



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Criminal Appeal 67 of 2004

RICHARD MULWA NDETO 1ST APPELLANT

MUTISYA MUTUA KING'OO 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the Ruling of Honourable Mr. N.N. Njagi, SRM dated 31st March 2004

in Kangundo SRM'S CR.C. No. 250 of 2004)

JUDGMENT

1. The Appeal herein arises from the decision of N.N. Njagi Esq. in **Kangundo SRM'S Court Criminal Case No. 250 of 2004**. In that case, the Appellants, Richard Mulwa Ndeto and Mutisya Mutua King'oo were charged with 2 others with 4 counts of the offence of stealing stock contrary to section 278 of the Penal Code and 4 counts of the alternative charges of handling stolen property contrary to section 322 (2) of the Penal Code. The 5th count is irrelevant to this Appeal as it related to one Philip Sila Makau who is not a party to the Appeal.

2. In any event and of relevance to the Appeal, the Appellants were acquitted of the offences in counts 1 to 4 but were both convicted in the alternative charges to counts 1, 2 and 4 and were sentenced to serve 5 ½ years in each count, all the sentences to run consecutively. They were dissatisfied and in their Petitions of Appeal and in submissions they raised the following issues;

- i. whether the evidence as tendered justified a conviction more so whether in fact

any of them was found in possession of the goats that were allegedly stolen.

ii. If so, whether the sentences meted were manifestly harsh and excessive.

3. From the record the evidence tendered in support of the alternative charge to count 1 was the following;

Patrick Wambua Muasa, a herbalist stated that on 14/2/2004 at 4 p.m. he was at home when he received a report that a young man who was herding his goats had lost 2 of them and his attempts at tracing them failed but on 17/2/2004 he was informed by his scouts that the goats were “**found being sold at Tala Police Post.**” He identified the goats in court but did not know any of the Appellants or how the goats were actually recovered.

4. PW8, P.C. Jefferson Okong’o stated that on 15/2/2004 at 8.00 a.m. the Assistant Chief Sengani Location brought 3 suspects with 11 goats that they were alleged to have stolen. He re-arrested the 3 “**accused persons**” whom he did not identify either by name or any other description and later charged them in court.

5. I should pause here and note that the Assistant Chief was not called to testify (See **Bukenya vs R (1972) E.A. 549**) and it is unclear in what circumstances either of the Appellants was arrested and how, if at all, it came to be that they were in possession of the 2 goats belonging to PW1 and who between the 3 suspects was in possession of which of the 11 goats or whether in fact they were all jointly in possession of the goats and where.

6. In my view, the alternative charge in respect of count 1 was far from being proved beyond reasonable doubt and the conviction and sentence in that regard was clearly in error.

7. Turning to the alternative charge to count 2, Veronica Ngina PW2, recalled that sometime in February 2004, she was informed by an unidentified person that 4 of her goats were missing and all attempts at tracing them failed. On 17/2/2004 however she learnt that they were being sold at Tala Market and at the police station in Tala, she found 2 of the goats which she identified in court. She did not know who had stolen them or who was found with them. PW7, Joseph Kimeu Mbuluo stated that on 17/2/2004 he found 4 goats tethered at the home of the then 4th accused whom he identified as “**Musyoki**”. For avoidance of doubt the 4th accused is the present 1st Appellant Richard Mulwa Ndeto. He added that he also found 5 goats at the home of the 1st accused who was in fact one, Peter Musyoki Ndinga. He went on to say, “**The man I am calling Musyoki is accused 4. I do not know the accused 1, accused 3 it is the accused 4 who took us to where the goats were.**” Pausing again for a moment here, who exactly was found in possession of the goats belonging to PW2? If (and it is unclear) indeed 4 goats were recovered from the 1st Appellant’s home, was he the only person in that home and why was he said to be in “**possession**” thereof? In any event, if 5 goats were also recovered from the 1st accused, whom PW7 denied knowledge of, why was Mutisya Mutua King’oo arrested? Whose goats was in he in possession of? Further, of the 9 goats allegedly recovered from the 1st accused and the 1st Appellant, who identified 4 to belong to PW2 and how come she only identified 2 at the Tala Police Station?

8. My view again is that there were too many evidentiary gaps as regards the alleged possession of goats in respect of the alternative charge to count 2 and those doubts must favour the Appellants. The conviction and sentences meted out in respect of count 2 were therefore in error.

9. As to the alternative charge to count 4 the charge was that the Appellants were found in possession of 5 goats belonging to Mwikali Kitheka. That person never testified at all and it is therefore unclear what the basis for the complaint and charge were. Elsewhere above I have said that it was unclear who arrested the accused persons with the 11 goats that PW8 re-arrested them with. It is even less clear in respect to count 4 which of the 11 goats belonged to which complainant and the circumstances in which the Appellants were found to be in their possession.

10. Mr O'Mirera, Learned Principal State Counsel properly concedes the Appeal in respect of the 2nd Appellant but as I have shown none of the alternative charges and the subsequent convictions and sentences can be properly sustained.

11. In the event, the Appeals as consolidated are allowed, the convictions quashed, sentences set aside and the Applicants shall be set at liberty forthwith unless they are otherwise lawfully held.

12. Orders accordingly.

Dated and delivered at Machakos this 13th day of **May** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr O'Mirera for Republic**

Appellants present

ISAAC LENAOLA

JUDGE