



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA

#### AT NAKURU

#### CRIMINAL APPEAL NUMBER 104 OF 2018

DAVID RUMPASS OLEPELO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal against conviction and sentence of Hon. F. Munyi (PM) delivered on 15<sup>th</sup> November, 2018 in Nakuru Chief Magistrate's Court Criminal Case Number 384 of 2012)*

#### J U D G M E N T

1. At all material times Halima Mwima Noor was a horticultural and dairy farmer at Banita. She had a **Farm Manager, John Mwangi Waweru, PW5**, and a **Dairy Clerk, Isaack Okore PW6** among other employees.
2. According to PW5 in 2012 the farm had sixty-three (63) cows, though PW6 said they were seventy-one (71) and sixteen (16) employees.
3. According to PW5 on 16<sup>th</sup> December 2011 at 4.00 a.m. he was called by PW6 who told him that twelve (12) dairy cows and one (1) beef cow were missing. He said he woke up and confirmed that the cattle were missing. They also found that the herdsman Joshua Rotich was missing. They rang the owner **PW1**, reported to the Administration Police (AP) Camp and later to Anti Stock Theft Police. The herdsman never came back to work after the incident.
4. On 30<sup>th</sup> January 2012, number 75743 Kirui Katwa and others were approached by PW1 who told them that some people who had stolen her thirteen (13) head of cattle were within Nakuru Town. They proceeded to arrest Joshua Adonyo Lokitale and Philip Nemuse, 1<sup>st</sup> and 2<sup>nd</sup> accused persons.
5. These two (2) took plea on 2<sup>nd</sup> February 2012 and pleaded not guilty to the charge of stock theft contrary to s. 278 of the Penal code where it was alleged that **“on the 16<sup>th</sup> December 2011 at Banita Mutukania area Nakuru North District of the Rift Valley Province jointly with others not before court stole twelve cows and one bull all valued at Ksh 1.9 million the property of Halima Mwima Noor”**.
6. On 20<sup>th</sup> September 2012, the 3<sup>rd</sup> accused Samson Chepkolel was added to the charge. The appellant was joined in the case on 5<sup>th</sup> April 2013. The both pleaded not guilty to the charge against the four (4) accused: **“that on 16<sup>th</sup> December 2011 at Banita, Mutukania area in Nakuru North District of the Rift Valley jointly stole twelve (12) cows and one (1) bull all Friesian Breed valued at Ksh. 1.9 million, the property of Halima Mwima Noor”**
7. By the time appellant was brought in as the 4<sup>th</sup> accused person, PW1 had testified, but she was later recalled on 24<sup>th</sup> May 2013. **PW2 Geoffrey Kamau Njenga** testified on 22<sup>nd</sup> November 2012 but was never recalled.

8. In her testimony Halima told the court that she received the report from PW5 that some milking cows were missing and the herder was also missing. She told him to report to the police. They searched for the cattle in slaughter houses in vain. She later spoke to a news reporter from The Standard Group Newspaper who published the story. She later met a police officer by name Chepkogei who gave her a piece of paper with the particulars of the appellant herein. She testified further that when accused 2 (Joshua) was arrested he told her that Accused 1 and Accused 3 were the ones who had planned the theft. That a motor vehicle registration number KZC 519 had been used to transport the cattle. That upon their arrests accused 1, 2 and 3 said that one David had bought the cattle and the said lorry was at Mai Mahiu. That they went to Mai Mahiu, found the lorry and the driver, PW2 who told them that he was led to the farm by David the appellant and accused 3 to a farm, and that accused 3 issued a permit for moving the cattle. She said she did not know the appellant but that he had been mentioned adversely by several people. That accused 2 had said they had taken the cattle to the appellant as the buyer. That PW2 had testified that they were in company of accused 4 when they went to pick the cows, which the owner of the slaughter house said some cows

that were taken there belonged to accused 4. She did not know how accused 4 was arrested.

9. When PW2 testified he told the court that he was a lorry driver, and they mostly transported cattle. On 11<sup>th</sup> December 2011 while he was in Nairobi he was rang by his employer John Manji, to go to Bahati Nakuru to transport cattle. The owner of the cattle had already paid Ksh. 40,000/= . PW2 left for Mai Mahiu where he fueled the lorry KZC 519 with his turn boy one Michael Power and someone who said he worked for the owner of the cattle. The owner came. His name was David. They met about 10.00 p.m. At 3.00 a.m. the following morning he was woken up by the lead man, a Maasai and they went up to Solai area. He was shown a movement permit and agreement in David's name. They found the cows with three people. The lead man told him that the owner was following in a taxi. PW2 drove to a petrol station. David came there and gave him Ksh. 5,000/= to fuel the motor vehicle. PW2 rang his employer expressing his fears that the cattle may not have been genuinely acquired but his employer told him to continue with the task. They left. On the way they were stopped at a road block. He testified that David produced movement permit and they were let through. That David then led him to his home, having left the others at Mai Mahiu. At David's home they off loaded the cattle and he returned to Mai Mahiu. He found his employer there. The three men they had left there alleged they had not been paid. He picked them and his employer and took them to David's home.

10. About a week later one Joshua, whom they had been with on the material night showed up with a CID officer. The CID officer took him to the AP Camp and called his employer who came. They were asked about the cattle and began to trace David. Their efforts to trace him on phone were in vain, but they traced "a young man who had accompanied" them and he was arrested. It is this young man who said that David had sold some of the animals which had been slaughtered.

11. PW2 said that accused 2 had said the cows were his, and that he was selling to David. He did not see David in court.

12. **PW3 John Gitau** was a herder at Mai Mahiu and also worked at **PW7's** slaughter house. On 17<sup>th</sup> July 2011 at 9.00 a.m. he went to the slaughter house to take cattle out for grazing. They were dairy cows, Friesian, black and white in colour. He said they were over three cows. He was told they belonged to David alias BF. On 18<sup>th</sup> July 2011, David went and told him the cattle were his and they could be grazed. PW3 arranged for the cattle to be grazed by one Philip Lang'at. Later David called and said, he was going to collect the cattle. He collected them from Philip Lang'at.

13. **PW7 Salome Wachira** the owner of the slaughter house testified that she was called by her employee **Karanja** in December 2011 that one customer BF had brought cattle which were suspicious for slaughter as they were Friesian and lactating. She told him not to slaughter them. She later learnt from Gitau that David had collected the cattle from the grazing field. She later learnt that there was an investigation on missing cattle. When police officers and PW1 came, she told them about David and his cattle and he was later arrested with the assistance of her husband. She also learnt that the cattle had come in a yellow canter lorry.

14. **PW4 Paul Kariuki, Veterinary Department Mai Mahiu** said he was called to record a statement when the complaint was made about PW7's slaughter house.

15. **PW9 Number 85861 PC Mathews Nundi** testified that he was the investigating officer. He received the 1<sup>st</sup> two (2) suspects into custody, visited the scene, took photos of the fence where entry was gained into the farm and also called scenes of crime personnel to take the photos of the place where the fence was cut. He and his colleagues traced the lorry KZC 579 green in colour. He said the driver of that lorry told him he was contracted by one *David Olumpus Ole Pelo* to transport cattle from Halima Farm. That he received information from an informer that the cattle were slaughtered at **Salome Waithera's (PW7's)** slaughter house in Mai Mahiu. On 22<sup>nd</sup> November 2012 David was arrested. He said thirteen (13) animals were slaughtered. He never recovered any meat, skins. That he relied on the statement of the driver PW2. He also testified that he obtained a muster roll from the complainant's farm but did not produce it. He said PW2 saw Accused 4 steal and ferry the cattle, that he established who the owner of the lorry was but did not have the search records in court. He did not know why neither PW2 nor his employer had been arrested.

16. The appellant was put in his defence. He denied stealing any cattle testifying that he was a livestock businessman. That he had done this work for over ten (10) years, a fact that was confirmed by PW7 who said that he had been her customer for about six (6) years. He testified that when he was arrested he had bought twenty-four (24) heads of cattle; twenty one (21) bulls and three (3) dairy cows. He said he hired Mandi's lorry and the driver was one Njenga. (Neither of whom had testified against him). He took the cattle to Mai Mahiu PW7's abattoir. The police saw the cattle but none was identified by the complainant as being one of hers

17. In a judgment dated 15<sup>th</sup> November 2018 framed the following issues for determination: -

**1. Were any cows taken from the farm of PW1?**

**2. Who took them and was it fraudulent?**

**3. The defence?**

The trial court concluded that cows were taken from PW1's farm, and believing PW2's testimony about accused 4, rejected his defence and found him guilty of the offence, convicted him and sentenced him to six (6) years imprisonment on 19<sup>th</sup> November 2018.

18. It is against this conviction and sentence that the appellant has filed an appeal on the following grounds: -

*a. The Learned Trial Magistrate erred in law and in fact in failing to appreciate the totality of the evidence adduced before the Court.*

b. *The Learned Trial Magistrate erred in law and in fact by convicting the Appellant on an offence that was not supported by the Charge before the trial Court.*

c. *The Learned Trial Magistrate erred in law and in fact in shifting the burden of proof to the accused person who is the Appellant herein.*

d. *The Learned Trial Magistrate erred in law and in fact in convicting the Accused herein based on her own speculations and conclusions and not on evidence tendered in court hence disbelieving the Accused resulting in a potentially biased conviction and sentencing.*

e. *The Learned Trial Magistrate erred in law and in fact in holding that the elements of stock theft had been met and the offence of the same had been proved whereas the evidence tendered was to the contrary.*

f. *The Learned Trial Magistrate erred in law and in fact in sentencing the Accused to six (6) years imprisonment against the weight of the evidence adduced.*

g. *The Learned Trial Magistrate erred in law and in fact in failing to take into account the contradictions on the dates of the alleged theft and subsequent events which were contradicting as per the evidence tendered by the prosecution's witnesses.*

h. *The Learned Trial Magistrate erred in law and in fact while sentencing the Appellant by failing to take into account the Appellant's grounds of mitigation and the fact that he was a first offender.*

i. *The Learned Trial Magistrate erred in law and in fact in the admitting hearsay evidence of the prosecution's witnesses and relying on the same to convict the Appellant.*

j. *The Learned Trial Magistrate erred in law and in fact in convicting the Appellant whereas the prosecution evidence as against him was not proved beyond reasonable doubt.*

k. *The Learned Trial Magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt.*

19. The appellant through counsel Kipruto Gitau & Company Advocates filed submissions on 8<sup>th</sup> July 2019.

20. Ms. Kipruto made oral arguments as well, she raised issues, with the date of the offence, whether it was 15<sup>th</sup> or 16<sup>th</sup> December 2011; the number of cows alleged to have been stolen, whether thirteen (13) or fourteen (14) or twelve (12); the lack of a description of the alleged stolen cows except that they were Friesian; failure by the prosecution to produce farm records which were said to be available to establish the existence of the cows; lack of evidence on how the cattle were valued at Ksh. 1.9 Million; failure to evidence of alleged publication of the missing cows in the Standard Newspaper; no evidence on the alleged identification of cows found at the slaughter house as to whether they belonged to the PW1 or not; fact that appellant was never found in possession of the cattle; failure to produce alleged lorry used to transport stolen cattle as exhibit; failure of prosecution to recall PW2 to identify the appellant; trial court's ignoring of the appellant's defence; meting of an unjustified sentence upon unsafe conviction. In totality that the case for prosecution not proved. She relied on;

i. **James Kariuki Wachira v Republic [2015] eKLR**. The gist of the case being that there was no description of the stolen animal given to the police failure of which 'cast doubt to the Complainant's assertions that the recovered bull belonged to him because there was no evidence of the description he had given to the police to its recovery'

ii. **Derrick Korir Chuma & Another v Republic [2007] eKLR** that having not given any description 'the identification was challenged and rightly so as the witnesses did not give any unique features or produce any documents to prove their ownership that the animal was theirs'

21. In opposing the appeal Ms. Nyakira for the state urged the court to uphold the conviction and sentence. She argued that oral evidence by witnesses was sufficient; that the evidence of PW1 was supported by that of her manager on the issue of theft; that PW2 placed appellant at the scene; that PW3 saw lactating cows at the slaughter brought by appellant and his evidence was supported by PW7; that appellant produced no evidence that he was the owner of the said cows.

22. In a rejoinder Ms. Kipruto, argued further that appellant did not have a fair trial as PW2 was never recalled to testify after arrest of appellant; that only three (3) cows were seen at the slaughter house and the questions as to what happened to the rest was never answered; that there was no evidence these were complainant's; that no evidence was tendered to prove that that the appellant disposed of complainant's cattle.

23. This being a first appeal the appellant is entitled to a review, re-assessment of the evidence and for this court to arrive at its own conclusions; see **Okeno vs R [1972] EA 32**

*"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (**Pandya vs Republic (1957) EA. (336)**) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (**Shantilal M. Ruwala vs 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 finding and conclusion; 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. See **Peters vs Sunday Post [1958] E.A 424.**”

24. Taking into consideration the totality of the appellant’s grounds of appeal, the issues for my determination is whether the prosecution proved its case beyond reasonable doubt to warrant the conviction, and, whether the court considered the appellant’s defence and his mitigation in meting out the sub subsequent sentence.

25. The offence of Stealing Stock is provided **under Chapter XXVI. Theft**” of the Penal Code. Stealing is defined by **Section 268 of the Penal Code.**

**“S. 268 (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.”**

**Section 278** provides specifically for stealing stock, which includes cows or cattle, with a sentence not exceeding fourteen (14) years. To prove this charge, the prosecution must establish that;

i. *The complainant had a thing capable of being stolen, in this case, either twelve (12), thirteen (13) or fourteen (14) cows, one of which was a bull.*

ii. *That the appellant took those cattle away in what amounted to theft.*

26. On the first issue, no evidence at all was produced to support the allegation that the complainant had sixty-three (63) or seventy-one (71) heads of cattle, thirteen (13) or fourteen (14) or twelve (12) of which were stolen. This is especially so because there were said to be farm records kept by PW6, the Farm Clerk. PW6 the Farm Manager testified that when he received the missing cattle report he *‘confirmed that the cattle were missing’*. He does not say how he did that. He simply says he went out and confirmed that the cattle were missing. Out where? How? The investigating officer attempted to introduce evidence that a fence was cut and the farm accessed, and cattle taken out through there. This was not supported by any evidence of the Farm Manager, PW1 and the Farm Clerk. He also testified that he had taken photos of the cut fence and also shown it to the scenes of crime personnel who did the same. Curiously not a single photo was producing rendering that evidence to the realm of conjecture.

27. The PW1, PW5 testified that they reported to the AP camp and Anti Stock Theft Unit. There is no evidence of any such initial report and more importantly of any description of the alleged stolen cattle that was given to the police apart from the breed. What colour were the cattle, did they bear the owners marks, anything in the farm record? Absolutely no description given. Without this how could anyone even suspect that the cattle the appellant had belonged to the complainant? Is it not strange that even the star witness PW2 did not give any description except to say they were 12, Friesian, milking cows? Yet he saw them loaded and unloaded onto his lorry. Even if any cattle were to be recovered, how would it be established that they were the complainants? Hence from the onset the prosecution made no effort to establish the simple fact that the complainant had the said cattle before they were stolen. The fact that the evidence is said to have been available and was not produced creates doubt as to this piece of evidence. In addition, the PW3 spoke of three (3) cows at the slaughter house, there was nothing to identify them as belonging to the complainant. Even the ones that had been slaughtered, no hides were found to match whatever description fitted the complainant’s cattle. Such testimony cannot be relied upon to sustain a conviction.

28. In a similar situation such as this, this is what *Koome J* (as she then was) stated in **Derrick Korir Chuma & Another vs R (2007) eKLR;**

*“...I would not have allowed this appeal solely on the above ground. I am however, not satisfied with the evidence by the complainant regarding the identification of the stolen animal although photographs were produced which were taken when the animal was recovered, the same photographs were not matched with similar photographs taken before the animals were stolen to prove that they are the same animals that belonged to PW1. The complainant also did not describe and give distinctive features of the animals. The tag which was meant for identification were not found on the animal which was recovered. I find the conviction of the 1st appellant unsafe and I accordingly allow the appeal. The upshot is that the appeal in respect of both the 1st and 2nd appellant is allowed, the conviction and sentence is quashed and unless otherwise lawfully held they are to be set at liberty forthwith...”*

29. On the second issue whether the cattle taken from the complainant’s farm? I have already pointed out the dearth of evidence on this issue. Did the appellant take any cattle from the complainant’s farm? PW2, the prosecution’s star witness testified in the absence of the accused. He spoke about a “David” who was the buyer of the cattle, but, he never identified the appellant as the said David in court. The prosecution left it to the imagination to connect appellant with the ‘David’ mentioned by PW2. Considering that this witness is the one who said that David was the owner of the cattle, that David paid him Ksh. 5,000/= to fuel, that David led to him to his home where he off loaded the cattle, the prosecution never called this witness to identify the appellant as the said ‘David’ who was with him on the night of the alleged theft.

30. By placing the appellant on his defence the trial court did just what is prohibited in criminal trials. Putting the accused on his defence to fill in the gaps in the case for the prosecution. There is no point in the case for prosecution where any witness pointed at the accused and placed him at the scene of crime. In fact even PW1 said she did not know David. That he had been mentioned adversely but mere suspicion can never amount to proof. Nothing was recovered from the appellant, no permit was recovered by police in his name regarding thirteen (13) or fourteen (14) or twelve (12) head of cattle from the complainant’s farm.

31. Everything PW1 knew about the appellant was hearsay. The owner of the lorry KZC 519 or 579 was never called to testify. The fact that the PW2 testified that he told his employer he was suspicious the cattle were not genuinely obtained and the employer told him to simply

complete the task makes that owner of the lorry a person of interest. Who paid him the Ksh 40,000? In what form was it paid? Could it be traced to the appellant? The fact that the police say they knew who he was but did not take a statement from him creates a weak link in the case, PW2 could have done more, reported the matter to the police, he is a witness whose testimony must be taken with caution. He and his employer may have known something about the theft of the cattle or they cooked the story to escape further investigations. What is evident is that looking at the totality of the evidence, no witness placed the appellant at the scene of crime.

32. What is also evident is that **PW9 the investigating officer** did not investigate the case. It is said that Accused 2 “Joshua” was an employee of the complainant and was on duty the day the cattle disappeared. The investigating officer said he had a muster roll showing who was on duty at that time of the sixteen (16) employees, however he did not produce it, why? There was no explanation and the only deduction is that it is not in support of his position. The investigating officer did not investigate the case to establish the relationship between the accused persons now that this was a joint charge. How come they were charged jointly? What was their relationship to warrant a joint charge? Further he testified that the cows were slaughtered, yet he produced no such evidence that had actually happened. He made no recoveries or found evidence that could support these positions that he took in order to charge the appellant.

33. The appellant even on this very weak case for prosecution had a plausible defence, which was corroborated by the PW7, that he was a cattle dealer and was a customer at the slaughter house. His conduct with regard with the cattle he had was not that of a thief. If PW2 is to be believed, the appellant took the he had cattle to his home. He took the other three (3) to the butchery where he was known and where he could easily be identified. The act of taking the lorry driver to his home, and collecting the cattle that PW7 alleges they refused to slaughter, does not reek of a thief. Thus, it is again the case for the prosecution that the appellant stole the cattle, took them to his home with witnesses, is not tenable and I am of the view that his testimony and conduct held up against the case for the prosecution threw more than a whiff of doubt on the case for the prosecution.

34. My view is that on the basis of the facts alone, the trial court did not have sufficient evidence to place the appellant on his defence let alone, make a finding of guilt.

35. I find that the conviction was not safe.

36. With regard to the sentence, the court could have done with a pre-sentence report to assist it to arrive at the reasonable sentence considering the maximum sentence provided by the law.

37. Be that as it may, having considered the evidence before the trial court, the submissions by both the state and the defence, the appeal is allowed, the conviction is quashed and sentence set aside. Appellant is to be set at liberty forthwith unless otherwise lawfully held.

**Delivered, Dated and Signed at Nakuru this 23<sup>rd</sup> day of April, 2020.**

**Mumbua T. Matheka**

**Judge**

In the presence of:- Via Zoom

Court Assistant Edna

Ms. Odera for state

Appellant present