



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 76 & 77 of 2008**

FRANCIS MUNYIRI MURIUKI APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO. 77 OF 2008

JOSEPH WAIGIRI MURIUKI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Judgment and Sentence in the Senior Resident Magistrate's Court at

Karatina in Criminal Case No. 1990 of 2004 dated 17th April 2008

by B. M. Kimemia-R. M.)

J U D G M E N T

The two appellants, **Francis Muniyiri Muriuki** and **Joseph Waigiri Muriuki** whose appeals I consolidated for ease of hearing and as they arose from the same trial in the subordinate court were charged with one count of stealing stock contrary to section 278 of the Penal Code. They also faced an alternative count of handling stolen goods contrary to section 322(2) of the Penal code. They pleaded not guilty on both counts and their trial ensued. At the conclusion thereof, the learned magistrate found the main count unproved and consequently acquitted both of them under Section 215 of the criminal procedure code. However she found the appellants guilty of the alternative count, convicted them and thereafter sentenced each one of them to 4 years imprisonment.

The appellants were aggrieved by the conviction and sentence aforesaid. In days following, the appellants separately lodged their appeals to this court. But as already stated when the same came up for hearing, they were consolidated with the consent of all the parties involved. The appellants raised more or less the same grounds of appeal which revolve around the alleged recovery of the stolen cows, mode of arrest of the appellants, failure to summon vital witnesses, breach of section 200 of the criminal procedure code and rejection of their defences by the learned magistrate without assigning any reasons.

In brief, the prosecution case was that on 22nd December 2004 PW1, hereinafter referred as “the

complainant” woke up at about 6.00 a.m. intending to milk his cows. However his 2 cows were nowhere to be seen. His herdsman by the name Richard too was missing. He proceeded to his home and found the herdsman’s grandmother who informed him that the herdsman had come at night. Together with the herdsman they went to look for the cows albeit unsuccessfully. The herdsman then went to record his statement with the police and was placed in custody. Later that night the complainant was woken up by members of public so that he could identify some cows. He did so and confirmed that the two cows were his. He was told that 2 people, the appellants herein, had been arrested in connection with the said 2 cows.

P.W.II was a surveyor and Chairman of the local vigilante group. He stated that he was at work when his colleagues called him and informed him that they had seen 2 cows suspiciously tethered along a road without a herdsman in sight. He told them to wait and see who would come to drive them away. At 6.00 p.m. he was called again and informed that the owner of the cows, the complainant had been found. He proceeded to the chief’s camp and later to the appellants’ home with the police. One, Njogu a member of the vigilante group had however earlier on seen the 2nd appellant with the said cows. On being interrogated the father of the appellants told the group that 1st appellant had previously stolen his cow and sold it.

P.W. III was the investigating officer. On the material day he was on crime standby duties at Karatina Police Station when the appellants were brought to the police station by APs from Kahuru Police Post accompanied by 2 cows. **P.C. Karia** who has since left the forces carried out investigations, recorded statements and called the scenes of crime who photographed the cows. The photographs were tendered in evidence.

Upon the prosecution closing its case, the appellants were out on their defence. The 2nd appellant in his sworn statutory statement stated that on 19th December 2004 he went to Ichuga to his cousin’s home and come back on 22nd December 2004. At about 2.00 a.m. members of public came with P.W. II and he was arrested with his brother, the 1st appellant. He alleged that the reason for their arrest was that they had refused to join the vigilante group and or give out batteries. He also testified that his father didn’t testify or say that he be arrested because they had another case. The 1st appellant gave unsworn statement and stated that on the material day he went to work and came back home. At about 2.00 a.m. members of the public came with a vigilante group in the company of APs and they were arrested and taken to the police station with the cows. D.W. III, a witness for 2nd appellant stated that the appellant was with him between 19th and 22nd December 2004 respectively. When he went to check on him on 25th December 2004, he was informed that he had been arrested. D.W. IV a death row convict stated that P.W.II called them for a meeting on 10th December 2004. He wanted volunteers for the vigilante group but the 2nd appellant refused to join the group and could also not afford the batteries demanded and he was told that he would be investigated.

The learned magistrate having carefully evaluated and considered the evidence by the prosecution and the defence found favour with the prosecution case and as already stated convicted the appellants on the alternative count. In support of the appeals, the appellants tendered written submissions which I have carefully read and considered. **Mr. Orinda**, learned Senior Principal State Counsel opposed the appeal. He submitted that the appellants were found in recent possession. The presumption is obvious. They failed to give explanation for the possession. The defence was considered and properly dismissed.

This court as a first appellate court has a duty to re-appraise the evidence and come to its independent finding. In doing so I have to appreciate that I did not have the advantage enjoyed by the trial court of seeing and hearing the witnesses and to make due allowance for that – **Soki v/s Republic (2004) 2 KLR 21, Kimeu v/s Republic (2007) 1 KLR 756**. Moreover, I am guided by the principle that the first appellate court should not interfere with the findings of the trial court which were based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it was shown that the findings of the trial court at erroneous in law – **Republic v/s Oyier (1985) 2 KLR 353, Burn v/s Republic (2005) 2 KLR 533**.

The conviction of the appellants turned on the alleged recovery of the complainant's stolen cows in their compound. In that compound lived many people besides the appellants. Indeed as at the time of the alleged recovery of the cows, besides the appellants there was their father as well. The cows were not tethered anywhere near where the appellants were found. Rather they were found tethered behind their father's house. Nobody saw the appellants steal the cows. There is evidence that earlier in the day, those cows had been seen tethered in a farm along the road. No evidence was led as to the owner of that farm. Further there was evidence, particularly by PW2 that on receiving information from a member of the vigilante group who had seen the 2 cows tied in a farm along the road without anyone. **".... he had told the informant to leave them and see whether anyone would come for them i.e. John Wamugo....."** This **John Wamugo** never testified to confirm whether the said cows were later collected by the appellants or any one of them as instructed. Accordingly the mere fact that the cows were recovered in the compound where the appellants were does not amount to handling stolen goods. Had **John Wamugo** or any one else testified that he had seen the appellants or anyone of them drive away the cows then only then perhaps could the appellants have been held to account for the offence. From the evidence it is quite clear that nobody handled those cows as understood in law and as required by the provisions of section of 322(2) of the penal code. There are various possibilities as to how the cows could have found themselves in the compound. Yes it is possible that the appellants could have been involved. It is also possible that the appellant's father could have hand in it. How about the complainant's herdsman? There is evidence from the complainant himself that on the night that his cows disappeared, his herdsman by the name Richard was nowhere to be seen. The complainant eventually traced him the following day at his grandmother's home. When the complainant asked the herdsman's grandmother where he was, her response was that he had come at night. Was it a mere coincidence that the complainant's cows disappeared at the same time as the herdsman? I do not think so. There is much more than meets the eye in this whole saga. Indeed the herdsman was treated as a suspect. He recorded a statement. However he was never charged for the offence. Indeed there is nothing to suggest that any action was taken against him. There is nothing to suggest that any further investigation were carried out on the herdsman by the police. If such investigations were carried out and a clean bill of health passed on him, why couldn't the police say so. Further, being the herdsman, I will presume that he was the last person seen with the cows. Why was he not called to testify? It is very possible that he may not have taken back the cows to the complainant's home. I think that the conduct of the herdsman required further interrogation. The failure by the police to mount further investigation on the herdsman tends to lend credence to the appellants' claim that this case was but a frame up by the head of the village vigilante group who had attempted to recruit them into the group and when they refused, he threatened to take some undisclosed actions against them in future.

During cross-examination of PW2 by the 1st appellant he made this telling observation. The said appellant was **"linked because they and the father were there and the father said accused 1 had previously stolen his cow and stolen (sic). The informant is alive"** From this answer it is quite clear that the 1st appellant was arrested and charged for the offence merely because his father had said that he had previously stolen his cow. And when cross-examined by the 1st appellant he stated **"..... you were asked about the cows and you said they were to ask your father and he went to check and he said he didn't know the cows. Njogu identified the 2 cows which were with your fathers..... The people who identified them are not from our village...."** From the foregoing what was the basis of preferring the charges against the appellant. The cows were found in the midst of his father's cows. The compound and land in which the cows were found belonged to the appellant's father. It is also instructive that once the appellants were arrested and handed over to the police, no further investigations were undertaken to establish who was responsible for the presence of the cows in their father's compound. This comes out very clearly in the evidence of P.W. III, the investigating officer. All that was done when the appellants and the 2 cows were handed to him was to open the file, record statements and then call the scenes of crime personnel who photographed the 2 cows. From the foregoing, can it be denied that the case was not stage managed against the appellants? There are far too many doubts raised in the prosecution case that had the learned magistrate addressed her mind to them, no doubt she would have had to resolve them in favour of the appellants as is the rule in our criminal jurisprudence.

Those doubts aside, it is also apparent that the learned magistrate kept on shifting the burden of prove to the appellant in her judgment. Sample this **"..... Accused 1 alleges that he was not at home but at**

Ichuga with D.W. III who indeed stated that his home is at Karogoto but he lives in Nanyuki and that on 22nd he took him to Ichuga to board a matatu However, no evidence has been produced before this court to affirm/confirm that indeed the accused and D.W. III were at Ichuga Indeed, no receipts for fare to Ichuga or therefrom have been produced by accused 1 to confirm that indeed he was at Ichuga.....” It is a cardinal rule of our criminal justice system that save in very few instances, the burden of proof is always on the prosecution. It never shifts to the accused. The accused need not prove anything. The learned magistrate therefore misdirected herself when she expected the 2nd appellant to prove by evidence that indeed he was at Ichuga at the time of the alleged offence.

With regard to the 1st appellant, the learned magistrate had this to say about his defence. **“Accused 2 stated that he woke up and went to work and at 2.00 a.m. he was arrested. He has called (sic) an unsworn statement whose credential (sic) value is minimal as it allows no cross-examination for clarity.....”** This was yet another gross misdirection on the part of the learned magistrate. An accused person is at liberty to choose his style of defence. He may choose to make a sworn, unsworn statutory statement or even keep quiet. Whichever election the accused makes, it should never be the subject of adverse inference and or comment by the trial magistrate.

In the light of what I have pointed out as the shortcomings of the learned magistrate I am satisfied that the conviction of the appellants cannot be sustained. Accordingly I allow the appeals, quash the convictions and set aside the sentences imposed on each of the appellants. They shall forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 30th day of June 2009

M. S. A. MAKHANDIA

JUDGE