



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 173 OF 2012

JAMES KARIUKI WACHIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the Senior Principal Magistrate's Court at Nyahururu (V. K. Kiptoon) delivered on 12th September, 2012 in Criminal Case No. 2278 of 2011)

JUDGMENT

1. The appellant was charged with the offence of stealing stock contrary to **Section 278** of the **Penal Code**. He was charged with an alternative charge of handling stolen property contrary to **Section 322 (1)** of the **Penal Code**.
2. The trial court acquitted the appellant of the main count of stealing but convicted him of the alternative count of handling stolen property and sentenced him to four years imprisonment.
3. Aggrieved, the appellant has appealed to this court against the conviction and sentence on the grounds that-
 - (a) **the trial court erred in convicting the appellant against the weight of the evidence;**
 - (b) **the trial court erred in not finding that the failure of the prosecution to produce the item that was recovered was fatal to its case;**
 - (c) **the trial court erred in disregarding the defence's evidence;**
 - (d) **the trial court erred in shifting the burden of proof to the defence;**
 - (e) **the trial court erred in finding that the prosecution had proved its case beyond reasonable doubt.**

4. For the above reasons, the court has been asked to quash the conviction and set aside the sentence.

SUBMISSIONS

5. Counsel for the appellant argued all the grounds of appeal together. He submitted that the conviction of the appellant was not safe because he tendered credible evidence of how he acquired the bull which he had been accused of stealing. His evidence was, that he acquired the bull in an

- open market, this essentially rendered the conviction not safe as it cast serious doubt to the prosecution case.
6. Counsel also faulted the prosecution for failing to produce the bull which was recovered as an exhibit. It was his opinion that the photograph produced as “**PEXb 1**” was not sufficient. Therefore without identification of the recovered property, the conviction cannot stand. Counsel also pointed out that the complainant did not give a special description of how he was able to identify the bull after it was recovered.
 7. The prosecution counsel argued that the appellant was found in possession of the bull and that his defence did not have any evidential value. That, failure to produce the bull in court was not fatal as the photographs taken by the officer at the scene of the crime and the other prosecution evidence was sufficient.
 8. It was counsel's submission that the prosecution case was not shaken and it established, beyond reasonable doubt, that the appellant was guilty of handling the stolen bull.
 9. In rejoinder counsel for the appellant argued that the question of possession is vital to the appeal. That, the appellant was not found in actual possession of the bull and the evidence of how the same was recovered was essential. However this evidence was very contradictory and unreliable. He urged the court to allow the appeal and set aside the conviction.

ISSUES FOR DETERMINATION

10. The issues for determination in this appeal are as follows:

- (a) whether the prosecution evidence was sufficient to convict the appellant on the offence of handling;
- (b) whether the appellant's conviction was safe.

11. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno V. Republic, (1972) EA 32**.
12. The prosecution case was that on 1st October 2011 at Rumuruti Township in Laikipia West District within the Rift Valley Province, the appellant, jointly with others who were not charged in court, stole three cows and one bull all valued at Kshs. 160,000/= which belonged to one Abdi Ali Dulacha. In the alternative, the prosecution alleged that on 5th October 2011, at Ngarua (Kinamba) in Nyahururu District, otherwise than in the course of stealing, the appellant dishonestly received and retained one bull knowing it to be Ali Abdi Dulacha's stolen property which was valued at Kshs. 13,000/=.
13. The complainant, **PW1**, testified that on 1st October 2011, thieves broke into his home and stole his three cows and one bull. He did not see the thieves and could therefore not identify them. He immediately reported to the police station. He together with several officers who include **PW4, NO. 87164P**, unsuccessfully tried to track the robbers.
14. Four days later he received information that his stolen bull had been recovered. Accompanied by Police Officers from Ng'arua Police Station, he went to a slaughter house where he identified one of the cows that had been stolen from him. He identified his stolen bull by its black and white tail and confirmed that it was the one which had been photographed in “**MFI 1 A and B**”.
15. **PW2** was **P.C. Levin Nyamier** from Ng'arua Police Station. On 5th October 2011, acting on information from the members of the public that the appellant had been seen with a stolen cow, he and the Officer Commanding Station went to Kinamba Trading Centre.
16. They found the appellant and after interrogating him he confirmed that he was in possession of the cow. He led them to where he had stored it. They arrested him and took the confiscated bull to the Police Station. On their way to the station, they ran into the complainant who identified the bull as the one which had been stolen from him earlier on.
17. The bull was photographed by **PW5, Cpl. Corporal Koskei Joel**, at the instance of **PW4, P.C. Muhammed Diba** and then released to the complainant by **PW3, Ag. Inspector Christopher Nawanya**.

18. When put on his defence, the accused gave sworn testimony. He testified that he trades in livestock for a living. On 4th October 2011, he was instructed by **DW2** to procure for her a bull which she would slaughter in an upcoming wedding. The Appellant went to Olmoran Market where he purchased a white bull with no horns or earmarks from two small boys who included **DW4**. He produced the agreement with the purchaser as **DEX 1**. He then instructed **DW3** to transport the bull to his house.
19. The following day, he was informed that the person who was transporting the bull to **DW2**'s house had encountered the complainant who alleged that he was the owner. He led the police to **DW2**'s house where the bull was recovered. He was thereafter arrested and charged with the offences as per the charge sheet.
20. **DW3** was with the appellant at the time he purchased the bull from **DW4**. He also identified it as the one photographed in "**PEXb1**". **DW4** transported the bull to the appellant's home upon procuring a permit to transport livestock.
21. **DW4** was among the boys who sold the bull to the appellant. He testified that on that day, he was instructed by his father, **DW5**, to sell the bull in "**PEXb1**". He sold that bull to the complainant for Kshs. 14,000/= and confirmed that he entered into a sale agreement with him although he did not sign it because he can neither read nor write. He produced a copy of his Identification Card as "**DEXb 4**".
22. **DW5** alleged that he was the owner of the bull in "**PEXb1**". He testified that he sold it to the appellant for Kshs. 14,000/=. When he learnt that the appellant had been accused of stealing this bull from a third party, he presented himself to the Police Station and took with him the cow that had calved this bull.
23. From the evidence, it is apparent that none of the witnesses saw the robbers who invaded the complainant's home and stole his cattle. Accordingly, the prosecution relied on the doctrine of recent possession to support their case for the first charge.
24. The principles of the doctrine of recent possession were stated in ISAAC Nganga Kahiga Alias Peter Kahiga V. Republic – Criminal Appeal No. 272 of 2005 (U/R) which was cited, with approval in Richard Oduor Adera V. Republic, [2010] eKLR-

“It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses.”

25. The appellant acknowledged that he was found in possession of the bull whose photograph was produced as "**PEXb 1**". He however led evidence that negated the contention that this bull belonged to the complainant and that it was the one that was stolen from him.
26. **DW5** who allegedly sold the bull to the appellant alleged that the bull belonged to him. On learning that the appellant had been arrested and charged with theft, he presented the cow that had calved the bull to Olmoran Police Station. He described it as one with small horns and earmarks. **DW4** who had been sent to sell the cow to the complainant confirmed that it is the same bull that he had been told to sell to **D.W.1**.
27. This evidence casts doubt to the complainant's assertion that the recovered bull belonged to him particularly, because there was no evidence of the description he had given to the police prior to its recovery. His description of the bull as white with a black and white tail was not satisfactory.
28. I am not conclusively satisfied that the bull that was recovered was the property of the Complainant and that it has been stolen from him.. There is a probability that the confiscated bull belonged to **DW5**, which means that that the appellant was not found in possession of the complainant's stolen property. Therefore without positive identification of the property as that which was stolen from the complainant the offence of handling cannot stand.

29. Even if this property had been properly identified by the complainant, it is my view that the appellant could still not be held liable. The doctrine of recent possession creates a rebuttable presumption that the person is the thief or that he is a guilty receiver. (See **Republic V. Hassan s/o Mohamed**, [1948] 25 EACA 121). It shifts the burden of proof to the appellant to prove how he came into possession of the stolen item and whether he had knowledge that the property was stolen.
30. Once the accused is able to offer a reasonable explanation on how he came to possess the goods, the court cannot find him guilty of the offence. This was the holding of the court in **Kipsaino V. Republic**, [1975] E.A. 253, cited with approval in **John Kamundia Gitau & Another V. Republic**, CR.APP. NO. 28 of 1997 [U/R]. The court held:

“where an accused person is charged with receiving stolen property, his guilt is not established if the explanation that he has given is one which is reasonable and might possibly be true, even if the trial court is not convinced that it is in fact true.”

31. The appellant offered evidence on how he came to possess the bull in question. He testified that he was in the business of buying and selling cattle. On 4th October 2011, he was instructed by DW2 to buy her a bull worth Kshs. 14,000/= which she intended to slaughter for her function.
32. The appellant testified that he went to Olmoran Market where he purchased the bull identified in the photograph marked “PEXb 1” from DW4 and his brother who were acting under the instructions of their father DW5. He produced a copy of the agreement between him and the DW4. DW5 claimed that he was the owner of the bull and that he sold it to the appellant.
33. The trial court rejected the explanation on the grounds that DW4 had not signed the agreement between him and the appellant and therefore doubted its authenticity, that the evidence of DW2 who allegedly instructed the appellant, was not believable because she could not remember the date when she gave the instructions and that the defence evidence regarding where the bull had been stored was contradictory.
34. The trial court however failed to consider that the defence evidence substantially cast doubt on the prosecution's case. The appellant was a bona fide purchaser for value of the bull which he believed was the property of DW5. He entered into a sale agreement which although not signed by DW4, he confirmed that in fact he did enter into the agreement.
35. This evidence ultimately negated the inference of the appellant's guilt. Reference is made to the case of **Mwaura V. Republic**, [1984] KLR 643-

“A person who takes possession of property which he believes to be his own does not take it fraudulently, however unfounded his claim may be and for a person to be said to steal a thing, he must take it fraudulently and without claim of right.”

36. The offence of handling stolen property contrary to **Section 322(1)** of the **Penal Code** was not proved by the prosecution. Handling is defined in that section as follows-

“A person handles stolen goods if (otherwise than in the course of stealing) knowing or having or having reason to believe them to be stolen goods, he dishonestly receives or retains the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.”

37. The accused person must have knowledge that the goods were stolen and must have dishonestly undertaken or assisted in their retention, removal, disposal or realization by or for the benefit of another person. (See **Thahabu Ibrahim V. Republic**, [1983] KLR 688 and **Bakari & Another V. Republic**, [1987] eKLR).
38. As demonstrated above by the evidence, the appellant had no knowledge that the bull was stolen. He procured it for DW2 and was at the time intending to pass it on to her.

FINDINGS

For the reasons state above, I make the following findings:

i) The evidence tendered by the prosecution was not sufficient to support the conviction of the appellant for the offence of handling stolen property.

ii) The conviction is therefore found to be unsafe.

DETERMINATION

39.The appeal is hereby allowed.

40.The conviction is hereby quashed and the sentence set aside.

41.The Appellant be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 22th day of May, 2015.

A. MSHILA

JUDGE