



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CRIMINAL APPEAL NO. 17 OF 2018**

**KOIBATET SILALO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**Introduction:**

1. The Appellant was charged with offence of Stock theft Contrary to Section 268(1) as read with Section 278 of the Penal Code.
2. Particulars being that on the night of 12<sup>th</sup> – 13<sup>th</sup> March 2018 at unknown time at Konza farm in Mukaa Sub-County within Makueni County, jointly with others not before court stole Thirty Six cows valued at Kshs. 1,000,000/= (One Million Kenyan Shillings) the property of Mr. Jackson Maweu Mutune.
3. He pleaded not guilty and matter went into trial.
4. He was found guilty and convicted and sentenced to serve four (4) years imprisonment.
5. Being aggrieved by the said verdict, he lodged appeal and set out 6 grounds of appeal which he amended and retained 4 grounds in his submissions namely:-

*a. **That** the trial magistrate erred in both law and facts in finding that the prosecution had proved its case beyond reasonable doubt when the evidence as presented did not prove the charge as drawn.*

*b. **That** the learned trial magistrate erred in both law and facts by convicting Appellant on hearsay evidence.*

*c. **That** the learned trial magistrate erred in both law and facts by convicting Appellant on defective charge sheet.*

*d. **That** the learned trial magistrate erred in both law and facts by convicting me in failing to consider glaring inconsistencies and contradictions in prosecution evidence.*

6. The parties agreed to canvass via Submissions.
7. The State relied on the evidence on record and the Appellant filed the same.

**Duty of first Appellate Court**

8. The duty of the court of appeal has been established in a long line of cases. The position is that the court ought to subject the evidence tendered in the Trial Court to fresh scrutiny and subsequently determine whether the said court erred in both law and fact in arriving at the impugned decision.

**Evidence Adduced:**

9. PW1 stated that he was on leave when he locked his cows safely in the cow shed and checked on them at around 8.30 p.m. and found them safe. He woke up at around 6.40 a.m. and proceeded to check on his cows and found all the 36 cows missing.

10. He proceeded to check on them while following their trail in vain. He reported to slaughter houses within the county of Kajiado in vain. He also checked on market places in vain. He received a call from his wife who informed him of recovery of some cows at Bisili.
11. He tasked his brother in law to go and confirm but was denied the animals until the police officers arrived. He proceeded to Bisili and the cows were photographed and returned to him. It was his testimony that all the animals had a mark on the ears except for those he had bought.
12. PW2 stated that she was the proprietor of Bisili slaughter house in which they carry out their service on Monday night and Friday night. It was her testimony that they had agreed that in times of need then slaughtering can be done.
13. It was her testimony that she was called by one Moriasi who is the chairman of the market with information that someone wanted to slaughter his cows though he was suspecting that the cows had been stolen.
14. She went to the slaughter house and found the 1<sup>st</sup> accused who always slaughters cows therein. They called him but did not come. She found 18 cows therein. It was her testimony that the 1<sup>st</sup> accused was confirming upon being called that he owned the cows and wanted to slaughter the same.
15. She proceeded to report to the police and when the 1<sup>st</sup> accused was called again, he promised to meet them at a certain place at Bisili. He came and was arrested by the police officers who had accompanied her. It was her testimony that the 1<sup>st</sup> accused was insisting that the cows belonged to him and had bought the same from the 2<sup>nd</sup> accused. It was her testimony that later it was revealed that the cows had been stolen.
16. PW3 stated that he received a call from Moriasi who informed him that some cows were to be slaughtered numbering 18. He asked Moriasi who the owner was and he informed him that the same belonged to the 1<sup>st</sup> accused.
17. He asked the watchman to guard the cows and proceeded to the slaughter house but did not find the 1<sup>st</sup> accused who had gone to town and refused to return. He was later arrested and he was the owner who mentioned the 2<sup>nd</sup> accused as having sold him the cows.
18. PW4 stated that cows were brought to the slaughter house but did not find anybody within. He was suspicious as the cows did not have a mark. He called his manager and relayed his suspicion. It was later revealed that the cows had been stolen.
19. PW5 carried out investigations and preferred the current charges as against accused persons. It was his testimony that the complainant had lost 36 cows and upon search recovered 4 which had been left behind as they were weak for the journey.
20. On the 16/03/2018, he received information that 18 cows had been taken to Bisili slaughter house on a day which they normally do not slaughter cows which raised their suspicion. Accused persons were arrested and the cows photographed and returned to the owner.
21. He tendered the photographs as PEX 1. It was his testimony that the 1<sup>st</sup> accused is the one who wanted to slaughter the cows while claiming that the 2<sup>nd</sup> accused had sold him.
22. DW1 stated that he was a businessman dealing in cattle of which he trades in and did not know the reason behind his arrest.
23. DW2 stated that he did not know anything about 12<sup>th</sup> and 13<sup>th</sup> March 2018 but stated that on the 14/03/2018 he went to Kajiado to take care of a patient namely Morosio. He cleaned his clothes as he was sick. He left Kajiado at around 6.00 p.m. and went to Bisili Centre whereby he arrived at 8.00 p.m.
24. It was raining prompting him to enter into a bar. He left the bar at around 10.00 p.m. when he met police officers who arrested him together with another person. It was his testimony that he did not know the 1<sup>st</sup> accused herein.

## 25. ISSUES

26. After going through the evidence on record and the submissions filed, I find the issue is;

***-Whether the prosecution proved its case beyond reasonable doubt?***

## **ANALYSIS AND DETERMINATION:**

27. PW1, a police officer and also the complainant explained that between 12<sup>th</sup> and 13<sup>th</sup> March 2018 while he was on leave, he went to herd his cows and at 6.00 p.m., he closed in his shed whereby he also confirmed at 8.30 p.m. and found they were safe and then he went to sleep.
28. He narrated that he woke up at around 6.40 a.m. and proceeded to check only to find that all were missing. He said to have thirty six (36) in number; he went back to the house and went to check on the cows. He went on and explained how he went to Mombasa road and checked the footprints which led him to Masani but upon following he was forced to return due to heavy rains and slept at Makutano junction.
29. He further explained how he woke and proceeded to Kajiado area using another route and went up to between Salama and Sultan Hamud. He testified to have reported at Isinya slaughter house and also at Salama police station the day which followed.

30. He further explained how he received a call from his wife who informed him that there were cows at Bisili slaughter house and he called his brother-in-law Nduku at Athi River and asked if he could check for him, he went and confirmed that it was his animals.
31. On cross examination PW1 said that he did not see Appellant steal his animals nor find him in their possession but only claimed to have heard from somebody else.
32. The evidence of PW1 of what he heard was not admissible before the court since it was hearsay evidence and uncorroborated in its entirety.
33. PW2 Judith Tunui and a resident of Bisili Kajiado County testified she runs Bissil slaughter house limited as the manager.
34. She explained how she was called with information that there were cows which needed to be slaughtered and the caller informed her that he was suspecting the cows stolen as they appeared fat and it was during drought.
35. Further she explained how she went to the slaughter and found the first accused, she also found 18 cows but when he called on the first accused he was just on the way. He was confirming that he owned the cows.
36. Further she added PW1 was arrested and led to the arrest of the second accused, the first accused insisted that the cows still belonged to him and added that the second accused sold him the cows.
37. It is clear from the evidence of PW2 that the Appellant did not steal neither was he connected with alleged theft. This is because PW2 relies on accused 1 who said that the Appellant sold him the cows and could not prove.
38. PW3 a residence of Bisili slaughter house in Kajiado County and the manager of Bisili slaughter house limited, narrated that on 14/03/2018 at around 6.00 p.m. he received information from Moriasi who informed that some cows were to be slaughtered numbering 18 and asked who was the owner, he was informed that 18 cows belonged to first accused.
39. He further explained how he proceeded to the slaughter house but did not find the first accused as he had gone to town. He refused to return and later was arrested where he mentioned the second accused. On cross examination PW3 said that he never saw appellant steal nor find him in possession of the stolen cows.
40. PW4 a guard at Bisili slaughter house testified that on 12/03/2018 at 6.00 p.m. cows were brought into slaughter and did not find anybody within, he narrated that he grew suspicion and called the manager and relayed his suspicion.
41. PW5 the investigating officer of this matter explained that he received the complainant herein and narrated that it was reported 32 cows got lost and four were found.
42. He further narrated that he received information that 18 cows had been taken to Bisili slaughter from slaughter manager. On cross examination PW5 stated that he saw appellant at police station and had not seen accused 2 in possession of the cows.
43. From the prosecution evidence it appears like the accused 1 is the one who stole the cows since PW2 and PW3 confirmed before the Honourable court that the accused 1 stated that he owned the cows. In his defence he never rebutted that piece of evidence nor did he say that appellant sold him the cows.
44. Moreover PW5 evidence did not corroborate with PW1's evidence which said that it was reported that 32 cows were stolen contrary to what was said by PW1 that his cows were 36 in number where all were stolen.
45. PW5 further explained how other four cows were recovered and but did not tell where they were recovered and who was found in their possession. This creates doubt in this court on who to believe. In the case of Woolimington –vs- D.P.P (1935) AC 462, the court stated that;
- “if there is any reasonable doubt created by the evidence brought forward by the prosecution then the case of the prosecution is not proven and the prisoner is entitled to an acquittal.”***
46. It is trite principle of law that he who alleges must prove, the principle has a statutory backing as provided for under **Section 107(1) and (2) of the Evidence Act.**
47. It is cardinal principle of law that any contradictions, inadequacies or inconsistencies should be resolved in accused favour, see the case of Pius Arap Maina –vs- Republic (2013) eKLR, where the court opined that;
- “It is again said that the prosecution must prove a criminal charge beyond reasonable doubt, doubts must be interpreted in the accused favor.”***
48. The Appellant's submission is that he was not connected with the offence and the prosecution did not produce any piece of evidence to prove the appellant guilt. Even if accused 1 mentioned appellant as the person who sold him the cows, same was not proved and in any case he never repeated it in court in his defence nor allude to it in cross-examinations of prosecution witnesses.
49. In any case the same would be evidence by an accomplice which requires corroboration.

50. It is clear from the prosecution evidence that the 1st accused said that he owned the cows, and there is nowhere in the prosecution evidence where the 1st accused shows on how he sold him the cows, neither did he show how many cows the Appellant sold to him and how much money he paid to the Appellant.

51. It was hearsay evidence which led to Appellant's conviction. It is clear that this evidence was not corroborated by any other. Hearsay evidence is never admissible in court unless it is corroborated by credible an admissible evidence.

52. Thus the court finds the appeal has merit and allows the same with court making the following orders;

*i. The appeal is allowed, conviction is quashed, and sentence set aside.*

*ii. The appellant shall be set at liberty forthwith unless otherwise lawfully held.*

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31<sup>ST</sup> DAY OF MAY, 2019.**

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**C. KARIUKI**

**JUDGE**