



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 20 OF 2015**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**PIUS WASWA TOME.....APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. H. Wandere, PM delivered on 30<sup>th</sup> April 2014 at the Mumias Magistrate's Court in Criminal Case No. 389 of 2011)*

**JUDGMENT**

1. The appellant, **PIUS WASWA TOME**, appeals against his conviction on a charge of handling stolen property namely animals contrary to **section 322 (1)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on 29<sup>th</sup> June 2011 at Shiembelo Village in Matungu District within Kakamega County otherwise than in the course of stealing dishonestly received or retained two cows valued at Kshs 24,000/- knowing or having reason to believe them to be stolen goods.
2. The charge of handling stolen goods was an alternative count to two counts of stealing contrary to **section 278** of the *Penal Code* where the appellant was charged and acquitted of the offence of stealing of one cow valued at Kshs. 9,000/- and another valued at Kshs. 15,000/- the property of Omar Washika Mukungu (PW 1) and Roselyn Auma Ocheso (PW 2) respectively.
3. The appellant appeal against conviction and sentence of 7 years' imprisonment imposed on him. Mr Akwala, his advocate, submits that the offence was not proved and that in his defence, the appellant provided a reasonable defence which was not considered by the trial magistrate. Counsel for the respondent takes the view that the prosecution proved all the elements of the offence and that the conviction was proper and sentence warranted.
4. As this is a first appeal, I am required to evaluate the entire evidence and reach an independent conclusion as to whether I should uphold the conviction. I must bear in mind that I neither heard or saw the witnesses testify. The prosecution called 5 witnesses whose testimony was as follows.
5. PW 1 testified that on the evening of 16<sup>th</sup> May 2011, he had tethered his three cows outside this house. When he woke up in the next morning, his black and white cow valued at about Kshs. 9,000/- was missing. He reported to the village elders and after looking for it without success reported to the Assistant Chief and District Officer. On 27<sup>th</sup> June 2011, he was informed that a suspect had been arrested with some stolen cows. He proceeded to the DO's office at Matungu where he found the missing calf. In cross-examination, he stated that although the appellant was familiar to him, they were not related.
6. PW 2 recalled that on 27<sup>th</sup> June 2011, she had tethered two bulls and three heifers outside her house. In the morning her brown coloured cross-breed cow valued at between Kshs. 10,000 – Kshs. 15,000/- was missing. She looked for the cow without success and reported to a village elder, Barassa Juma Kuale (PW 3) and the Assistant Chief. Later on she was informed that the cow had been found in a suspect's house. She proceeded there with Administration Police officers who led her to a hut where two cows emerged. She identified one of the cows as hers. PW 2 testified that she did not know the appellant.
7. PW 3, a member of the community policing, testified that PW 2 informed him that cow her was missing. Since he lived close to her, he knew the cow as it was usually tethered outside her house. He informed the Assistant Chief of the incident and they mobilized members of the public who were discussing the recovery of stolen animals at the appellant's home. He accompanied the Assistant Chief to the appellant's home where they found 2 cows. He identified PW 2's cow tethered in the house. PW 2, who was present, also identified her cow. He further recalled that the appellant told the Assistant Chief that he did not know how the cow came there and that the house belonged to his late wife,

Asmin Okanga. He further told the Assistant Chief that the two animals were left in the house upon the advice of a veterinary doctor. The cows were taken to Matungu DO's office where PW 1 identified his cow. PW 3 stated that the appellant's late wife was his aunt.

8. Musa Adam Were (PW 4) testified that on 17<sup>th</sup> May 2011, PW 1 informed him that his calf was missing. He advised PW 1 to report to the Assistant chief. He later learnt that that animals suspected to be stolen had been recovered and were at Matungu DO's office.

9. The Investigating Officer, PC Charles Njaramba (PW 5), recalled that on 28<sup>th</sup> June 2011, he was sent to Matungu DO's Office to arrest a person suspected to have stolen cattle. He proceeded to the scene, arrested the appellant and collected the animals which he proceeded to photographed. He produced the photographs of the cattle recovered in evidence.

10. In his sworn defence, the appellant (DW 1) denied the offence. He told the court that the cows belonged to his wife who died in January 2013. He stated that Morris Taraji, a brother to PW 1, sold to his wife the cow claimed by PW 1. When his wife fell ill, he was told to take charge of her property including her animals and household goods. He told the court that Morris did not claim the cow when his wife died but demanded Kshs. 500/- that the deceased owed him. The appellant's witness, Musa Aura Ziadewe (DW 2), testified that he knew the appellant's wife. He testified that before she died, she told him that she had purchased a cow from Taraji leaving a balance of Kshs. 500/- and when she became sick, she sent for the appellant to come and take her cattle and goats. He recalled that during the appellant's wife's burial, Taraji demanded the balance of Kshs. 500/- which he told the appellant to pay up in accordance with Islamic tradition.

11. In light of the aforesaid evidence, the question is whether the appellant is guilty of the offence of handling stolen property contrary to **section 322** of the **Penal Code**? **Section 322** which defines the offence of handling stolen property as follows:

*322(1) A person handles stolen goods if (otherwise than in the course of the 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, disposal or realization by or for the benefit of another person, or if he arranges to do so.*

*(2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.*

*(3) For the purposes of this section-*

*(a) goods shall be deemed to be stolen goods if they have been obtained in any way whatever under circumstances which amount to felony or misdemeanour, and 'steal' means so to obtain;*

*(b) no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody, or after that person and any other person claiming through him have otherwise ceased as regards those goods to have any right to restitution in respect of the stealing.*

*(4) Where a person is charged with an offence under this section-*

*(a) it shall not be necessary to allege or prove that the person charged knew or ought to have known of the particular offence by reason of which any goods are deemed to be stolen goods.*

*(b) at any stage of the proceedings, if evidence has been given of the person charged having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in, or arranging to undertake or assist in, their retention, removal, disposal or realization, the following evidence shall, notwithstanding the provisions of any other written law, be admissible for the purpose of proving that he knew or had reason to believe that the goods were stolen goods-*

*(i) evidence that he has had in his possession, or has undertaken or assisted in the retention, removal disposal or realization of, stolen goods from any offence taking place not earlier than twelve months before the offence charged;*

*(ii) provided that seven days' notice in writing has been given to him of the intention to prove the conviction evidence that he has within the five years preceding the date of the offence charged been convicted of stealing or of receiving or handling stolen goods.*

12. The ingredients of the said offence were summarized in **Tembere v Republic [1990] KLR 393** as follows: -

*One of the important elements of the charge of handling is that the accused must know or have reason to believe that the goods were stolen ..... Another vital element of the charge of handling is that the accused must dishonestly receive or retain etc..*

13. The testimony of PW 1 and PW 2 is that their animals were stolen in May and June 2011. Both of them complained to the village elder and the Assistant Chief and efforts were made to locate the animals. In as much as the appellant contended that there was no proof that the animals were owned by the complainants, I find that their testimony was consistent and there was no reason to disbelieve that their animals were stolen. The complainants acted in a manner consistent with being owners of the animals and identified them when they were recovered. I also find that the animals were recovered in the appellant's homestead as confirmed by PW 2 and PW 3. In his defence, the appellant admitted that PW 1's cow was one of the animals he took from deceased wife and it was in his homestead. I therefore find and hold that the appellant was in possession of the animals in terms of **section 4(a)** of the **Penal Code** which states as follows:

*(a) "be in possession" or "have in possession" includes not only having in one's own personal possession, but also knowingly*

having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person:

14. Since the complainants' stolen animals were in his possession, the appellant bore an evidential burden to show that the animals were his or that there was a lawful reason for the animals to be in possession. In considering the appellant's defence in a prosecution for handling stolen property, the Court of Appeal in **Kipsaina v R [1975] EA 523**, has this to say;

*As regards the second conviction of handling, the appellant defence was that the documents – an identity card, an employment relief card and a note book – had been left in his home by a man who had slept there one night but whose name he did not know. The magistrate rejected the defence, commenting that he found it very difficult to believe. With respect, this was a misdirection, the law in East Africa is well settled. When an accused person is charged with receiving stolen property, his guilt is not established if the explanation that he has given is one which is reasonable and might possibly be true, even if the trial court is not convinced that it is in fact true .... [Emphasis mine]*

15. As regards, PW 1's cow, the appellant stated the animal had been sold to his wife by PW 1's brother, Taraji. This was supported by DW 2. When cross-examined, PW 1 admitted that he knew the appellant. However, the appellant's counsel did not put to any question to suggest that the animal had been in possession Taraji and that Taraji had sold it to the appellant's deceased's wife. He also did not raise this issue with PW 3 who testified that the appellant's deceased's wife was his aunt. In any case, PW 3 denied that he knew Taraji.

16. As regards the cow belonging to PW 2, it was reported lost on 27<sup>th</sup> June 2011 and recovered on the next day. The appellant's wife died in January 2013 hence she could not have owned PW 1's cow. It was thus in the appellant's possession in circumstances that imply that he knew that it was stolen. In addition, PW 3 testified that when the animals were recovered, the appellant was asked why the animals were in his house, he responded first by stating that he did not know how the cows came into the house as the house belonged to his deceased wife. He changed the answer and stated that the animals were in the house on the advice of a veterinary doctor. The initial accounts given by the appellant of his possession of the cows is clearly inconsistent with his sworn defence.

17. Since both stolen animals were found in his home together, the appellant's defence collapses on the weight of its falsity; it is neither reasonable or possibly true. The irresistible inference is that the appellant knew that the cows were stolen. The totality of the evidence is that the appellant was guilty of handling stolen goods contrary to **section 322** of the **Penal Code** and I therefore affirm the conviction.

18. I now turn to the sentence. The appellant contended that the sentence of 7 years' imprisonment was harsh, vindictive and biased. An appellate Court can only interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence the trial court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see **Wanjema v Republic [1971] EA 493**).

19. In this case, the trial magistrate had the benefit of a Social Inquiry Report prepared by the Probation Office. On the date of sentencing, the trial magistrate made the following remarks, "*I have considered the social inquiry report. It does not favour the accused person.*" There is no evidence on record that the appellant was given an opportunity to offer mitigation or comment on the report particularly given that the appellant was represented by an advocate. The sentence cannot stand and it hereby quashed as it was imposed in contravention of appellant's right to be heard or to offer mitigating circumstances before sentence. Such a right is fundamental in the trial process as was held by the Supreme Court in **Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR** that:

*[46] We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the Constitution are not exhaustive.*

20. For the reasons I have set out, I affirm the conviction but quash the sentence of 7 years' imprisonment. In order to provide an opportunity for the appellant to offer mitigation, I direct that the matter be placed before the subordinate court for appropriate sentencing. It shall be placed before the magistrate who heard the case or any other magistrate if that magistrate is not at the station on a date to be fixed by this court.

21. In the meantime, the appellant's bond is now revoked and the appellant is remanded in custody until he is sentenced by the subordinate court.

**SIGNED at NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KAKAMEGA this 26<sup>th</sup> day of SEPTEMBER 2019.**

**W. MUSYOKA**

**JUDGE**

Mr Akwala, Advocate for the Appellant.

Ms Ombega, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.