



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 143 OF 2010**

**SIMON KIPKOSGEI**

**BOR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPON**

**DENT**

*(Being Appeal from the Judgment of the Chief Magistrate's Court at Eldoret in Criminal Case No. 7354 of 2009*

*delivered by Hon. N. Shiundu – Senior Resident Magistrate on 14<sup>th</sup> September, 2010.)*

**J U D G M E N T**

The appellant, **Simon Kipkosgei Bor**, and two others appeared before the Senior Resident Magistrate at Eldoret facing three counts of stealing stock contrary to section 278 of the Penal Code.

It was alleged that on the 23<sup>rd</sup> day of August, 2009 at Kitingia Village, Uasin Gishu District, they jointly stole a heifer valued at Kshs.20,000/-, the property of Abraham Kibiwott Tuwei and also that, on the 27<sup>th</sup> November 2009 at Olainguse Location Uasin Gishu District, they jointly stole one cow valued at Kshs.35,000/- the property of Joseph Tarus and one cow valued at Kshs.30,000/- the property of Pauline Chepkurgat.

Alternatively, they were charged with handling stolen goods contrary to section 322(2) of the Penal Code, in that on the 2<sup>nd</sup> December 2009 at Koilot Village Nandi South District, otherwise than in the course of stealing, jointly dishonestly received or retained three cows valued at Kshs.85,000/- knowing or having reason to believe them to be stolen goods.

On the outset, the alternative charge was defective for duplicity for the reason that the elements or ingredients of receipt and retention were included in a single charge (see, **Selimina Mbeu Owuor & Another v.s. Republic Criminal Appeal No. 68 of 1999 (C/A)**).

Be that as it may, the appellant pleaded not guilty to all the counts. He was thereafter tried, convicted and sentenced to five (5) years imprisonment on each of the main counts. The sentence was to run concurrently.

The appellant's co-accused were acquitted in accordance with section 215 of the Criminal Procedure Code. Being dissatisfied with the conviction and sentence, the appellant filed the present appeal on the basis of the following grounds;-

- (1) That the learned trial magistrate erred in law and fact by finding the appellant guilty notwithstanding the fact that the prosecution had not proved its case on the requisite threshold of prove beyond any reasonable doubt.***
  
- (2) That the learned trial magistrate erred in law and in fact by wholly disregarding and/or failing to consider all the material evidence placed before him thereby reaching a wrong decision altogether.***
  
- (3) That the learned trial magistrate erred in law and in fact by disregarding the inconsistency and contradictions in the prosecution case which raised doubts on that case.***
  
- (4) That the learned trial magistrate erred in law and in fact by finding that the stolen livestock was found at the appellant's homestead and that proved charges of handling stolen property and that such findings was absolutely watertight when it was not.***
  
- (5) That the learned trial magistrate failed to consider the appellant's explanation in defence.***
  
- (6) That the learned trial magistrate erred in law and in fact by failing to extent the benefit of doubt to the appellant.***

Learned Counsel, **Mr. Terer**, argued the said grounds on behalf of the appellant. The learned state counsel, **Mr. Kabaka**, appeared for the respondent and conceded the appeal while more or less agreeing with the appellant's submissions in support of the appeal.

In his submissions, the appellant's learned counsel stated that the appellant was convicted for the main reason that the stolen stock was found in his homestead in accordance with what was stated by PW1, 2 and PW3. However, the evidence by the said witnesses was in contradiction to that by PW5, PW6 and PW7 who did not say that the stolen stock was found in the appellant's homestead. PW7 stated that the stolen stock was found in the home of one Samuel Morendat.

The appellant's learned counsel further submitted that the defence raised by the appellant's showed that police officers and an area chief went to his homestead and informed him that he was suspected of stealing stock which stock was not found in his homestead yet the learned trial magistrate found that the scene of the recovery of the stolen stock was the appellant's homestead.

Learned counsel went on to submit that the entire evidence against the appellant did not establish theft since the complainants said that they found their stock missing and were later informed by administration police officers that the stock had been traced. Learned counsel contended that there was no theft linked to the appellant and urged this court to allow the appeal.

To allow or disallow the appeal is all dependant on this court's conclusions upon fresh scrutiny of the evidence adduced at the trial court but of course, bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see **Okeno Vs. Republic (1972)EA 32**). In brief, the prosecution case was that on the 23<sup>rd</sup> day of August, 2009 the first complainant **Abraham Kibiwott (PW1)** took his eleven cows for grazing in a forest and later found a calf missing. He reported to the area chief and to the police at Kondoo Police Station. On the 27<sup>th</sup> November 2009, the third complainant **Pauline Chepkurgat (PW2)** had also taken her cows to graze at a forest but later found one missing. She reported to the area chief and a neighbour.

On the following month (i.e. December 2009) both complainants (PW1 and PW2) were informed that some stolen cows had been found at a place called Koibet. They went there and found their stolen cows at the homestead of the appellant. **Abraham Kirwa Ngeleche (PW3)**, a businessman and a neighbour to both complainants also had his cow stolen on the 28<sup>th</sup> October 2009. He later heard that some stolen cows had been found at Koibet. He went there and found his stolen cow at the homestead of the appellant.

**Francis Kiprof Kebenei (PW4)** also found one of his cows missing on the 13<sup>th</sup> November 2009. He reported to the police and on 2<sup>nd</sup> December 2009 proceeded to Koibet where some stolen cows were recovered. He found his stolen cow at the appellant's homestead.

**APC Victor Simiyu Nyikuri (PW5)** of Olenguse AP Camp in Burnt Forest acted on a tip off and arrested a suspect on the 5<sup>th</sup> December 2009 for stock theft. He said that two other suspects including the appellant were arrested by the Anti Stock theft unit **APC Edwin Koskey (PW6)** of Chepterit Anti Stock Theft Unit was on patrol within Nandi South District on the 3<sup>rd</sup> December 2009 when he joined fellow officers in search of stolen stock. They made no recoveries but by 5<sup>th</sup> December 2009 the appellant and others had been suspected and arrested.

**APC Jacob Kipkemboi Kemei (PW7)** acted on information and proceeded to a place called Chephanga on the 2<sup>nd</sup> December, 2009. With his team they went to the homestead of one Samuel Morendat and recovered one of the stolen cows. The said Samuel Morendat told them that the appellant had sold him the cow. The appellant in turn said that he had purchased the cows from David Kosgei Lagat who was the second accused. The recovered cows were identified by their respective owners.

**Chief Inspector Isaiah Ngetich (PW3)** of the scenes of crime office Eldoret, took photographs of the two recovered cows.

It was on the basis of the foregoing facts that the appellant was placed on his defence and stated that he was a farmer at Kapchemei village, sigilai sub.location and that in the month of December 2009 an assistant chief accompanied by police officers went to his home and informed him that he was required in respect of some stolen cows. His cattle shed was searched but nothing was found. He was then taken to Lessos Police Station where he found other suspects. Later, he was arraigned in court.

It is clear from the evidence under review that the theft of the complainant's cows was not disputed and was indeed established by themselves (PW1 and PW2). This however related to the first and second counts involving the first complainant (PW1) and the third complainant (PW2). The second complainant by name Joseph Tarus did not testify. Therefore, the second count remained unproved. Abraham Kirwa (PW3) and Francis Kiprop (PW4) also lost their cows on different dates but were not treated as complainants. They were treated as witnesses to support the allegation that some stolen cows were found at the homestead of the appellant.

Having established the fact of theft, it was incumbent upon the prosecution to establish beyond reasonable doubt that the appellant was responsible for the offences. The obligation ought to have been discharged by way of cogent direct or indirect evidence or both. More so, considering the appellant's denial of involvement in any theft and possession of any stolen stock. However, there was no direct evidence implicating the appellant. Indeed, the learned trial magistrate relied on indirect evidence to convict the appellant. This was based on the fact that the recovered stolen cows were found in the appellant's homestead. However, the evidence intended to establish the fact was in the opinion of this court, insufficient and unreliable. It was not clear how and where the stolen cows were recovered.

The police officers (PW5, PW6 and PW7) were expected to have provided proper and sufficient evidence of the recovery of the stolen cows but none of them did so in relation to the appellant. PW5 did not recover any cows from anybody. PW6 did not also recover any cows from anybody while PW7 recovered some cows at the homestead of one Samuel Morendat who was neither treated as a suspect nor a witness for the prosecution despite his allegation that the cows had been sold to him by the appellant.

It was only the complainants (PW1 and PW2) together with PW3 and PW4 who stated that they found their stolen cows at the homestead of the appellant. None of them had previously known the appellant and their cows were recovered away from their villages. It is not known how they came to know that the place where they found their cows was the appellant's homestead.

Nobody including the area chief was called to testify and confirm that indeed the place where the stolen cows were found was the appellant's homestead. If the arresting officers (PW5, PW6 and PW7) did not say that the stolen cows were found in the appellant's homestead and said that in fact some were found with a person called Samuel Morendat, it would follow that PW1, 2, 3, and 4 were speaking out of ignorance such that they did not know where exactly their stolen cows were found and with whom.

Consequently, the appellant's conviction by the learned trial magistrate was based on a misapprehension of the facts and on undue regard of the evidence adduced by PW1, 2, 3, and 4 relating to the recovery of the stolen cows. To that extent the conviction was not proper and must be interfered with by this court. The appeal, as conceded by the respondent, is merited. The conviction is hereby quashed and the sentence set aside. It is noted that the appellant was released on bond pending appeal. His liberty prevails and his surety is discharged of his obligations.

**J.R. KARANJA**

**JUDGE**

**(Delivered and signed this 9<sup>th</sup> day of June, 2011)**