is a dairy farmer. They went to his farm where he reared six hybrid cows. The crowd then looking for a lost cow did not spot the one they were looking for. They stood aside at a distance of 100 metres, discussed amongst themselves, went back and one lady claimed that one of the cows was the one they were looking for. The cow was his. It was expectant. It had been calved at his homestead. The cow was taken away and he had never seen it. The chief had begrudged him that is why he led complainants to his homestead. He had taken photographs of the cow sometime on 14.6.2014. he produced the photographs. DW2, corroborated the evidence of DW1.”

“I have carefully analysed the accused person’s defence as well as the evidence by prosecution witnesses. As I observed earlier, truly, a brown and white cow could be found given homestead. It is however, not possible to find a cow with both the horns and tail cut in many homesteads. Further, there is no logic that the cow is possession of the accused was, other than having, the same features uniquely described by complainant could also be pregnant. I have carefully analysed the evidence herein. The complainant’s testimony is so precise. I say so because she was categorical that the cow was three months and half pregnant. She had taken it for artificial insemination in July 2014. It calved down in March 2015. The veterinary report confirms the testimony of the complainant. This evidence remained unchallenged by the defence. On the other hand, the accused only said the cow was his. He did not state that it was expectant and the duration of the pregnancy. He did not know when it conceived. The accused went further and produced some photographs showing a similar cow to that shown by prosecution witnesses. The photograph was never shown to the complainant and her witnesses at the time of the testifying. It was only introduced when the investigating officer testified, nearly a year after the complainant had testified. I find that this piece of evidence was an afterthought. I find that the explanation by accused is not plausible. It does not rebut the presumption that he is either the thief or guilty receiver.”

13. On the case not being proved beyond reasonable doubt, I am satisfied that there was proof beyond reasonable doubt. There was proof that the cow belonged to PW1, upon considering the testimonies of PW1, PW2 and PW3. There was proof that the cow was found in possession of the appellant, from the testimonies of PW1 and PW3. The principle of recent possession was properly applied by the trial court, to conclude that the cow was either stolen by the appellant or he received it knowing it to be stolen.



14. On the sentence being excessive and unreasonable, the maximum penalty for stock theft, under section 278 of the *Penal Code*, is 14 years. The appellant was sentenced to less than half of that term. Sentencing is at the discretion of the trial court. Am not persuaded that the trial court, in this case, improperly exercised that discretion.
15. Overall, I do not find any merit in the appeal, and I hereby dismiss it. The conviction is upheld, and the sentence confirmed.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 23<sup>RD</sup> DAY OF DECEMBER 2022.**

**WM MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

Mr. Ondieki, instructed by Gichaba Ondieki & Company, Advocates, for the appellant

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

