



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL 65 OF 2011**

*(From original conviction and sentence in Criminal Case No.783 of 2009 of the Principal Magistrate's court at Molo – (S.M.S. SOITA, PM)*

**JOHN KIPLANGAT RUTO.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**JUDGMENT**

This is an appeal from the judgment of S.M.S. Soita, Principal Magistrate, Molo in Criminal Case No. 783 of 2009. The appellant, John Kiplangat Ruto was jointly charged with Jane Chemutai Chepkwony for an offence of stealing stock contrary to **Section 278** of the **Penal Code**. It was alleged that on 22/3/09 at Huruma Estate, Londiani in Kipkelion District, with others not before the court, stole seven heads of cattle, the property of Robert Kiplimo Mulei. In the alternative, the 2<sup>nd</sup> accused, Jane Chemutai was charged with the offence of handling stolen goods contrary to **Section 322(2)** of the **Penal Code** in that she was found in possession of one Fresian cow knowing or having reason to believe it had been stolen.

The case proceeded to full hearing with the prosecution calling a total of four witnesses. The appellant made unsworn statement in his defence while his co-accused, Jane Chemutai gave a sworn statement. The court acquitted the 2<sup>nd</sup> accused on the main and alternative charge but the appellant was convicted on the main charge and sentenced to serve 5 years in prison. He filed this appeal against both conviction and sentence.

At the hearing of the appeal, the appellant conceded the conviction and only asked the court for leniency on the sentence, if possible, to be placed on Community Service Order.

Mr. Nyakundi, learned counsel for the State conceded to the appeal for reasons that the conviction was not proper, that the only evidence against the appellant was by a co-accused who was charged as accused 2. Counsel submitted that accused 2 who linked the appellant to the offence should have been made a witness. He said that without any other independent evidence linking the appellant with the offence, a conviction cannot be sustained.

The brief facts of this case are that Robert Kiplimo Murei (PW1) went to bed about 9.00 p.m. on 22/3/09 His 7 head of cattle had been secured at 6.00 p.m. When he woke up the next day, the cows were all missing. They were 5 female and 2 bulls. He made a report to the police and Anti Stock Theft Unit

were involved and started looking for the cattle. PW1 was called to Chepseion police post on 26/3/09 where he identified his 6 animals. The 7<sup>th</sup> one which was allegedly sold was also recovered later. He did not know any of the suspects who were arrested.

PW2, William cheruiyot Chirchir, the Assistant Chief of Chesinendet sublocation was at a leaders' meeting on 25/3/2009 when he received a report that some stolen cows were being sold at Mau Forest. He rushed to the scene, but the 4 suspects ran into the forest. He recovered 3 cows. Later, he arrested accused 2 with a cow allegedly sold to her by the appellant. He sent vigilantes to arrest the appellant.

PW3, Joseph Ropi, a village elder found 2 cows abandoned in his home on 25/3/09. He took the cows to the post. He also learned of accused 2 having bought a stolen cow. PW4, Cpl James Omolo is the one who received a report from PW1 about the theft of his cattle and circulated the report. Later, the cattle were recovered and he re-arrested two suspects from the chief of the area, the appellant and accused 2.

Apart from PW2 alleging that he was informed that it is the appellant who had the stolen cattle that were recovered, the only other evidence that linked the appellant to the stolen cattle was that of the 2<sup>nd</sup> accused. It means that the only evidence that linked the appellant to the theft was that of an accomplice. In the case of **R. v Ndara s/o Kariuki & 6 Others (1945)12 EACA 84 (pg 86)**, the court enunciated the correct approach to accomplice evidence, thus:-

**“A point which is sometimes lost sight of in considering accomplice evidence is, that the first duty of the court is to decide whether the accomplice is a credible witness.**

**If the court, after hearing all the evidence feels that it cannot believe the accomplice it must reject his evidence and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending not connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief.”**

Again in the case of **Kinyua v Republic (2002)1 KLR 256**, the court reiterated the above position when it said at holding:-

**“8. Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.**

**9. If the court decides that the accomplice witness' evidence, though credible requires corroboration, the court must look for, find and identify the corroborative evidence.”**

**Section 141** of the **Evidence Act** provides that an accomplice shall be a competent witness against an accused person, and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice. However, as held in the above case's the court must warn itself of the danger of evidence of an accomplice and record that it believes the said evidence.

In this case, the court believed accused 2's testimony when it went ahead to acquit her of the offence because she said she had bought the cow from the appellant. The appellant's conviction was based on the testimony of the 2<sup>nd</sup> accused. However, the court never warned itself of the danger of basing the appellant's conviction on that evidence. Having relied on that evidence, there should have been other independent evidence, either direct or circumstantial to corroborate accused 2's evidence. That was lacking, otherwise the prosecution should have treated accused 2 as a witness.

In the end, I agree with the learned State counsel that the conviction of the appellant is unsafe. It is hereby quashed, sentence set aside and the appellant is set free forthwith unless otherwise lawfully held.

**DATED and DELIVERED this 30<sup>th</sup> day of May, 2012.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

The appellant in person  
Mr. Nyakundi for the State  
Kennedy – Court Clerk