



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 19 OF 2013**  
**CONSOLIDATED WITH**  
**CRIMINAL APPEAL NO. 20 OF 2013**

**BETWEEN**

**MARTIN MUGENDI NJERU .....1<sup>ST</sup> APPELLANT**

**MICHAEL MUGENDI NJIRU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(BEING AN APPEAL FROM THE ORIGINAL CONVICTION AND SENTENCE IN EMBU  
CRIMINAL CASE 1555 OF 2012 BY D. A. OCHARO AG. P.M ON 17<sup>TH</sup> MAY, 2013)***

**JUDGMENT**

1. Martin Mugendi and Michael Mugendi Njiru were charged with stealing stock contrary to **section 278** of the **Penal Code** and an alternative charge of handling stolen goods contrary to **section 322(1)** as read with **section 322(2)** of the **Penal Code**. They were convicted of the offence of stealing. The particulars were that on 14<sup>th</sup> December 2012 at Rianyagi sub-location of Embu Municipality, they jointly stole two goats valued at Kshs.10,000/= being the property of Esther Wanjira Njiru.
2. The complainant, PW1 testified that on 14<sup>th</sup> December 2012 at 5.00 am she woke up to find the two goats missing. She informed the village elder, sub-chief and made a report at Manyatta Police Station. She was later informed that the goats had been found in possession of two men. She proceeded to Kangaru Police Station where the goats were identified; one was brownish he-goat with big horns and a whitish she-goat. The goats were duly photographed by an authorised officer PW 4 and handed back to the complainant.
3. PW 5, Corporal Odongo, testified that he received information from the public that two young men were carrying two goats in a sack and attempting to dispose of them had been seen at Gakwegori Trading Centre in circumstances to suggest that they had been stolen. He rushed to the centre and found the appellant negotiating with a prospective buyer outside a butchery. The two were then arrested and charged and consequently convicted on evidence which the learned magistrate concluded was unassailable as the prosecution had proved the goats were stolen and recovered in the appellants' possession.

4. Counsel for the appellant contended that the magistrate erred in law and in fact by convicting the appellants without sufficient evidence.
5. As this is a first appeal, the High Court is called upon to reevaluate the evidence with the caveat that it did not see or hear the witnesses. Having considered the evidence this appeal must succeed.
6. In an offence of stealing, the identity of the goods stolen is an essential ingredient of the offence that the prosecution must prove. The prosecution case is that two goats valued at Kshs.10,000/= were stolen from PW 1. The two goats were duly photographed by PW 4, a police officer and returned to her. PW 4 produced the photographs as Exhibit 1(a) and (b) together with the certificate.
7. Unfortunately, the photographs were not put to PW 1 in examination in chief to confirm that indeed the photographs were those of her stolen goats. Likewise, PW 5 who arrested the appellants with the goats did not identify the goats although he confirmed that PW 1 came with her sons and identified the goats as hers. He did not describe the goats nor were the photographs of the goats put to him to confirm that the photographs were those of the goats he allegedly found in the appellants' possession.
8. While it is not a doubt that PW 1 woke up on the material date to find her goats missing and the appellants found in actual possession of goats, the identity of the goats which were photographed was not confirmed by her or the arresting officer.
9. The accused gave sworn evidence and were cross-examined but the photographs of the goats were not put to them.
10. In the circumstances, I find that the identity of the goats stolen was not proved. In the circumstances, the appeal is allowed, the conviction and sentence are quashed. The appellants are set free unless otherwise lawfully held.

**DATED and DELIVERED at EMBU this 30<sup>th</sup> day of October 2013**

**D.S. MAJANJA**

**JUDGE**