



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 77 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 773 of 2008 of the Senior Resident Magistrate's Court

at Taveta: J.M. Githaiga – S.R.M.)

PETER SAMMY KATOTO KARORI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant has filed this appeal against his conviction and sentence on a charge of **STEALING STOCK CONTRARY TO SECTION 278 OF THE PENAL CODE**. The Appellant entered a plea of '*not guilty*' to the charge. The prosecution led by **INSPECTOR GALAMA HAPPI** called a total of six (6) witnesses in support of their case. In brief the prosecution case was that the Appellant who was a son to the complainant over a period of time stole over 60 head of cattle from the complainant's herd worth Kshs.2.1 million. The Appellant then sold the cattle and kept the proceeds for himself. **PW2 NDIETA OLE SINDILA**, a herdsboy employed by the complainant told the court that the Appellant would come and take cattle from his father's herd claiming that the family needed to raise money for the medical expenses of his father. Once the theft was discovered the Appellant was arrested and was charged.

At the close of the prosecution case the Appellant was found to have a case to answer. He gave an unsworn defence in which he denied the charges.

On 19th February 2009 the learned trial magistrate delivered his judgement, in which he convicted the Appellant and sentenced him to serve six (6) years imprisonment. Being aggrieved the Appellant filed this present appeal.

MR. MAGOLO Advocate argued the appeal for the Appellant. **MR. ONSERIO** learned State Counsel conceded the appeal on behalf of the State.

I have myself considered the evidence on record, and I do find the same wanting in several aspects. The complainant alleges that the Appellant stole 60 cattle which belonged to him. No description has been given at all of the 60 cattle allegedly stolen. Were they male or female? What were their colours? **PW3 LEAH KARORI** the complainant's wife told the court that she visited their cattle boma at Salaita and found several cattle missing. **PW3** too fails to give an adequate description of the stolen livestock. **PW2 NDIETA OLE SINDILA** the herdsboy who was employed by the complainant told the court that the

Appellant went to the boma on various occasions and took away cattle claiming that he had been sent by the complainant. **PW2** does not give a description of which cattle the Appellant took in this manner. In a case of theft it is essential that the allegedly stolen property be adequately described. To simply refer to ‘cows’ does not adequately describe the stolen property. Cows can be of different shapes, sizes, colours, male or female and in some cases may have been branded with marks exclusive to the owner.

PW4 KETUKEI OLE KENGES told the court that the Appellant sold him three bulls. He too gives no description of the bulls so sold. Thus there is no way of knowing if the bulls sold to **PW4** were taken from the complainant’s herd. Cows and bulls are very common forms of livestock and are found in almost every rural Kenyan home. No evidence is adduced to show that the three bulls sold to **PW4** came from the complainant’s herd. The mere fact that the Appellant sold livestock to third parties is not proof that he stole the same from the complainant. I find that the prosecution evidence falls short in this respect.

PW2 was a minor. The trial magistrate did indicate that he conducted a voire dire examination on the child before receiving his testimony. However it is essential that the content of the voire dire examination be recorded. The questions posed to the child and his answers thereto must be recorded by the trial court. This will enable the appeal court to determine whether the trial magistrate’s conclusion that the child was competent to give sworn evidence was justifiable. In the case of **JOHNSON MUIRURI –VS- REPUBLIC [1983] KLR 445**, the Court of Appeal held as follows:

“2. it is important to set out the questions and answers [my own emphasis] when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

(3)

(4)

(5)

(6) The Judge (or Magistrate) is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to the conviction”

In this case the learned trial magistrate did not comply with the Court of Appeal guidelines in this **Muiruri** case. This failure is fatal to the subsequent conviction of the Appellant.

Finally I find that the Appellant’s conviction was unsafe. The evidence adduced by the prosecution did not meet the required standard of proof. Consequently I hereby allow this appeal. The Appellant’s conviction is quashed and his six (6) year sentence is set aside. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 10th day of January 2012.

M. ODERO
JUDGE

In the presence of:
Mr. Magolo for Appellant
Mr. Onserio for State