



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KITUI**  
**CRIMINAL APPEAL NO. 96 OF 2015**

**MWINZI KILONZI ALIAS MUTIE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in **Kyuso Principal Magistrate's***

***Court Criminal Case No. 49 of 2015 by Hon. B. M. Kimtai S R M on 16/09/15).***

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

1. **Mwinzi Kilonzi Alias Mutie**, the Appellant, was charged with the offence of **Stealing Stock** contrary to **Section 278** of the **Penal Code**. Particulars of the offence were that on the night of **6<sup>th</sup> and 7<sup>th</sup> March, 2015** at **Ikukumu Village, Gai Sub-Location, Kyuso Location, Kyuso Sub-County** within **Kitui County** stole one he goat valued at **Kshs. 8,000/=** the property of **Jacob Kyalo Maundu**.
2. In the alternative he was charged with the offence of **Handling Stolen Goods** contrary to **Section 322(1)** of the **Penal Code**. Particulars of the offence were that on the night of **6<sup>th</sup> and 7<sup>th</sup> March, 2015** at **Kamuwongo Location, Kyuso Sub-County** within **Kitui County** other than in the course of stealing dishonestly retained or arranged for disposal one he goat knowing or having reason to believe it to be stolen property.
3. Having been taken through full trial he was convicted and sentenced to **five (5) years imprisonment**.
4. Aggrieved he appealed on grounds that: The Complainants did not identify the thief who stole the goat; he was not provided with witness statements; there were many people in the motor-vehicle but only the conductor was called to testify; the trial Magistrate relied on previous convictions without considering that he had served sentences imposed; and his alibi defence was rejected.
5. Facts of the case were that on the **6<sup>th</sup> March, 2015**, PW1, **Jacob Kyalo**, the Complainant found his goat missing. He reported the matter to the police who commenced investigations. On the **7<sup>th</sup> March, 2015**, PW3, **No. 2008051013 P C Benson Kitony** of **Kamuwongo A P Camp** having received information from **P C Korosiany** flagged down a motor-vehicle christened Princess from which he recovered a goat and the conductor led them to the arrest of the Appellant.
6. When put on his defence the Appellant stated that he was at **Kyuso** on the morning of **7<sup>th</sup> March, 2015** where he boarded a motor-vehicle headed to **Mwingi**. Reaching **Kamuwongo** some sacks of charcoal

were loaded on the motor-vehicle. A police officer talked to the conductor and he was later on arrested without knowing the offence that he committed. Later, he was told he had stolen a goat, an allegation that he denied.

7. The Appellant canvassed the Appeal by way of written submissions. In response the State through learned Counsel **Mr. Mamba** opposed the Appeal. He urged that the Appellant was in possession of the goat; he was properly identified and the goat recovered. That the issue of not having been provided with statements should have been raised at trial. In a rejoinder the Appellant stated that he asked for statements but was directed to ask his relatives to obtain them.

8. This being a first Appeal, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).

9. It is urged by the Appellant that he was denied the right to be supplied with statements to prepare for his case which was in contravention of **Article 25(c)** of the **Constitution** that provides thus:

***“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—***

***(c) the right to a fair trial;”***

10. It is every individual’s right to be accorded a fair trial. In this regard, an Accused person has a right of being furnished with witness statements so as to prepare for his trial. In the case of **Juma vs. Republic (2007) EA 461** the Court stated that:

***“We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence.”***

11. A perusal of the Court record shows that on the **1<sup>st</sup> April, 2015** the Appellant sought to be provided with witness statements and the Court made an order to that effect. On the **27<sup>th</sup> May, 2015** the Appellant reminded the Court that he did not have witness statements. He intimated that he was not ready to proceed. The State opposed the application but the Court adjourned the matter. Subsequently, three (3) witnesses testified. When the matter came up on **14<sup>th</sup> September, 2015** the Appellant was not ready to proceed because he had just received the statements and he was given one (1) hour to peruse them and proceed with the case. On the material day the last two (2) witnesses testified.

12. It is evident that the Appellant’s right to fair trial was compromised. It was unfair for the trial Court to continue with the matter without statements being availed to the Appellant to prepare for his case. The one hour duration he was given ultimately, after being furnished with statements was also not sufficient. He was prejudiced.

13. The question to be answered is therefore: whether a retrial should be ordered? None of the witnesses who testified saw the Appellant taking the goat. The Appellant admits having boarded the motor-vehicle in which PW4 **Gitonga Karuka** was a conductor. He stated that he saw the Accused board the motor-vehicle with the goat. He admitted having recorded his statement late but denied being a hired witness. What he did not prove beyond reasonable doubt was the fact of having been engaged as a conductor.

14. Following the conviction the Appellant has been incarcerated for **three (3) years and three (3) months**. This is not a proper case for a retrial. In the premises I do quash the conviction and set aside the sentence imposed. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

15. It is so ordered.

**Dated, Signed and Delivered at Kitui this 19<sup>th</sup> day of December, 2018.**

**L.N. MUTENDE**

**JUDGE**