



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT CHUKA**  
**HCCRA NO. 10 OF 2015**  
**(FORMERLY MERU HCCRA 124 OF 2014)**

**JOHN NJERU KATHENYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal from the Judgment and conviction of L.N. MESA - made on 5/9/2014*

*in Marimanti Senior Resident Magistrate's Criminal Case No. 226 of 2014).*

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

1. John Njeru Kathenya, the Appellant herein and another, were on 15<sup>th</sup> April, 2014, arraigned before the Principal Magistrate's Court, Marimanti with the offence of burglary and stealing contrary to sections 304 and 279 (b) of the Penal Code. It was alleged that on 3<sup>rd</sup> September, 2013 at 8.00pm at Muramba wa Nkunju village in Tharaka North District within Tharaka County, jointly with others not before court the Appellant and his co-accused broke and entered the house used as a dwelling home, the house of Lucy Mukethi Karuguru with intent to steal therein and did steal therein one wheel barrow make Datini, one ox-plough, a DVD music machine, two large sufuria, a solar panel, plates, trays and assorted clothing valued at Kshs.50,000/- the property of Lucy Mukethi Karuguru.

2. The Appellant also faced a second count of stock stealing contrary to section 278 of the Penal Code. It was alleged that on the 20<sup>th</sup> August, 2012, at Muramba Wa Nkunju village in Tharaka North District, within Tharaka Nithi County, jointly with others not before court, the Appellant stole five (5) goats and five (5) sheep valued at Kshs.40,000/- the property of Lucy Mukethi Karuguru. There was also an alternative charge of handling stolen property contrary to section 322 (1) (2) of the Penal Code. It was alleged that on 30<sup>th</sup> December, 2013 at Muramba wa Nkunju village in Tharaka North District, within Tharaka Nithi County, otherwise than in the course of stealing, the Appellant dishonestly received or retained a goat valued at 4,000/- or having reasons to believe it to have been stolen. The Appellant denied the charges but after trial he was found guilty and convicted of the charges. He was sentenced to imprisonment for three (3) years for the first and to two (s) years for the second count, respectively. The said sentences were ordered to run concurrently.

3. Aggrieved by the said decision, the Appellant has appealed to this court setting out various grounds which can be summarized into three; that the trial court erred in convicting the Appellant on inconsistent and contradictory evidence; that vital witnesses failed to testify and that the Appellant's defence, was not

considered. This being the first appellate court, it behoves it to review and re-evaluate the facts afresh with a view to draw its own independent findings and conclusions. **Okeno .v. Republic [1972] EA 32.** In so doing however, this court must have in mind that it did not have the opportunity of seeing the witnesses testify.

4. The prosecution case was that on 20<sup>th</sup> August, 2012, Lucy Mukethi Karuguru (PW1) was grazing on a (4) acre farm she had purchased from one Kathuru Kathenya who was the 2<sup>nd</sup> Accused before the trial court. At around 5 pm, the Appellant and his co-accused, while armed with arrows and bows, came and ordered the complainant out of the farm. When leaving, the complainant saw the Appellant and his co-accused driving away five (5) cows and goats. She reported the matter to the area chief. On 3<sup>rd</sup> September, 2013 she went to graze her livestock at Mbuku in Kathangacini and left her home under the watch of her brother Muthee Kathenya (PW3). At about 9.00 pm of the same day, her said brother called her and told her he had been attacked by three thieves who included the Appellant. He narrated the items that were stolen. When she returned the following morning, she confirmed and recorded the items that had been stolen and once again reported the incident to the area chief. Some of these items were recovered later from amongst others, the Appellant. In cross-examination, she told the court that she showed to the chief the marks on her goats. That the receipts for the stolen items were stolen together with those items; that there were no marks on the stolen items and that she had bought land from the Appellant's brother but they had refused to give it to her.

5. Benson Njeru Mitugo (PW2), told the court that on 30<sup>th</sup> December, 2013, there was an operation by police officers from Gatunga which targeted the homesteads of the Appellant, one Muteria Kathuru and Kiora. In the operation, a goat was recovered from the Appellant's home. Muthee Kathenya (PW3) told the court how on 3<sup>rd</sup> September, 2013 people attacked him while in the home of PW1. He switched on his torch and was able to identify the Appellant and one other person in the group that had invaded the home. The group broke into one of the houses. He did not know what was stolen. He called neighbours who traced the thieves to the home of the Appellant. The neighbours refused to go beyond the boundary out of fear. In cross-examination, he stated that he did not call the neighbours that night until the following morning. PC Boaz Malala (PW4) told the court how an operation was carried out on 30<sup>th</sup> December, 2012. During the operation, several items were recovered from the Appellant's home. He said that the Appellant's family was notorious for theft. On his part, PC Burton Kagumba, the investigations officer told the court that on 30<sup>th</sup> December, 2013, they went to the Appellant's village with specific instructions to arrest the Appellant against whom there had been hue and cry. The home of the accused had been nicknamed Kismayu because of bad reputation of theft.

6. When put on his defence, the Appellant complained that the period between the alleged theft of goats and 30<sup>th</sup> December, 2013 was over one (1) year; that both the police station and the chief's office were at Gatunga, yet the complainant alleged that she only used to make reports to the chief and not the police; that the plough and the wheel barrow that were produced were his and he tendered receipts therefore as DExh 1 and 2, respectively. According to him, he was being framed because of having stood on the way of the complainant's attempts to grab land that belonged to the late Kavindu the latter's widow.

7. At the hearing of the appeal, the Appellant relied on his written submissions which this court has considered. On his part, Mr. Ongige for the state opposed the appeal and submitted that the prosecution case was consistent and not contradictory. That the complainant identified her property that was recovered from the Appellant. That the chief was not a complainant in this case and therefore he had no motivation to frame the Appellant. He urged that the appeal was without merit and should be dismissed.

8. Before the appeal was heard, the state filed and served the Appellant with a notice of enhancement of sentence. The court warned the Appellant that if he proceeded to argue his appeal and he failed to succeed, there was a likelihood that the sentence of three (3) years metted out on him would be enhanced. The Appellant admitted that he had understood that but fact he nevertheless chose to argue the appeal.

9. The first ground was that the trial court erred in convicting the Appellant on the evidence that was contradictory. This court has considered the record. In her testimony, the complainant told the court that

her brother (PW3) narrated to her on the material night the items that had been stolen from her home. These were, a solar, plough, tray, sufuria, plates and spoons and assorted clothes. However, PW3 was categorical in his evidence in chief that when he went to the house that was broken into by the thieves, he did not know what was stolen. Further, PW1 stated that when she returned the following morning, she checked what was stolen, recorded the same and reported to the chief. She did not state what these items that she recorded were and what she had reported to the chief as stolen. She only mentioned what was recovered. The question that arises is, what were these items that were stolen? Where were they recorded at the time of reporting? Did they include the items produced as PExh 1, PExh 2, PExh 3 and PExh 4?

10. As regards the raid that yielded the recovery of the exhibits that were produced in evidence, PW2 told the court that it took place at 11.00 am. That he accompanied the police, the AP, the area chief and members of the public. PW4 on his part told the court that the operation of 30<sup>th</sup> December, 2013 was at 3.00 a.m. The question that arises is, were the witnesses testifying on the same operation or were there two (2) different operations.

11. As regards the items allegedly stolen on 3<sup>rd</sup> September, 2013, PW1 admitted that they had no marks on them. She told the court that the receipts in respect of the items were stolen together with those items. On being cross-examined, PW5, the investigations officer told the court that the complainant showed him a mark she had put on the plough. To compound the prosecution case, PW1 told the court that of the items recovered, only the plough had been recovered from the Appellant. However, PW4 gave a different version. He told the court that they recovered from the Appellant's house a solar, a solar battery, wheelbarrow, plough, domestic animals and other assorted items. Some of these items were never produced in court.

12. To this court's mind having considered the foregoing inconsistencies, this ground cannot be said to be without merit. The trial court erred in not resolving these contradictions before convicting the Appellant. Indeed, that court relied on the evidence of PW3 who told the court at one time that he called the neighbours on the material night who followed the thieves to some boundary then later denied calling anyone that night after the robbery. Those he called were neither named nor called to testify to confirm the alleged theft. Ground 1 therefore succeeds.

13. The second ground was that the area chief who was a very crucial witness was not called to testify. The evidence of PW1 was that after the theft of 5 cows and goats on 20<sup>th</sup> August, 2012, she reported the matter to the chief. It is important to note that she did not state how many goats she saw the Appellant and his Co-accused drive away. Further, she stated that after the alleged theft of 3<sup>rd</sup> September, 2013, she reported the matter to the chief. The area chief participated in the operation of 30<sup>th</sup> December, 2013. It is the chief to whom PW1 allegedly told the marks of her goats. To this court's mind, the chief was a very crucial witness by no means. He would have confirmed to the court if and what reports were made to him on the alleged theft. As the case stood before the trial court, there was no report made to the police of the alleged thefts. The chief was a crucial link as far as establishing the prosecution case was concerned. In failing to call him, that was fatal to the prosecution case.

14. As regards the second count, the evidence was so contradictory to sustain any conviction. PW1 told the court that she saw the Appellant and his co-accused drive away five (5) cows and undisclosed number of goats. She stated that after the operation, a goat and sheep were recovered (P Exh 5 and 6) but she never specified from whom. PW4 told the court that a sheep was recovered from the Appellant. According to PW5, when the complainant was attacked on 20<sup>th</sup> August, 2012, the Appellant and his Co-accused drove away five (5) goats and five (5) sheep. That on the day of operation, the complainant was able to identify one goat that was among those that were stolen on 20<sup>th</sup> August, 2012. He never stated from whom such goat was recovered. The issue of sheep was being introduced at the trial yet PW1 had not told the court that any of her sheep had been stolen on 20<sup>th</sup> August, 2012. Clearly, the trial court was in serious error when it convicted the Appellant on the second charge of stock stealing.

15. The last ground was that the Appellant's defence was not considered. The court dismissed the

Appellant's defence on the ground that the receipts (DW1 and DW2) contained alterations to their dates of issue and that D Exh 2 was for something else other than an ox-plough. The court did not consider the angle presented by the Appellant that he was being framed because of a dispute of ownership of some property.

16. This court has on its part carefully considered the record. At no time did the issue of the alleged alterations raised by either the prosecution or the court itself. In my view, the court made an adverse conclusion on the alleged alterations without giving the Appellant an opportunity to give an explanation. There is nothing that stopped either the prosecution or the court to raise that issue and seek an explanation from the Appellant at the time he was giving his testimony. By raising it at the judgment stage, that in my view prejudiced the Appellant as he had no opportunity to explain that issue. Further, the Appellant testified that PW1 had a serious dispute with him and his family on some property from where she was allegedly evicted on 20<sup>th</sup> August, 2012. There were allegations that the area chief was not happy with the involvement of the Appellant and his family in the victory that the widow of the deceased in that dispute had scored. That chief had refused to appear and testify although it is him to whom all the reports relating the case were being made. To my mind, whilst the Appellant produced some semblance of evidence of ownership of the two items, the wheelbarrow and ox-plough, the complainant indicated that her receipts were stolen together with the items on 3<sup>rd</sup> September, 2013. It is very improbable that one will keep receipts for such items together with the items having in mind the nature of the items allegedly stolen. This ground also succeeds.

17. Accordingly, I find the appeal to be meritorious. The same is hereby allowed. The Appellant is to be released forthwith unless otherwise lawfully held.

**DATED and DELIVERED at Chuka this 26<sup>th</sup> day of May, 2016.**

**A.MABEYA**

**JUDGE**

**Judgment read and delivered in open court in the presence of all parties.**

**A.MABEYA**

**JUDGE**

**26/5/2016**