



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 7 OF 2012**

**SIMON MUTAI MONI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Simon Mutai Moni, the appellant herein, was charged with three others for the offence of stealing stock contrary to **Section 278** of the **Penal Code**. In the alternative, he was charged with the 2<sup>nd</sup> accused with the offence of handling stolen property contrary to **Section 322** of the **Penal Code**. The appellant was the 1<sup>st</sup> accused in the trial court. After the trial, the court acquitted the 3<sup>rd</sup> accused but the others were convicted on the main charge and sentenced to 5 years imprisonment each. The appellant is aggrieved by the said conviction and sentence and preferred this appeal.

I have looked at the grounds of appeal but all that can be deduced is two grounds; that the offence was not proved beyond any doubt and that the appellant's defence was not considered.

The appeal was opposed and Ms. Ngovi, the Learned State Counsel submitted that though the accused person alleged that there had been a sale and a sale agreement had been written, the court did not believe it because the purported agreement lacked the consideration and signatures and that since they had alleged a sale, the burden was upon the appellant to prove it; that the appellant called a witness who disputed the sale agreement.

This is the first appeal and this court is required to reconsider and analyse the evidence afresh and arrive at its own conclusion and determination. But before I do so, I will summarise the evidence that was adduced before the trial court.

The prosecution called a total of six witnesses. Francis Kinyua, PW1, a resident of Kagumo Munyaka recalled that his bull was stolen from his cowshed on the night of 4/6/2010 and 5/6/2010. He reported to police. On 14/4/2011, he met the 2<sup>nd</sup> accused on the road with a bull which he recognized as being his. He asked the person if it was for sale and the person offered to sell it at Kshs.30,000/-. PW1 offered to buy it if the person had documents for it but the person said it was not stolen. Assisted by members of public, PW1 went to Maseno Police Station. 2<sup>nd</sup> accused produced a fake permit. PW1 said that the bull looked like its mother which was photographed – PEx.1. He identified it by the spots on the forehead and the legs.

PW2, Charity Wakabari, PW1's wife confirmed that their bull was stolen and she received a report of its recovery on 14/2/2011. She saw the bull at the police station with the 2<sup>nd</sup> accused. She said that the bull looked like its mother.

Simon Murage (PW3), Paul Kamau (PW4), Paul Mwangi Gacheru (PW5) all of Subukia recalled that they learnt of the complainant's bull having been stolen on 5/6/2010. They knew it and saw it at the police station when it was recovered and identified it as the complainant's bull.

PW6, PC Sanda Tonje of Subukia Police Station was the Investigation Officer. He learnt of a person having been arrested with a stolen cow at Kagochi. The 1<sup>st</sup> accused then claimed to have bought it from the 4<sup>th</sup> accused and produced an agreement dated 14/4/2011, written in Kiswahili but did not contain the sale price. It was then claimed that the 3<sup>rd</sup> accused sold the cow to the 4<sup>th</sup> accused but they had no sale agreement. The cow was photographed.

The appellant (DW1) in his sworn evidence told the court that on 13/4/2011 he went to Subukia and asked Kabogo if he knew anybody selling a cow, they went together to Soronjo. They discussed and agreed on a price of Kshs.19,000/-. He paid on 14/4/2011 and they wrote an agreement and he asked Kabogo to take the cow to his home. Later he was called and informed that somebody was claiming the bull to be his and he went, found Kabogo arrested. He called Soronjo who also claimed to have bought it.

DW2, Kabogo Kinyua who was arrested with the cow said that he led the appellant to Soronjo who was selling a bull, they agreed on the price and when he was taking it home he was stopped by somebody who claimed the bull had been stolen.

DW3, Lukenya Mwai, in his unsworn evidence said that he has 9 cows. That in January 2010, he sold a young calf to Soronjo (4<sup>th</sup> accused) for Kshs.5,000/-. He was paid through MPESA and there was no written agreement. After a year, Soronjo called him and said that somebody was claiming the bull to have been stolen. He went to see it and it is the one he had sold to 4<sup>th</sup> accused.

DW4, Justus Sorocho Aminga in his sworn defence said that he bought the calf from 3<sup>rd</sup> accused on 5/5/2010 for Kshs.5,000/-. In 2011 he wanted a buyer and the appellant went to his home on 13/4/2011. They agreed on a price of Kshs.18,500/- and he collected the bull next day but he was called and informed that it had been stolen. He agreed that there was an agreement with the appellant but not with 3<sup>rd</sup> accused.

DW5, Wilfred Aminga is the father of the 4<sup>th</sup> accused. He testified to having known when 4<sup>th</sup> accused who bought a cow from the 3<sup>rd</sup> accused and that he sold it but it was said to have been stolen.

I have considered all the evidence on record and submissions by both the appellant and Ms Ngovi, Learned Counsel for the State. There is no doubt the bull in issue was found with the 2<sup>nd</sup> accused who then called the appellant who claimed to have bought it. So the bull was constructively in possession of the appellant.

The appellant produced in evidence a sale agreement (PEX.2) showing the seller to be the 4<sup>th</sup> accused, Julius Sorocho Aminga and the buyer being the appellant while the witness was the 2<sup>nd</sup> accused, Kabogo. The agreement was not signed by any of them and most significantly, it did not indicate what the consideration was. The appellant admitted that normally, a sale agreement is written in such a transaction. In cross examination, the appellant also admitted that a movement permit was also required and none was shown to the court. It is common knowledge that due to rampant stock theft, it is a requirement that the party moving cattle from one place to another or selling it has a permit issued by the local chief. The permit was missing and the appellant totally failed to give a plausible explanation of how he came into possession of the bull.

The 3<sup>rd</sup> accused claimed to have sold a calf to the 4<sup>th</sup> accused and that he was taken to Subukia Police Station to confirm whether the bull is what he sold to the 4<sup>th</sup> accused. The 3<sup>rd</sup> accused told the court that it was the same bull that he sold though he did not have any agreement to prove the sale. The trial magistrate went ahead to believe the 3<sup>rd</sup> accused's defence but did not believe the others. The court's finding was contradictory. If the trial court believed the 3<sup>rd</sup> accused's defence then it followed that the

bull in issue emanated from the 3<sup>rd</sup> accused. In my view, the court erred in acquitting the 3<sup>rd</sup> accused yet disbelieving the other accused persons. There was no evidence that the 3<sup>rd</sup> accused was the owner of the bull or that he sold it to the 4<sup>th</sup> accused who in turn sold it to the appellant.

PW1 positively identified the bull as his and even had the mother of the bull photographed to confirm the resemblance. He further identified it by the spots on the body and legs something that the 3<sup>rd</sup> accused, who claimed to be the original owner did not do. PW2 and three other witnesses, their neighbours who knew the calf at the time it was stolen also corroborated PW1's evidence.

In the end, I find that the appellant failed to give a plausible explanation of how he came by the bull. The bull was recovered after a period of about 10 months. Nobody witnessed the theft. I find that the appellant was in possession of stolen property and failed to give a plausible explanation of how he came to be in its possession. I will make no finding on the main charge and instead find him guilty of the alternative charge of handling stolen goods contrary to **Section 322(1) of the Penal Code**. The maximum sentence under the above section is 14 years imprisonment. When sentencing the appellant the court had taken into account the fact that he had been convicted of an offence of stealing stock which is relevant to the present one. Consequently, I will find that the sentence of five years imprisonment is fair and a confirm it. The appeal is hereby dismissed. It is so ordered.

**DATED and DELIVERED this 28<sup>th</sup> day of February, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

The appellant in person

Mr. Mombi for the respondent

Kennedy – Court Assistant