



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 18 OF 2015

OMAHE MWITA WANDWI 1st APPELLANT

THOMAS MEGA OMOGA alias RASTA 2nd APPELLANT

NYANGI WANGUBO 3rd APPELLANT

MATIKO SAMWEL 4th APPELLANT

-versus-

REPUBLIC RESPONDENT

JUDGMENT

1. The genesis of this appeal relates to the events which took place on 17/04/2011 at Nyabokarange Village in Kuria West District within the County of Migori.
2. In the night of the said day, the Chairman of the Locational Community Policing Group one JOHN SINDAS NYANG'ANYI, who was the first accused person before the trial court, was attacked by two armed robbers about 200 metres from his home within Ikerege Sub-location. He sustained some injuries and sought medical intervention at Komamange Dispensary and later on reported the matter to the Kehancha Police Station on 18/04/2011.
3. Some members of public visited the scene later on and recovered two spent cartridges and handed them over to the Police as the Area Chief hurriedly convened a public meeting (*baraza*) to discuss the said events with the hope of recovering the firearms which had been allegedly used in the said attack. The meeting took place was on 18/04/2011 when the said Chairman was seeking medical attention as above stated.
4. Since the two attackers had been identified as ROBERT MAHIRI MUNIKO and MOSENDA KIRIGO NYAMOHANGA, the meeting resolved that the families of those attackers do produce the said firearms as they were a security threat. ROBERT MAHIRI MUNIKO happened to be a brother to the complainant (PW1) one SAMMY WARIOBA and a son to SUSAN NYAMOHANGA who testified as PW4.
5. It hence appears that the recovery of the firearms was taken over by the local Community Policing Committee members. The said members organized to visit the said homes for the said mission. OMAHE MWITA WANDAHU who was the second accused person before the trial court and the first appellant herein took charge of the mission.

6. At around 10:00 a.m. on the said 18/04/2011 the said OMAHE MWITA WANDAHI called six motor cycle operators to ferry the community policing members in the course of the said mission.
7. One of the said operators was called was DANIEL MASIRE MOSANE who testified as PW2. He confirmed heeding to the said call by OMAHE MWITA WANDAHI and alongside his six fellow riders ferried the said members to two destinations which happened to have been the homes of those who were allegedly in possession of the firearms. Each rider carried two of the members.
8. While under the instructions by the said OMAHE MWITA WANDHI the convoy proceeded to a place called Gati where PW2 witnessed the members surrounding a homestead and later on came out with six cows alongside a young man of about 16 years old. The riders then returned some members to the community policing offices at Ikerege as some of them drove the cows on foot.
9. On return of all the members to their offices, the team left for the other assignment at Nyabokarage; to the home of one Thomas Mahiri. This time round the riders were nine in number and each carried two members. On reaching about 70m from the intended home they were directed to and indeed stopped. The members then, and as usual proceeded, and surrounded the homestead and later on came out with six cows alongside a woman who happened to be PW4. PW2 was then directed by OMAHE MWITA WANDAHI to take the woman with another old man who was to guard her to the community policing offices at Ikerege. He so did. His other colleagues carried the other members whereas some drove the cows to the said offices.
10. PW2 then witnessed PW4 being locked up at the said offices as the riders were paid for the completed assignment and all left. PW2 was later on summoned by the police and interrogated on the said assignment. He then recorded a statement.
11. PW4 who was working in her farm that day was ambushed by the community policing members who forcefully took her to her homestead and asked her to open the door to her house. She obliged. The members then entered the house as they ordered her to remain silent. They then came out with six cows which were in the house and led them away. She was ordered to follow them and on reaching at the road she was put on a motor cycle with a man and led to the community policing offices at Ikeregi where she was locked up until 03:00 p.m.
12. On being released PW4 was told to go and tell her son to surrender an alleged weapon before the members could release the cows to her. She proceeded back to her home and on reaching there she met her son Robert Mahiri whom she asked, in the company of other family members, to surrender the firearm if he had any so as to free the cows which had been taken away.
13. As luck was on PW4's side, the firearm was eventually surrendered to the community policing members on the very day and as expected PW4 was eager to go and collect the cows back home.
14. PW8 one MOGESI MAHIRI witnessed PW4 being forcefully led away from her farm by the community policing members to her homestead and eventually being led away to the community policing offices at Ikerege. PW8 was a neighbour to PW4 and also confirmed seeing six cows being driven away from the complainant's home by the said members.
15. There was also PW5 who was a Village Elder and a Pastor at a local church who also witnessed the animals being driven away and pleaded on behalf of the complainant's family in vain. PW7 was the complainant's brother and also witnessed all the events as they unfolded from the taking away of the cows upto the arraignment of the accused persons before the trial court. He is the one who called his brother, the complainant, and informed him of what had happened and since the complainant was returning to his work at Mombasa he had to cancel the journey so as to attend to the then emerging events.
16. The people who undertook the said mission were the local community policing members who were well known in the community and were clearly identified by several witnesses including PW2, PW3,

PW4, PW5, PW7 and PW8. And as the mission was carried out during the day, the issue of their identification did not even arise and that is why that issue is not in controversy in this appeal.

17. *But what really happened that led to the matter being taken before the trial court instead?*

18. Had the community policing members stood by their word and released the cows as they promised upon the return of the firearm, I highly doubt if the matter would have reached the corridors of justice. However the actual problem happen to have arisen after the alleged firearm was surrendered but the cows were not released.

19. SAMMY WARIOBA, PW1, who was the complainant, intervened for the return of his cows to no avail. He followed the legal channels so as to have the dispute legally settled including taking steps to send people who convinced his brother to surrender an illegal weapon. Being an officer in the Kenya Defence Forces his conduct in handling the matter really proved him to be a member of the disciplined force. This Court hereby takes this humble moment to congratulate him for a job well done. Once again congratulations hoping that such a conduct would be acknowledged by his superiors.

20. Upon receiving the news of his cows having been taken away by the local policing members PW1 proceeded to see the OCPD. He was referred back to the OCS. The OCS informed PW1 of the attack on the local chairman by two armed people whom one of them happened to be his brother. PW1 then decided to assist the police towards the recovery of the firearm as he was surprised that his brother was involved in such a conduct. PW1 managed to steer family discussions and even sent people who were close to his said brother and eventually the firearm was surrendered. The OCS asked him to go back to his work as the release of his cows was to follow. He obliged and travelled to his workstation in Mombasa.

21. Things however did not work out as anticipated. Upon making some countable trips to the police in vain PW1 then decided to seek some assistance from the Police Headquarters in Nairobi. He then laid a complaint against the Police in the way they were handling the matter moreso after the recovery of the firearm.

22. The police headquarters then wrote to the Kuria West District Commissioner (Deputy County Commissioner) on the matter. The said Commissioner then instructed one of his Assistant County Commissioners to persue the matter. The said Assistant County Commissioner summoned the community policing members who instead contested that the cows belonged to the PW1's brother who had the firearm and they were not intent to release them to PW1. The matter was then taken to the Deputy County Commissioner, but surprisingly the said members changed their position that they had indeed never taken away any of the alleged cows at all. That was the turning point in the whole matter. Investigations were commenced and the matter referred to the Area DCIO for further dealing. I have noted that the said DCIO, who was allegedly new in office, undertook the said investigations and prepared his file and took it to the Office of the Director of Public Prosecutions where a nod to prefer the charge of stock theft on the part of the community policing members was given. That then led to the arraignment of six accused persons before the trial court. Out of the said persons who were charged, one had bought one of the six cows at an auction at Ikerege market under the direction of the first appellant herein, Omahe Mwitwa Wandwi.

23. Two out of the said six accused persons were acquitted and the appellants herein found guilty and convicted. They were sentenced to serve 4 years in prison each.

24. Being dissatisfied with the said conviction and sentence they preferred an appeal and on 05/11/2015 their Counsel filed a Supplementary Petition of Appeal which raised the following six grounds vis:-

1. The trial Magistrate erred in law and in fact when he held that there was evidence of stealing of stock.

2. The learned Magistrate erred in law and in fact when he failed to find as he ought to have done that there was no MENS REA of stealing in taking of the cattle.

3. The learned Magistrate erred in law and in fact when he failed to take cognizance of the provision of Article 159 (2) (3) of the Constitution as it relates to traditional dispute resolution mechanism.

4. The learned Magistrate erred in law and fact when he failed to consider the link of community policing structures. Its role vis-a-vis the accused and the prevention of crime.

5. The trial Magistrate imposed a sentence that was harsh and excessive in the circumstances.

6. The learned trial Magistrate took into account non existence facts, while sentencing the accused thereby leading to bias.

25. At the hearing of the appeal Mr. Kerario Marwa appeared for the appellants. He argued that the prosecution had failed to prove *mens rea* in the offence before court as when the animals were taken the intention was not to keep them but to compel the complainant's family to produce an illegal firearm which by their act, the same was eventually recovered. He further argued that the duties of appellants being community policing members included maintaining peace and order in the area and they indeed ought to have been applauded instead of being arraigned and charged in court. He further argued that though the appellants did not have the powers of arrest they played a crucial role in the recovery of an illegal firearm and their action of taking the cows ought to be seen in light of **Article 159(c)** of the Constitution being a traditional way of dispute resolution and an acceptable means of fighting crime within Kuria West District.

26. It was also argued on behalf of the appellants that even the Police Service as established under **Article 244** of the Constitution recognized the crucial role played by the community policing members and that they were not an illegal outfit and indeed undertook their work on behalf of the Police and further that after the taking over the cows they handed them over to the Area Chief and had nothing to do with them thereafter.

27. There was also the issue of ownership of the cows to PW1. It was also challenged as it was alleged that no sufficient proof of ownership was availed.

28. On sentence, Counsel submitted that even if the appellants were to be found guilty, the sentence was unlawfully high given that the pre-sentence reports were favourable to them and that the prosecution never opposed any non-custodial sentence and given that they were all first offenders.

29. The State opposed the appeal and contended that the acts of the appellants did not come under the umbrella of the community policing as commonly known as “*Nyumba Kumi*” as they engaged in an outright theft of the animals. The sentence was submitted to be an appropriate deterrent in the circumstances of the case.

30. Being the appellant's first appeal, the role of the court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

31. In discharging the said duty, this Court is to satisfy itself that the ingredients of the offence of stock theft were proved and as so required in law; beyond any reasonable doubt. To that end this court shall address the issue of ownership of the cows, the *mens rea*, any possible justification of the part of the appellants as members of the community policing and if need be, the issue of sentence.

32. PW1 stated in evidence how he came to own the six cows in issue. He purchased them. Upon acquisition of the said cows he left them under the care of his mother, PW4, as he was staying with his family in Mombasa. PW4, so confirmed that the cows in issue belonged to PW1 and that is why upon

being arrested she asked her other son PW7 to call and inform the complainant that his cows had been taken by the community policing members. PW7 did so and also confirmed that PW1 was the owner of the cows that had been taken away by the community policing members.

33. The evidence on the ownership of the cows was not shaken at all. It was well corroborated and even the appellants' one-time allegation that the cows belonged to PW1's brother remained a bare assertion. As there is no evidence to the contrary it remains that the cows which came from the PW4's homestead belonged to and were the owned by PW1.

34. The above finding is further buttressed by in the efforts undertaken by PW1 towards the recovery of his cows which made him take the trouble and go all the way to the Kenya Police Service Headquarters in Nairobi. That was an expense both on time and resources in a bid to protect his property. I hence settle the ownership of the cows in favour of the complainant, PW1.

35. On whether the appellants had the requisite *mens rea* when they took the cows, I will revisit some of the occurrences in the entire episode. It is not in dispute that out of the six cows which were taken away from the PW4's home, only one was recovered from where it had been sold through an auction and under the guidance of the first appellant herein. The one who bought it was also charged but later on found not guilty and was acquitted. As neither PW1 nor PW4 offered the cows for sale in the auction and moreso never received the cows back from the time they were forcefully taken away by the community policing members, it remains clear that the act of selling the cows at an auction was done by the members who were then in such custody of the animals; the community policing members. Needless to say the effect of such an act was to permanently deprive the ownership of the cows from PW1.

36. It is imperative to note that the idea of taking away of the cows in issue herein was mooted after the Area Chief gathered the community members and updated them on the occurrences that had led to the Chairman being injured. I say so because the record does not speak to the effect that the meeting so resolved. It is clear that after the meeting it is the community members who took the initiative to recover the firearms and came up with the strategy of taking away of the cows from the two families of the people who were allegedly in possession of illegal firearms. That was confirmed by the Appellants' Counsel who stated that it was an acceptable way of fighting crime in the area. What Counsel fell short of telling the court was what usually happens to the cows once the firearms are recovered.

37. If the tradition is that once the cows are taken from a suspect's home are never returned then that settles the issue that even by the time the community policing members went to take the cows from PW4's homestead, it was very clear and they knew that they were not about to return then or at all.

38. Even if the foregone is not the tradition, the actions of the community policing members clearly point out to the fact that they intended not to return the cows from the inception. **Firstly**, when they went to the PW4's homestead they did not interrogate her on the whereabouts of the alleged suspect or the firearm. In fact it is on record that she was only told to tell her son to surrender the firearm when she was released from the custody of the said members after which the cows were to be released. The members straightaway went into the house and removed the cows as they had so done at the other suspect's home. Their intention at that moment in time was hence not to recover the firearm but to take away the cows. One question which we may pose and ask ourselves here is had they asked PW4 of the firearm and possibly recovered it, could there have been the necessity to take away the cows? Why were the members so interested in taking away the cows as opposed to recovering the firearm?

39. The **second** point relates to the different positions taken by the members on the issue of the cows. PW1, PW4, PW5 and PW7 were all told that the cows were to be released on the recovery of the firearm. That however did not happen even after the said recovery. When the members were interrogated by the Assistant County Commissioner they brought the issue of ownership of the cows by the suspect. When the matter went before the Deputy County Commissioner, the members denied ever having taken the cows at all. One hence wonders why the members had to act in such a manner if it was not intended to retain the said cows. **Thirdly**, the firearm was recovered and surrendered on the very day the cows were taken, but it remains unclear why the cows were not readily released to the owners. **Fourthly**, the

members took it upon themselves and converted the ownership of the cows and proceeded to sell them at an auction more or less immediately after taking them from PW4's homestead.

40. The foregoing taken in totality points clearly that the community policing members had made up their minds long before they raided PW4's home and took the cows away that they would not return the cows or at all. They then had the requisite *mens rea* in the circumstances.

41. I will now examine if the appellants were justified in taking away of the cows as a means of either fighting or preventing crime in the society. It is not in doubt that the genesis of the whole issue arose from the attack on the Chairman of the community policing aforesaid. The Chairman readily reported the attack to Kehancha Police Station. When the meeting by the Chief was thereafter called and decided to pursue the recovery of the firearms, the report was already with the Police.

42. It is not on record that when the community policing members decided to and perused the recovery of the illegal firearms, they had been asked to do so by the police neither was the operation made in liaison with the police. The same appears to have been an independent action on the part of the community policing members to the total exclusion of the police.

43. The Appellant's Counsel referred the court to the **Fourth Draft Guidelines for the implementation of Community Policing – Nyumba Kumi (Usalama wa Msingi)** which I have carefully gone through. The objectives of the community policing are clearly stated and it appears does not include such acts as undertaken by the appellants herein. **It is clearly stated that community policing is not vigilantism, not a commercial enterprise, is not a political forum, is not a parallel security system; is not coercion or extortion; is not a replacement of village elders, neither is it a replacement of peace committee and is not about spying on one's neighbour.**

44. The actions by the community policing members which are now complained of were in clear breach of their mandate. Those actions amounted to running a parallel security system to the exclusion of the police system and/or any other such system in place and were anchored on coercion and extortion and to a very large extent was an organized commercial enterprise. The community policing members did not even heed the intervention of the village elder (PW5) meaning that they disregarded his role and carried themselves as a replacement of the village elders. To say the least, that is far from the good intentions of the community policing which the government has so far spent considerable resources in putting it in place. It is the likes of the appellants in serving as such members which end up portraying such a noble and well intended social outfit in bad light.

45. It can be seen that the said actions of the appellants herein who were then serving as the community policing members were not only contrary to the guidelines referred to hereinabove but openly and clearly in total contravention of the Constitution as well as the National Police Service Act. They curtailed the liberty of PW4 without any legal justification at all and took away the property of PW1 without any legal basis. Being holders of public offices I am not certain if their conducts complained of could stand the test of **Article 10** of the Constitution.

46. In as much this court recognizes the important role played by the community policing in Kenya, it has to be made absolutely clear that the said members should and can only discharge their mandate within the defined confines of the constitution and the law. That is the only way such players could bring good repute and standing to such a well-intended policy.

47. This court hence takes a very great exception to such actions which tend to take the painful gains attained in the fight for human rights to the dark ages in the name of fighting crime. West Kuria District is part of Kenya and ought to equally uphold the Constitution.

48. I will once again say that it is always important for the institutions mandated to fighting crime to so take their role more seriously rather than illegally delegating such a sensitive role to people who may not have the necessary expertise in the discharge of such a service. I strongly believe that it would have been a totally difference thing had the police accompanied the community policing members on their

assignment to recover the illegal firearms as they would not have allowed such blatant abuse of rights and the law to be undertaken. The community policing members must therefore be adequately trained on their roles and how to lawfully discharge their such important mandate.

49. I therefore find no justification at all on the actions in taking and retaining the six cows belonging to PW1 in the name of fighting crime. The Police and the other security agents have the necessary capacities to fight crime within the dictates of the law and the Constitution. The community policing members should not therefore carry themselves as a parallel security system and have no mandate to coerce or extort the public in the name of preventing crime. They can only remain true to their calling as such members and that any such member or members who engage in actions contrary to law cannot expect to take refuge in the perceived legal insulation in the name of fighting crime. They risk facing the law accordingly. It is my hope that this matter shall henceforth send a warning alarm to all the members of the community policing countrywide on the need to abide by the law in the course of discharging their necessary duties.

50. The upshot is therefore that the offence of stock theft was committed by the appellants and the trial court rightly so found them guilty and convicted them. The conviction is hence affirmed. Indeed the appellants are lucky to have been charged with only one offence.

51. I will now turn to the aspect of sentence. **Section 278** of the Penal Code provides the sentence for the offence of stock theft to be upto 14 years. The appellants were sentenced to 4 years. That sentence remains lawful.

52. I have noted the presence of pre-sentence reports on record which although they recommended probationary sentences on the appellants they also highlighted on the relationship the appellants had with the community. The appellants held positions of authority and leadership and they had been working in liaison with the local administration and the police. Further some had also jumped bail leading to the trial taking unnecessarily long.

53. Even though the appellants are first offenders there remained the real fear of them not discharging the non-custodial sentence due to the said relationship with the administrators and their past conducts. The trial court was hence right in preferring a custodial sentence instead.

54. I am aware that as a result of the convictions PW1 is likely to pursue the recovery of his animals or the equivalent monetary value thereof among other possible damages. Further PW4 remains at liberty to pursue the infringement of her liberties. The appellants have also been behind bars for close to one year now. It is my belief that the right message has been sent to holders of like offices.

55. By taking the foregone into account and without finding any fault on the part of the sentencing court, I will, with a lot of respect to the trial court, review the sentence to a non-custodial one. The appellants shall hence serve a Community Service Sentence at Kehancha Law Courts for a period of one year from the day they will be admitted into the service.

56. Further the Community Service Supervisor shall be filing monthly progress reports with the Kehancha Law Courts and shall bring to the immediate attention of this Court any actions on the part of the appellants contrary to the terms of the Community Service Orders.

57. In view of the foregone analysis I hereby direct the Deputy Registrar of this Court to serve this judgment upon the County Commissioner of Migori County, the Migori County Police Commandants and the Kenya Army Commandant.

Orders accordingly.

DATED, SIGNED and DELIVERED at MIGORI this 16th day of NOVEMBER, 2015

A. C. MRIMA

JUDGE