



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 88,89 &90 of 2012

NO.723

LUDUKUSWEI KESHAN ..... 1<sup>st</sup> APPELLANT

JAMES MACHERA RIOBA ..... 2<sup>nd</sup> APPELLANT

FREDRICK SAGIRA MWITA ..... 3<sup>rd</sup> APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Being an appeal from the conviction and sentence of the Honourable Mr. T.A. SITATI, (RM) delivered on the 3<sup>RD</sup> April 2012 in the original Kehancha SRMCR. Case No.503 of 2011)*

JUDGMENT

1.The appellants herein were the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused in Kehancha SRM's Criminal Case No.503 of 2011. They were charged with stealing stock contrary to **section 278** of the **Penal Code**. The particulars of the charge were that on the night of 13<sup>th</sup> October 2011 at Gimikonge village in Kuria West District within Nyanza Province jointly stole one bull and a cow valued at Kshs.120,000/= the property of SAMSON MWITA MARWA.

2.The 1<sup>st</sup> accused (not an appellant in this case) faced an alternative charge of handling stolen goods contrary to **section 322 (1) (2)** of the **Penal Code**.

**HCCRA (KISII) NOS. 88, 89 AND 90 OF 2012**

**(CONSOLIDATED)**

**NO.723**

3. The particulars of the charge were that on the 13<sup>th</sup> day of October 2011

at Nyaibara in Kuria East District within Nyanza Province, otherwise than in the course of stealing dishonestly retained one bull valued at Kshs.40,000/= knowing or having reason to believe them to be stolen goods.

4.They were all tried and found guilty of handling stolen goods contrary to **section 322 (1) (2)** of the **Penal Code**. They were sentenced to 7 years imprisonment.

5.The 3 appellants being aggrieved and dissatisfied with the said conviction and sentence each filed an appeal against the same to this court. When the matter came before me for trial and determination all the 3 appeals were consolidated under file number 88 of 2012.

6.The appeal was premised on the following grounds:-.

*1.That the learned magistrate failed to properly evaluate the evidence before him thus reaching on erroneous decision.*

*2.That the learned magistrate erred in dismissing the defence which was advanced by the appellants and failing to take cognizance that the explanation given by the appellants on the manner they came into the possession of the cow hide and/or the cow was reasonable explanation.*

*3.That the learned magistrate erred in conducting proceedings in a language the appellants did not understand and/or failing to avail the appellants the facility of interpretation to the language of his choice*

**HCCRA (KISII) NOS. 88, 89 AND 90 OF 2012**

**(CONSOLIDATED)**

**NO.723**

*understanding thus occasioning miscarriage of justice.*

*4.That the learned magistrate erred by engaging onto speculation as a basis of conviction and sentence against the appellant.*

*5.That the learned magistrate erred by failing to appreciate that charges facing the accused person were defective.*

7.The appellants therefore pray that the appeal be allowed and the conviction and sentence dated 3<sup>rd</sup> day of April 2012 be quashed, varied and or set aside and substituting the same by an order dismissing the charges facing the appellants before the subordinate court; that consequent to prayer (1) above being granted the appellants be set at liberty forthwith and that the court may issue such further and/or other relief as the court may deem necessary.

8.This appeal was not opposed by Mr. Mutuku for the state who submitted that the appellants' conviction based on recovery of cow skin brown in colour with a mark (M) was not sufficient evidence to support the conviction; that the mark (M) is not unique and that the animal had been sold and bought in the open market thus they had nothing to hide.

9.Secondly, he submitted that the defence given by each appellant was reasonable explanation of how they had come to be in possession of the cow/cow skin and if indeed the appellants had handled stolen goods the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants would have been purchasers for value without

**HCCRA (KISII) NOS. 88, 89 AND 90 OF 2012**

**(CONSOLIDATED)**

**NO.723**

notice.

10.Thirdly, he submitted that none of the appellants was seen stealing a cow from the complainant. Counsel also submitted that the sentence imposed by the trial court was contrary to the law, and in particular the amended **section 278** of the **Penal Code** which removed the minimum sentence. Counsel also submitted that the appellants herein were convicted and sentenced for the handling

charge which was a charge against the 1<sup>st</sup> accused in the lower court who has not appealed.

11. Lastly counsel submitted that the sentence was both harsh and excessive as the words accompanying the sentencing on the handling charge were extraneous and did not form part of the prosecution's case against the appellant. He urged the court to allow the appeal.

12. Mr. Otieno for the appellants concurred with the above submissions made by counsel for the State and further referred court at **Francis Koikoi Katikenya –vs- R. – Criminal Appeal No.1176, 1183 and 1187 of 2002** and further submitted that throughout the proceedings the trial court did not indicate the language in which the proceedings were conducted and that failure to do so was fatal to the trial. He also

***HCCRA (KISII) NOS. 88, 89 AND 90 OF 2012***

***(CONSOLIDATED)  
NO.723***

referred the court to:- **James Maina Wanjiru –vs- R – Criminal Appeal No.30 of 2006, Paul Kangeru Mwangi –vs- Republic – Criminal Appeal No.128 of 2004 and Peter Koech & others –vs- Criminal Appeal No.241, 242 and 243 of 2010.**

13. This being a first appeal, I am in law required to re-evaluate the evidence tendered before the trial court so as to come to my own conclusion on the same though taking into account the fact that I did not have the advantage of hearing and seeing the witnesses as did the trial court. See generally **Okeno –vs- Republic [1972] EA 32.**

14. I have gone through the evidence that was adduced before the trial court by Samson Mwita Marwa (PW1) who was the complainant, Number 82047 Corporal Joseph Kipngeno (PW2), Jacob Chacha, (PW3) a trader in cow hide and goat skin from whose business premises a cow skin was recovered by police. I have also carefully reconsidered the evidence adduced by Tabitha Muruga (PW4) the Assistant Chief of Nyaitara sub location who after receiving a report for the theft of the complainant's animals alerted the police who eventually arrested the appellants. Number 85090 PC Samwel Mwachoki testified as PW5. He is the one who made the arrests herein. PW6, PC

***HCCRA (KISII) NOS. 88, 89 AND 90 OF 2012***

***(CONSOLIDATED)  
NO.723***

Geoffrey Openda collected exhibits and produced them in court.

15. I have also reconsidered and evaluated the evidence given by all the 3 appellants during their defence. I have also considered the law. The question that arises for determination is whether the prosecution proved its case beyond any reasonable doubt against each of the appellants herein.

16. From all the above examination of the evidence on record, I have reached the conclusion that the conviction of the appellants by the trial court was not safe. The reasons advanced by the State in conceding this appeal are sound and I concur that the whole of the evidence laid before the trial court was flawed and further that if the trial court had given more thought to the appellants' defences, it would have found that the explanation offered by each appellant was reasonable in the circumstances. That defence raised reasonable doubt as to whether indeed the offence charged had been committed. That doubt should have been for the appellants' benefit.

17. I also find and hold that failure by the court to indicate the language in which the proceedings were conducted was prejudicial to the appellants and fatal to the proceedings. See **Adan –vs- Republic**

***HCCRA (KISII) NOS. 88, 89 AND 90 OF 2012***

**(CONSOLIDATED)**

**NO.723**

**[1973] EA 445.**

18.In the premises, I am persuaded that this appeal is merited. The same is allowed. The convictions are quashed and the sentences set aside. Unless any of the appellants is otherwise lawfully held, they are to be released from prison custody forthwith.

19.It is so ordered.

**Dated and delivered at Kisii this 28<sup>th</sup> day of March, 2013**

**RUTH NEKOYE SITATI**  
**JUDGE.**

In the presence of:

Miss Kusa for Appellants

Miss C. Cheruiyot for State

Mr. bibu - Court Clerk

**RUTH NEKOYE SITATI**  
**JUDGE.**

***HCCRA (KISII) NOS. 88, 89 AND 90 OF 2012***

**(CONSOLIDATED)**