



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM: A.K NDUNG'U J.**

**CRIMINAL APPEAL NO. 26 OF 2020**

**JANE HURAHURA.....APPELLANT**

**VERSUS**

**REPUBLIC Through ODPP.....RESPONDENT**

***(Appeal from the original conviction and sentence of Hon. R.M Oanda – PM***

***dated 12<sup>th</sup> July, 2019 at the Principal Magistrate's Court at Kilgoris***

***in Criminal Case No. 546 of 2018)***

**JUDGMENT**

1. The appellant Jane Hurahura was charged with the Stock theft contrary to **Section 278** of the **Penal Code**. The particulars of which were that on diverse dates between 25.7.2018 and 26.7.2018 at Enkoperia area within Transmara West Sub County of Narok County, stole one cow of type Sawal valued at Kshs. 60,000 the property of James Kisiko Tinai.
2. She faced an alternative count of handling stolen goods contrary to **Section 322(2)** of the **Penal Code**. That between the 25<sup>th</sup> and 26<sup>th</sup> July 2018 at Enkoperia area, otherwise than in the course of stealing, dishonestly undertook retention of one cow of type Sawal valued at Kshs. 60,000 knowing or having reason to believe it to be stolen or unlawfully obtained.
3. In a judgement dated and delivered on 12.7.2019, the appellant was convicted on the alternative count of handling stolen goods and sentenced to 3 years imprisonment.
4. Aggrieved by both the conviction and sentence, the appellant preferred this appeal and relied on grounds that the conviction was not based on sufficient evidence and the case was not proved beyond reasonable doubt. It is urged that the subject cow was not recovered in her house but in the locality. There were many homesteads where the cow was recovered.
5. The appeal was canvassed by way of written submissions with an oral response by the Director of Public Prosecutions.
6. In her submissions, the appellant submitted that the standard of prove beyond reasonable doubt was not achieved by the prosecution in the matter. She stated that the cow was recovered in an area with many houses belonging to her extended family. These family members never testified to shed light on the matter. It is sought that the conviction and sentence of 3 years be set aside.
7. Mr. Otieno for the Director of Public Prosecutions submitted that the State was conceding the appeal. He stated that there was a lot of doubt whether the appellant stole the stock. The alleged cow was found in the compound of the appellant and her husband. The burden of proof was shifted to the appellant. The prosecution witnesses did not testify that they knew the appellant and where she lived. The investigating officer did not testify.
8. It is further urged that the trial magistrate declined an application to withdraw the case by the complainant. No reasons were given for this refusal. Mr. Otieno urges that the evidence did not support the conviction.
9. I am alive to the fact that being the 1<sup>st</sup> appellate court I am obligated to re evaluate the evidence and make my own conclusions giving allowance for the fact that I never heard or saw the witnesses testify. (See, **Okeno –Vs- Republic [1972]EA 32**).

10. A summary of the evidence of PW 1 and PW 2 is that the stolen cow was recovered from the house of the appellant. She tried to run away. There were other women in the compound. It is clear from the evidence that the appellant shared the house with her husband. After being indulged for a considerable period, the prosecution was unable to avail the investigating officer to testify. An attempt by the complainant to withdraw the case was earlier declined by the court.

11. I note the State has conceded the appeal. I, however, have a duty to ensure that I subject the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach my own determination based on the evidence. In **Odhiambo –vs- Republic [2008] KLR 565**, the court stated;

***“The court is not under any obligation to allow an appeal simply because the State is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on the evidence.”***

12. Having considered the evidence and submissions on record, the issues for determination crystallize into;

**1) Whether the conviction herein was based on sufficient evidence.**

**2) Whether the sentence was lawful and appropriate in the circumstances.**

13. The evidence of PW 1 and PW 2 was sketchy and disjointed. The witnesses acknowledge that the house where the cow was recovered was a family house. No concrete evidence was adduced to show that it is the appellant and no other member of the family, including the husband, who had stolen the cow. The compound in which the cow was recovered had dwellings of the appellant’s extended family.

14. The most important cog in the wheel of the prosecution’s case is missing following the failure by the prosecution to call the investigating officer. This is the officer who could have tied the loose ends in the prosecution’s case. He could have confirmed the fact of ownership of the house from where the alleged cow was said to have been found. He could have confirmed why he chose to charge the appellant and no other member of her family. In the absence of this evidence, the evidence adduced was left hanging and inconclusive.

15. In light of the foregoing, the prosecution did not adduce sufficient evidence to warrant a conviction of the appellant. The conviction was unsafe.

16. With the result that I allow the appeal and set aside the conviction and sentence of 3 years. The appellant shall be set at liberty forthwith unless otherwise lawfully held under a separate warrant.

**Dated and delivered at Kisii this 23<sup>rd</sup> day of July 2020.**

**A.K NDUNG’U**

**JUDGE**