

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 64 OF 2014

JAMES MWENDWA MWANZIA.....ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court jointly with another of stealing stock contrary to section 278 of the Penal Code. The particulars of the offence were that on 16th August 2013 at Kitse Sub Location Mithuki Location Mwingi East District of Kitui County, jointly stole 3 goats valued at Kshs. 12,000/= the property of Mary Mutui Mutyuki. He pleaded not guilty to the charge. After a full trial, he was convicted and sentenced to serve seven (7) years imprisonment. His co-accused MWANGANGI NYAMU was put on Community Service Order for two (2) years.

Dissatisfied with the decision of the trial court the appellant has appealed to this court both against conviction and sentence, on several grounds.

The Learned Prosecuting Counsel Mr. Orwa has conceded to the appeal. Counsel submitted that there was no evidence to prove the offence for which he was convicted and sentenced. The evidence on record was merely against the co-accused.

I have perused the record of evidence and the judgment. No witness connected the appellant to the theft of the goats. Even in the judgment, the learned trial magistrate did not refer to any evidence connecting the appellant to the theft of the three goats. In convicting the appellant the learned trial magistrate summarized evidence against the co-accused and merely referred to the appellants defence as follows:-

“The 1st accused person testified the charge. That he was arrested for failing to register as a Kenyan citizen and sentenced for 10 months.....

Although the 1st accused alleges to have been accused because he did not have an ID card, he did not produce or mention the case number under which he was charged. I do not believe him and as such his defence crumbles down.”

The magistrate did not refer to any evidence tendered by the prosecution against the appellant.

The above reasoning of the trial court was shifting the burden of proof to an accused, which is wrong. There was no evidence connecting him to the theft of the two goats. The learned magistrate should thus not have convicted him, as she obviously found no evidence connecting him to the charge. The appellant should have thus been acquitted.

The Learned Prosecuting Counsel has conceded to the appeal. I agree with him. I find that the conviction of the appellant was not grounded on the evidence on record.

In the result, I allow the appeal, quash the conviction and set aside the sentence imposed. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 22nd day of April, 2015

GEORGE DULU

JUDGE