



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU  
CRIMINAL APPEAL NO. 376 OF 2010

(From original conviction and sentence in Criminal Case No. 3094 of 2009 of the Principal Magistrate's Court at Naivasha – P.M. MULWA, PM)

FRANCIS WAINAINA MBUGUA.....APPELLANT  
VERSUS  
REPUBLIC.....RESPONDENT

**JUDGMENT**

The appellant herein is Francis Wainaina Mbugua. He appeals against the conviction and sentence of P.M. Mulwa, Principal Magistrate in Naivasha Criminal Case No.3094/09. The appellant was charged jointly with Moses Kipas Kandim and Joseph Kagwi Maina for the offence of stealing stock contrary to **Section 278** of the **Penal Code**. It was alleged that on the night of 6<sup>th</sup> and 7<sup>th</sup> December 2009, at Muitumberia Village, Karunga Location, Gilgil Division, Naivasha District, stole 45 flocks of sheep/goats worth Kshs.95,000/-, the property of Dedan Mahira. In the alternative, the three accused faced a charge of handling stolen property contrary to **Section 322(2)** of the **Penal Code**, in that on 8/12/2009 at about 10.00 a.m. at Naivasha Township, other than in the cause of stealing, dishonestly handled 23 flock of sheep/goats worth Kshs.138,000/-, the property of Dedan Mahira, knowingly or having reason to believe that the same were stolen or unlawfully obtained. After a full trial, the magistrate acquitted the 1<sup>st</sup> accused but found the 2<sup>nd</sup> and 3<sup>rd</sup> accused guilty, convicted them on the main charge and sentenced them to serve 5 years imprisonment each. The appellant who was the 3<sup>rd</sup> accused is aggrieved by the said conviction and sentence based on the following grounds:-

1. **That the conviction was based on contradictory evidence;**
2. **That the prosecution failed to prove its case to the standard required;**
3. **That the sentence was excessive.**

The appellant therefore prays that the appeal be allowed, conviction be quashed and the sentence be set aside.

The brief facts of this case are that Dedan Mahira Ritho owns a farm at Mbewi in Gilgil where he keeps goats. On the morning of 7/12/2009 he received information from one of his employees that 45 goats had been stolen and he directed them to report to the Anti Stock theft offices which they did. He went to the

farm to help in the search.

PW2, George Mbugua a servant of Dedan (PW1) recalled that he closed up the goats on the evening of 6/12/2009 and on the next day at 7.00 p.m. he was informed that 45 goats had been stolen. He went to the scene and found that the fence had been cut and noted goats' hoof marks upto the fence. PW1, PW2 and in company of PW3, PC James Simpiri and PW4 Cpl Stephen Korir searched for the goats on 7/12/09 to no avail but on 8/12/09 they went in search and found them at Naivasha Slaughter House. The goats were identified by the marks on the ears of the goats by the complainant and PW2. They recovered 23 goats. PW1 found the accused persons arrested. PW2 said that he found the 2<sup>nd</sup> and 3<sup>rd</sup> accused guarding the goats at the slaughter house. PW3 said that people who were guarding the goats saw them and started to run away and they pursued them and arrested them. He identified them as accused 2 and the appellant.

PW4 also said that at Naivasha Slaughter House, they found accused 2 and the appellant guarding the goats which were identified by the complainant and the two were arrested.

DW1 in his unsworn defence said that he had left his place of residence on his way to town when he met a vehicle with 4 occupants. They stopped and arrested him and alleged that he had committed the offence. DW2 told the court on oath that he was a conductor in motor vehicle KAD a PSV plying Njoro Limuru Road. At Gilgil, three maasai men hired them to ferry goats to Dagoretti in Nairobi and they charged them Kshs.6,000/-. It was at 5.00 a.m. and they carried 35 goats. Their vehicle overturned after a tyre burst. The three Maasai men ran away and they were taken to hospital as the goats were put in a breakdown vehicle. While at the slaughter house, he was arrested and they explained how they came by the goats following which the 1<sup>st</sup> accused was arrested. The appellant stated on oath that he was the owner of motor vehicle KAD 817G Matatu PSV. He was hired to take children to Njoro and on the way back to Nairobi, at Gilgil, at about 5.00 a.m. they were stopped by three Maasai men who wanted their goats transported to Dagoretti, Nairobi. When near Naivasha, the vehicle overturned due to a tyre burst. Traffic officers came to the scene and called a break down. The Maasai men ran away and the breakdown ferried the goats from the scene. He consulted with police officers who advised him to go and take care of the goats in case the owners asked for them. He found out that the goats were at the slaughterhouse where he was found by Anti Stock Theft Police. He said that they managed to spot Kipas, accused. The appellant agreed that he had no permit to ferry animals but that the Maasai men had it.

Ms Njoroge, counsel for the appellant submitted that there were contradictions in the prosecution evidence in that whereas the complainant said that he had stopped near Naivasha prison when the search party called him that his goats were recovered, PW3 said that they went to Naivasha slaughter house where they found some goats awaiting sale and the complainant identified them as his; that PW3 added that the people on seeing them started to ran.

In my assessment of the evidence on record, I find no material contradictions that would go to weaken the prosecution case. There is no doubt that the goats were found in possession of the 2<sup>nd</sup> accused and appellant while at the Naivasha Slaughter House. The appellant admitted it. That is the bottom line. From PW1's testimony, he was with the others PW2 and PW4 but he stopped at the Naivasha prisons gate. The others went ahead of him and called him to inform him that they had recovered his goats which he went and identified. His employee, PW2 also identified the marks on the ears of the goats. The minor contradictions pointed out by counsel do not go to weaken the prosecution case in any way.

Counsel also raised issue with the finding of the trial court that accused 1 was a passer by. Accused 1 was arrested after accused 2 and the appellant implicated him. On being confronted by the police, the appellant and accused 2 claimed that Kipas left them with the goats to guard. In their defence, however, they denied knowing who the three Maasais who hired them were and that the Maasai men ran off after the accident. However, in the same breath the appellant claims to have led to the arrest of Kipas. If the appellant did not know the Maasai men, it is questionable how he knew where and how to truck down accused 1. What led to the arrest of 1<sup>st</sup> accused was accomplice evidence, by the 2<sup>nd</sup> and the appellant. For the court to found a conviction on it, it should have been corroborated by other independent evidence. The statement by PW3 that they found accused 1 looking for goats was not sufficient corroboration. In my view, the trial court correctly arrived at the decision to acquit accused 1 based on the

evidence before it.

As noted above, there is no doubt that the appellant and accused 2 were found in possession of the complainant's goats. The goats had been stolen on the night of 6<sup>th</sup> and 7<sup>th</sup> December 2009 and were recovered a day, later on 8<sup>th</sup> December 2009. Out of 45 goats, 23 were recovered. The appellant was in recent possession of the stolen goats. The appellant admits that they were arrested at the slaughter house and I find there to be no material contradiction in the prosecution evidence at all. Having established possession, it was upon the appellant to give a reasonable explanation on how he came by the goats and that does not amount to shifting the burden of proof. The trial court did not accept the explanation given by the appellant. I have considered the appellants explanation earlier on in this judgment. In its judgment, the trial court analysed the evidence in detail and gave reasons for the conclusions which the court arrived at. The appellant having said that the Maasais who hired them to ferry the goats had ran off, the mere act of running must have raised suspicion in his mind as to whether the Maasais were the true owners of the goats. It does not make sense that the appellant went to guard the goats at the slaughter house '**in case the owner came for them**'. Which owner would be looking for the goats if the Maasai owners had ran off? The trial court properly observed that the appellant and another having been guarding the goats at the slaughter house, it could only lead to the conclusion that they wanted to dispose of them for purposes of slaughter. I do find as the trial court did that having been in recent possession of the goats, the only conclusion that this court arrives at is that the appellant was one of those who stole the goats. I reject his defence as not being reasonable in the circumstances. The prosecution proved their case beyond any doubt as by law required. I therefore confirm the conviction.

The appellant complained that the sentence is excessive. The maximum sentence under Section 278 of the Penal Code is 14 years imprisonment. The appellant was said to be a 1<sup>st</sup> offender and I find a sentence of 5 years to be fair in the circumstances. I confirm the said sentence. In the result I dismiss the appeal both on conviction and sentence.

**DATED and DELIVERED this 17<sup>th</sup> day of February, 2012.**

**R.P.V. WENDOH**

**JUDGE**

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**PRESENT:**

Ms Idagwa for the State.

Ms Njoroge for the appellant.

Appellant present.

Kennedy – Court Clerk.