



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 501 of 2005**

*From original conviction and sentence in Criminal Case No. 9987 of 2004 of the Chief Magistrate's Court at Thika)*

**SAMUEL PELESI OLENGANJAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

**SAMUEL PELESI OLENGANJAI**, the appellant, was charged in the subordinate court jointly with one **ATHUMANI MWANGI ALI** with stealing stock contrary to section 278 of the Penal Code. The particulars of offence were that on 19<sup>th</sup> October 2004 at Kiandutu village in Thika District of the Central Province, jointly with others not before court stole 2 cows and 2 heifers valued at Kshs.50,000/= the property of **LUCY WANJIRU KAMAU**. After a full trial, they were both convicted and sentenced to 4 years imprisonment. The appellant decided to appeal to this court against both conviction and sentence, while I am told that his co-accused who was 1<sup>st</sup> accused in the subordinate court, did not appeal.

The grounds of appeal are in summary that ?

- 1. The learned trial magistrate erred in both law and fact in convicting him without considering the fact that there was a grudge between him and the complainant.**
- 2. The learned magistrate erred in convicting him while the prosecution did not prove the case beyond any reasonable doubt.**
- 3. The sentence imposed was harsh and excessive.**

The appellant also filed written submissions. At the hearing of the appeal, the appellant sought to rely on the written submissions.

The learned State Counsel Mr. Makura opposed the appeal and supported both the conviction and sentence. Counsel submitted that there was sufficient evidence to support the prosecution case that the domestic animals of PW1 were stolen. Those were the two cows and two heifers. Counsel contended that PW3 transported the meat of the slaughtered animals from the appellant's butchery. PW4 saw the cows and meat after the animals were slaughtered. Therefore the charge of stock theft against the appellant was proved beyond any reasonable doubt. Counsel also contended that the 4 years prison sentence was neither harsh nor excessive, since the maximum sentence was 14 years imprisonment.

In response, the appellant submitted that the evidence did not connect him to the offence for which he was convicted. He submitted that the complainant admitted that there was an existing grudge. The applicant also submitted that through the complainant stated that the appellant was implicated by the co-accused, the said co-accused denied the same. Lastly, the appellant submitted that there were contradictions in the evidence of PW1 and PW2.

This being a first appeal, I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences see **OKENO –VS- REPUBLIC [1972] EA. 32.**

I have re-evaluated the evidence on record. There is no one who saw the appellant steal the subject domestic animals. The case against the appellant is therefore based on circumstantial evidence. In **MUCHENE –VS- REPUBLIC [2002]1 KLR 367** it was held that ?

**1. It is trite law that where a conviction is exclusively based on circumstantial evidence such conviction can only be properly upheld if the court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant but also that there exists no co-existing circumstances which would weaken or destroy such inference.**

The circumstantial evidence that connects the appellant with the offence is that of PW1 (the complainant) who stated that she was informed by the co-accused that the appellant was involved in the theft of the livestock. There was also the evidence of PW2, the husband of PW1, who said that the co-accused mentioned the appellant as one of the thieves. PW3, the transporter of the suspected meat, also stated that when he was called by Nganga (the co-accused) to go and transport meat, he met the appellant where the cow had been slaughtered. The appellant in his unsworn defence stated that he was arrested later because of a grudge between him and the complainant.

Faced with this evidence, the learned magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt. In my view, and with profound respect to the learned magistrate, the circumstantial evidence on record did not point irresistibly to the guilt of the appellant. The testimony of PW1 and PW2 that the appellant was mentioned by the co-accused as having been one of the thieves was hearsay evidence as the co-accused did not state everywhere in evidence that he stole the cows together with the appellant. Nor was there a written statement signed by the co-accused which was produced in evidence. On the other hand, even assuming that PW3 saw the appellant where the cow or cows were slaughtered, that did not make the appellant one of the thieves. In my view, the circumstantial evidence on record is not adequate to sustain a conviction against the appellant. I will therefore allow the appeal.

Consequently, and for the above reasons I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 18<sup>th</sup> day of February 2008.

**George Dulu**

**Judge**

**In the presence of ?**

Appellant in person

Mr. Makura for State - absent

Mr. Mwangi – court clerk