



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 181 OF 2012

LUCAS MUTUA KIMUYUAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Kithimani Principal Magistrate's Court Criminal Case No. 428 of 2012 by Hon. M.A.O. Oponga, Ag. SRM on 4/12/12)

JUDGMENT

1. The appellant was charged with stock theft contrary to **Section 278 of Penal Code**. The particulars of the offence being that on the night of **4th day of June, 2012** at **Mamba sub-location Ndalani Location** in **Yatta District** within **Machakos County** stole two she-goats all valued at **Kshs. 16,000/=** the property of **Beatrice Syomiti Kilonzo**.

In the alternative the appellant was charged with handling stolen property contrary to **Section 322(1)** as read with **Section 322 (2)** of the **Penal code**.

Particulars of the offence being that on the night of **5th day of June, 2012** at **Kithimani sub-location Kithimani Location** in **Yatta District** within **Machakos County** otherwise than in the course of stealing dishonestly retained two she-goats knowing or having reason to believe them to be stolen property.

2. He was tried, convicted on the main count and sentenced to serve **five (5)** years imprisonment.
3. Being aggrieved by the conviction and sentence the appellant appeals on the ground that;-
 - i. The entire trial was a nullity as part of the trial was conducted by an unqualified police prosecutor;
 - ii. The case was not proved beyond reasonable doubt.
 - iii. The trial magistrate misdirected herself by reaching a finding that circumstantial evidence adduced was overwhelming;
4. To support his appeal the appellant filed written submissions.
5. **Ms Kefa**, the learned State Counsel conceded to the appeal on the ground that proceedings were indeed a nullity as the prosecutor who conducted the case was not gazetted as required by the law. She stated that **P.C Wachira** was gazetted on the **7th December, 2012**.
6. This being the first appellate court my duty is to re-consider and re-evaluate what transpired before the trial court bearing in mind that I neither saw nor heard witnesses who testified. (See **Okeno versus Republic [1972] E.A 32**).
7. It is apparent that **P.C Wachira** conducted the prosecution's case when the trial commenced upto the time of its conclusion on the **4th day of December, 2012**.

8. **P.C Wachira** having not been gazetted per the requirement of **Section 85(2)** of the **Criminal Procedure Code**, he was an unqualified prosecutor. Having conducted the prosecution's case, it was vitiated. The case was a nullity in the circumstances.
9. The State did not seek a retrial. The appellant has been in custody for **two (2) years**. Considering the value of the stock alleged to have been stolen, this court would not think of ordering a retrial.
10. I therefore declare the trial a nullity, quash the conviction and set aside the sentence meted out. The appellant shall be set at liberty, unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of MAY, 2014.

L.N. MUTENDE

JUDGE