



**Kariuki v Republic (Criminal Appeal 123 of 2019)
[2022] KEHC 16800 (KLR) (Crim) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL 123 OF 2019
CW GITHUA, J
DECEMBER 19, 2022**

BETWEEN

MOSES WARUI KARIUKI APPLICANT

AND

REPUBLIC RESPONDENT

*(An appeal from the conviction and sentence in Kibera Chief Magistrate's Court
Criminal Case No. 1911 of 2015 dated 23rd May 2019 (Hon. J. Kamau SRM))*

JUDGMENT

1. The appellant, Moses Warui Kariuki was charged in the main count with the offence of stealing stock contrary to Section 278 of the [Penal Code](#) and with an alternative Count of handling stolen goods contrary Section 322 (1) (2) of the Penal Code.
2. After a full trial, he was convicted of the offence charged in the alternative count whose particulars were that on 5th May 2015 at Kiamburi village (Thogoto) in Kiambu County, otherwise than in the course of stealing, he dishonestly received or retained one he-goat knowing or having reason to believe it to be stolen property.
3. Upon his conviction, the appellant was sentenced to pay compensation to the complainant in the sum of Kshs. 60,000 in default to serve a one year jail term. He was dissatisfied with his conviction and sentence. He proffered the instant appeal to this court relying on five grounds which can be condensed into three main grounds as follows;
 1. That the learned trial magistrate erred in law and fact in finding that the appellant handled a stolen goat yet the evidence on record did not establish all the elements of the offence of handling stolen goods to the required legal standard.



2. That the learned trial magistrate erred in law and fact by failing to give due consideration to the appellant's defence and submissions.
3. That the learned trial magistrate erred in law and fact in imposing a compensation order of Ksh. 60,000 yet the stolen goat had been restored to the complainant.
4. Both parties chose to prosecute the appeal by way of written submissions. The appellant, through his advocates Ms. Mbugua Nganga & Co. Advocates filed his submissions on 24th June 2022 while those of the respondent were filed by learned prosecuting counsel Ms. Edna Ntabo on 16th June 2022.
5. Briefly, it was submitted on behalf of the appellant that he was wrongly convicted because the prosecution failed to adduce evidence to show that he was aware or had reason to believe that the subject goat had been stolen. Counsel averred that the trial court having observed that Dagoretti Meat market was an informal market with no practice of keeping records or issuing receipts, erred in failing to appreciate that the appellant could not in those circumstances ascertain the source or ownership of the goats he bought for his trade.
6. Counsel further submitted that the prosecution failed to establish the elements of the offence of handling stolen goods beyond any reasonable doubt. He stated that the appellant in his defence provided a reasonable explanation of how the alleged stolen goat came into his possession which entitled him to an acquittal. To this end, he relied on the authority of *James Kariuki Wachira vs Republic* [2015] eKLR.
7. On sentence, Counsel submitted that the compensation order made by the learned trial magistrate was unlawful, as the alleged stolen goat had been returned to the complainant. For those reasons, he urged this court to allow the appellant's appeal.
8. The respondent in its submissions supported the appellant's conviction and sentence. It was the respondent's contention that the evidence adduced by the prosecution before the trial court proved all ingredients of the offence and was sufficient to support the appellant's conviction.
9. Regarding the order for compensation to the complainant, the respondent submitted that Section 175 (2) of the *Criminal Procedure Code* grants the trial court discretion to make appropriate compensation orders. The respondent invited me to take note that it was the appellant's prayer during mitigation that he be allowed to compensate the complainant. Further, the respondent averred that Section 23 of the *Victim Protection Act* provides for compensation to victims of offences, and that compensation or restitution does not form part of a sentence as envisaged under Section 25 of the said Act.
10. The brief facts supporting the prosecution case as can be ascertained from the evidence on record are that on 21st February 2015, PW1 Paul Kinuthia took his goats to graze at a school that was near his home in Ngong. He left the goats grazing and went to do some masonry work. At about 11.00am, he went to check on the goats and found three of them were missing. He searched for them to no avail. He reported the matter to the area chief who urged him to look for the goats again.
11. PW1 recalled that three months later, on 4th May 2015, he was at Dagoretti when he identified one of his stolen goats among a herd of about 50 goats. He stated that the goat was unique as he had cut one of its horns and had put an identifying mark on it. He reported the matter at Matasia Police Station. On the following day, police officers accompanied him and his son (PW2) to Thogoto where they managed to trace and recover the goat at the residence of the appellant.
12. PW3, CPL. Henry Ireri, was one of the arresting officers. He testified that 4th May 2015, PW1 went to Matasia Police post where he reported that his goats had been stolen from Kipayu Secondary School



where he had left them to graze. He further reported that he had spotted one of the stolen goats in Thogoto Kikuyu after receiving a tip from an informer. On the following day, on 5th May 2021, together with PC Moseti, he accompanied PW1, PW2 and a neighbour to Thogoto Administration Police Camp after which they were taken to the residence of the appellant.

13. According to PW3, they found about 50 goats and sheep in the appellants homestead and PW1 was able to identify his stolen goat from the herd. On interviewing the appellant, he stated that he had bought the goat at Dagoretti Market from one Mbugua. The appellant was however not able to avail the said Mbugua. He was then arrested and charged with the offences in the charge sheet.
14. When placed on his defence, the appellant elected to give a sworn statement and did not call witnesses. In his statement, he stated that he was a businessman, a meat trader at Dagoretti Corner. He told the court that habitually, he bought goats at Dagoretti Market and would afterwards take them for slaughter to get meat for his business. He was adamant that he had bought the alleged stolen goat at Dagoretti market in January 2015. He admitted that the goat in question was recovered from his house. He testified that as Dagoretti Market was an informal open market where no receipts were issued upon purchase of goods, he had bought the goat on trust that the person who sold it was its owner.
15. This being a first appeal to the High Court, I am enjoined to carefully re-evaluate and reconsider the evidence presented to the trial court in order to arrive at my own independent conclusions regarding the soundness or otherwise of the appellant's conviction. In doing so, I should remember that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance to that disadvantage. See: *Okeno v Republic*, [1972] EA 32; *Mwangi v Republic*, [2004] 2 KLR 28.
16. I have carefully considered the evidence on record and the parties rival submissions. I have also read the judgment of the trial court. Having done so, I find that only two key issues arise for my determination. These are;
 - i. Whether the prosecution proved the charge of handling stolen goods against the appellant beyond any reasonable doubt.
 - ii. If the answer to issue No. (i) is in the affirmative, whether the order of compensation issued against the appellant was lawful.
17. Section 322 (i) of the Penal Code defines what constitutes the offence of handling stolen goods by providing as follows;

“A person handles stolen goods if (otherwise than in the course of stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods or dishonestly undertakes, or assists in, their retention, removal or disposal or realization by or for the benefit of another person or if he arranges to do so.”
18. From the above provision, it is clear that for the prosecution to sustain a conviction for the offence of handling stolen goods, it must prove beyond reasonable doubt that the accused person dishonestly received or retained goods knowing or having reason to believe that they were stolen property See: *Tembere v Republic* [1990] KLR.
19. In this case, after my own appraisal of the evidence on record, I find that though the prosecution proved beyond doubt that the he-goat in question had been stolen from the complainant and that it was recovered several months later in the appellant's homestead, the evidence fell short of establishing beyond doubt that the appellant had possession of the goat knowing or having reason to believe that the same was stolen property.



20. In my view, the appellant in his defence gave a plausible explanation on how he came to be in possession of the goat. It was not disputed that he was a meat trader in Dagoretti corner and that he used to buy goats at Dagoretti open air market to slaughter for his business. The appellant explained that on purchasing the goats, he would slaughter some and keep others for in-breeding like the goat in question. He swore that he had bought the goat together with five others in the ordinary course of business in the livestock market, like he had for over eight years previously and he had no reason to believe that the goats had been stolen or were unlawfully obtained.
21. When convicting the appellant, the learned trial magistrate stated as follows;
- “Having analyzed the evidence by the accused I therefore find that when he said that he buys from people in trust that the goats are not stolen was not believable. He indeed testified that he has carried on the business of selling and buying goats for over 8 years. It would be strange not to know the source of your goods. In the circumstances I find that the conduct of the accused clearly demonstrates that he was aware of the presence of a stolen goat in his herd.....as to whether the accused dishonestly received or retained the said goat, still the totality of the evidence confirms the position.”
22. In my opinion, the above finding by the learned trial magistrate was made in error as it was not supported by the evidence on record.
- The evidence disclosed that the appellant was buying stock for his business not from one or two sources but from different sellers in an informal livestock market and in such circumstances, it would be unreasonable to expect that the appellant or any other trader for that matter would know the source of goats offered for sale in the market.
23. Secondly, contrary to the trial court’s finding, the conduct of the appellant in taking the goat to his home and keeping it together with his herd for months after buying it is inconsistent with the conduct of a person who knew that the goat was stolen property.
- Being in the meat business, had the appellant bought the goat with a guilty mind, that is, knowing or having reason to believe that it was stolen, it is reasonably expected that he would have immediately taken it for slaughter to conceal or destroy evidence of the crime instead of retaining it in his compound and run the risk of being arrested with it.
24. Flowing from the foregoing, I have come to the firm conclusion that the prosecution did not prove its case against the appellant to the required legal standard both in the main and in the alternative counts. It is thus my finding that the appellant’s conviction in the alternative count was improper and unsafe.
- The appellants appeal against conviction is therefore merited and it is hereby allowed. His conviction is consequently quashed.
25. Having allowed the appellant’s appeal against conviction, I find that it would be unnecessary to delve into an inquiry regarding the lawfulness or otherwise of the sentence passed against him which required him to pay the complainant compensation in the sum of Kshs. 60,000 in default to serve one year imprisonment. Suffice it to say that under Section 175 of the Criminal Procedure Code which sets out the circumstances under which a trial court can order compensation in a criminal case, no term of imprisonment should be imposed as a default sentence in lieu of payment of the amount ordered as compensation.
26. Section 175 (6) is clear that a compensation order that has taken effect should be enforced in the same manner as a judgement in civil proceedings. The sentence of the trial court was therefore unlawful but



even if it was lawful, it would still be set aside in any event given that the appellant's appeal against conviction has succeeded. The sentence is consequently set aside.

27. The court record shows that the appellant deposited in the trial court Kshs. 60,000 ordered as compensation which was not released to the complainant in view of the order issued by this court on 18th September 2019 directing that the money be deposited in the trial court until this appeal was determined. As the appeal has been concluded, I order that the money be released to the depositor forthwith.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF DECEMBER 2022.

C.W. GITHUA

JUDGE

In the presence of:

Mr. Nganga Mbugua for the Appellant

Ms. Adhiambo for the State

Ms. Karwitha Court Assistant

