



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEALS NOS 451, 448 AND 449 OF 2013
(CONSOLIDATED)
(Appeals from the original Convictions and Sentences in Kandara RM Criminal Case No 409 of 2011
– C. Kithinji, RM)

FRANCIS GACHIHI MBURU

SAMUEL MBURU NYOIKE

JAMES MWANGI MBOGO.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellants herein, **Francis Gachihi Mburu, Samuel Mburu Nyoike** and **James Mwangi Mbogo** (respectively 1st, 2nd and 3rd accused before the trial court) were each convicted after trial of two counts of ***stealing stock*** contrary to **section 278** of the ***Penal Code***, and also two counts of ***killing an animal with intent to steal*** contrary to **section 338** of the Penal code. They were each sentenced to 9 years imprisonment on each of the four counts, the sentences to run concurrently. They have each appealed against both conviction and sentence. Their grounds of appeal include complaints about the paucity of the evidence laid before the trial court by the prosecution, erroneous application of the doctrine of possession of recently stolen goods and failure by the trial court to properly consider the Appellants' various defences.

2. Learned Prosecution Counsel supported the convictions and sentences.

3. I have considered the Appellants' written submissions which each of them tendered at the hearing of the appeals as well as the able submissions of the learned Prosecution Counsel. I have also read through the testimonies of all the witnesses who testified, including the Appellants. Finally, I have evaluated the evidence placed before the court in order to arrive at my own decisions on it. This is my duty as the first appellate court; I have however borne in mind that I neither heard nor saw the witnesses myself, and I have given due regard to that fact.

4. The totality of the evidence was to the effect that the Appellants were found in possession of very recently stolen goats and sheep and were unable to give a satisfactory explanation of that possession. However, there was one fatal omission in the chain of evidence that renders the Appellants' convictions untenable.

5. The stolen animals and the two dead goat kids were not produced in court for identification by their owners and other witnesses. Instead what was produced were photographs of the animals and the dead kids by which the owners and other witnesses identified the animals and dead kids in court.

6. There are specific statutory provisions regarding the use of photographic evidence in court. **Section 78** of the *Evidence Act, Cap 80* provides –

“78. (1) In criminal proceedings a certificate in the form in the Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.

(2) The court may presume that the signature to any such certificate is genuine.

(3) When a certificate is received under this section the court may, if it thinks fit, summon and examine the person who gave it.”

7. The flip side of this provision of course is that the officer himself, properly appointed, who prepared the photographic print or photographic enlargement from exposed film that he himself exposed or that was submitted to him, may appear in court himself and produce the photographs. Otherwise, if the photographs are to be produced in evidence by someone else, then they must be accompanied by the certificate under section 78(1) quoted above.

8. What happened in the present case? The photographs by which the stolen animals and the two dead kids were identified by their owners and other witnesses were not produced in evidence by the scenes of crime officer who took and/or printed them. They were instead produced by PW10 (Cpl Bernard Kiminya), the investigating officer. There was no certificate under section 78(1) aforesaid of the Evidence Act produced which would have rendered the photographs admissible in law. As it was, those photographs, which provided the only link between the stolen animals and the dead kids and their owners and other witnesses, were not properly admitted in evidence, and it matters not that the Appellants (who were not defended) did not object to their production by PW10. The certificate under section 78(1) was an express requirement of the law and the absence of it could not, in effect, be consented to by the Appellants, particularly when they were unrepresented.

9. The effect of this is that the stolen animals and dead kids were not properly identified in law by their owners and other witnesses.

10. I must therefore allow these appeals in their entirety. The convictions are quashed and the sentences imposed set aside. The Appellants shall be set at liberty unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 8TH DAY OF MARCH 2016

H.P.G. WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 11TH DAY OF MARCH 2016