



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 11 A OF 2016

SIMON MITILI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.147 of 2014 of the Principal Magistrate's Court at Tigania by P.M Wechuli – Resident Magistrate)

JUDGMENT

The appellant, **SIMON MITILI**, was convicted for two offences of theft of farm produce contrary to section 8(1) of the Stock and Farm Produce Theft Act, cap 355 laws of Kenya.

The particulars of the offences were that on 3rd January 2015 at **Kathenge** village Tigania East Sub county of Meru County he stole some green maize valued at Kshs.80,000/= the property of **GEREVASIO MITHEU**. On the same night he stole some green maize valued at Kshs. 40,000/= the property of **JULIUS KIBURI**.

The appellant was sentenced to pay a fine of Kshs.40,000/= in count 1 and a fine of Kshs. 20,000/= in count 2 in default to serve 6 months imprisonment on each count. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Ndubi, learned counsel who raised seven grounds of appeal which can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by conducting proceedings in un procedural manner.
2. That the learned trial magistrate erred in law and fact by convicting the appellant on insufficient evidence.
3. That the learned trial magistrate erred both in law and fact by meting out two different sentences in similar charges.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the case are briefly as follows:

The appellant in company of others were spotted while harvesting the complainant's maize at night. They

were intercepted by the police while ferrying the maize in a Land Rover.

He was tried convicted and sentenced. This gave rise to this appeal.

On his part the appellant contended that the maize he harvested was his.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32**.

At the time of oral submissions, counsel for the appellant contended that it was not open for the complainants to pursue the criminal proceedings since they could seek redress in civil proceedings. He relied on the case of **KIGOROGOLO V RUESHEREKA [1969] EA 426**. My reading of the cited authority gave an impression that the learned counsel misunderstood instances when such a case can be applied. The circumstances were completely different from the present case. It is not applicable.

Though an issue was raised on procedure, my perusal of the record did not reveal any conduct that was not procedural. It would appear this ground was abandoned for there were no submissions on it.

The evidence on record was that the complainants' maize was harvested at night from their parcels of land. The evidence of Joseph Kimathi (PW3) is that when he arrived at the land of Gervasio Mitheu to guard, he found the green maize having been harvested and heaped at a place. He suspected that was the work of some thieves. He therefore called the owner and hid himself. After a while, motor vehicle KVN 872 Land Rover came to the scene and six people, one of them the appellant, alighted. Since one of them had arrows he got scared and left. When Julius Kaiburi (PW2) checked his land on the following day he also found his green maize having been harvested. His land and that of Gervasio Mitheu (PW1) share a border. Kaiburi's land is parcel Number 3630 while that of Gervasio is 6202.

When the matter was reported to the police, the said Land Rover was intercepted while ferrying some green maize. All the occupants fled after the vehicle stopped. The appellant was identified as one of the people who fled.

Mati Kennedy (PW3) testified in his capacity as an agricultural officer who went to the scene to conduct assessment. He said when he went to the land parcels Numbers 3650 & 6202 he confirmed that some green maize had been harvested. He carried out an assessment.

There were documents of ownership that were produced. I am therefore satisfied that the maize in issue was harvested on the complainants' parcels of land. There was overwhelming evidence on record to show that the appellant jointly with others stole the maize as charged.

The learned trial magistrate was criticized on the manner he handed down the sentences. Though the offences were similar, the value in each count was different. This is what informed the trial magistrate in passing the sentence. In my view given the value of the stolen maize, the sentence was very lenient.

The upshot of the foregoing analysis of the evidence the appeal must fail. The same is dismissed on both conviction and sentence.

The appellant to pay the fine that was imposed by the learned trial magistrate or serve the default sentence.

DATED at Meru 19th day of December 2016

KIARIE WAWERU KIARIE

JUDGE