



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 130 OF 2012

ANTHONY MUGENDIAPPELLANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Criminal Case No.448 of 2012 at the Principal Magistrate's Court at Runyenjes by Hon. G.P. WENDI - PM on 20/7/2012

J U D G M E N T

ANTHONY MUGENDI the Appellant was charged with the offence of stock theft contrary to section 278 of the Penal Code.

The particulars as stated in the charge sheet were as follows;

ANTHONY MUGENDI: On the nights of 19th and 20th May 2012 at Runyenjes Township, Gicheche sub-location in Embu County, jointly with another not before the Court, stole one he-goat valued at kshs.10,000/= the property of LINUS MWANIKI GACHAU.

ALTERNATIVE COUNT

Handling stolen goods contrary to section 322(1) of the Penal Code.

The particulars as stated in the charge sheet were as follows;

ANTHONY MUGENDI: On the 20th day of May 2012 at Gitare village, Gitare sub-location in Embu County, otherwise than in the course of the stealing, dishonestly handled one he-goat knowing or having reasons to believe it to be stolen goods.

The Appellant pleaded not guilty to the charges and the matter proceeded to full hearing. He was convicted and sentenced to seven (7) years imprisonment. The Appellant was aggrieved by the Judgment and filed this appeal against both conviction and sentence. He cited the following grounds;

1. ***That the learned trial Magistrate erred in both points of law and fact by putting reliance on evidence of PW1 which was not consistent to base conviction.***
2. ***That the learned trial Magistrate erred in law and facts by putting reliance on evidence adduced by the witnesses without observing that the same was surrounded and tainted with a lot of discrepancies namely;***

- a. *Un corroboration*
 - b. *Contradiction*
 - c. *Inconsistencies*
3. *That the learned trial Magistrate erred in law and facts by not considering that the evidence adduced was single evidence.*
 4. *That the learned trial Magistrate erred in both points of law and facts by rejecting the Appellant's defence which was solid and cogent to his acquittal.*

The Prosecution case presented to Court was that on 20/5/2012 at 7am PW1 woke up to find his he-goat missing from where he had tethered it. The matter was reported to the administration. The sub-area of Kimuri village directed him to Ndwiga Mwaniki's home. They went to the said home and found his he-goat tethered on a tree. The Appellant and his brother were arrested but the brother ran away. The father of the Appellant also ran away. PW2 testified that when he went to the home of the Appellant he found the he-goat tethered behind the cattle pen at the accused father's compound. The Appellant in his unsworn defence denied the charges. He stated that the person who stole the he-goat ran away.

When the appeal came for hearing the Appellant presented written submissions. He expounded on the fact that he was never in possession of the he-goat. Mrs Aluda the learned State Counsel did not oppose the appeal on the ground that possession was not proved. And that the defence of the Appellant was not considered.

This is a first appeal and this Court is enjoined to re-evaluate the evidence adduced. It also has to remember that it did not see nor hear the witnesses. I am guided by the case of *KINYANJUI & ANOTHER [2004]2 KLR page 364* where the Court of Appeal stated as follows;

1. *On a first appeal in criminal cases, the High Court is also mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment.*
2. *In reaching its decision, the High Court has to put in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore could not be expected to make any findings as to the demeanour of the said witnesses.*

The evidence before the Court confirms that indeed PW1's he-goat was found missing from his home on the morning of 20/5/2012 at 7am. He reported the matter. Later in the day the same he-goat was found tethered outside the compound of the Appellant's father. The Appellant and his brother were arrested. Their father and the Appellant's brother ran away when they saw the police motor vehicle.

From this analysis it is clear that the Prosecution never established who between the Appellant, his father and his brother was in possession of the he-goat. It was only after establishing possession that the thief would be identified.

The Appellant in his defence stated that the person who stole the goat ran away. It is true that the father and the brother of the Appellant ran away when police came. Why did they run away if they were innocent? There was no evidence directly or even remotely pointing to the Appellant as the thief. Secondly I should mention that the learned trial Magistrate should always indicate the language of use by the witnesses in testifying. The state has rightly conceded the appeal.

The result is that the appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant to be released unless lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 17TH DAY OF OCTOBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Appellant

Mutero/Kirong – C/c