

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

Criminal Appeal 12 of 2003

ELLY KIPKURUI MUTAIAPPELLANT

-VERSUS-

REPUBLICRESPONDENT

JUDGEMENT

The appellant **Elly Kipkirui Mutai** was charged with the offence of stealing stock contrary to section **278** of the **Penal Code**. He faced an alternative charge of handling stolen property contrary to section 372 of the Penal code. He was tried in the Principal Magistrate's Court at Kericho in **PMCR No. 3432 of 2001**. He was, on 11th November 2002, convicted and sentenced to 7 years imprisonment with two strokes of the cane.

The particulars of the charge facing the appellant were that on the night of 29th and 30th October 2001, at Kapchetoror village within Kericho District in the Rift Valley Province, jointly with others not before court stole one bull valued at KShs. 17, 000/= the property of Joseph Kipkoech Ngeno. The particulars of the alternative charge were that on 1st November 2001 at Kapsuser Trading Centre in Kericho District within Rift Valley Province, otherwise than in the cause of stealing he dishonestly received or retained one bull valued at KShs. 17,000/= the property of Joseph Kipkoech Ngeno, knowing or having reason to believe the same to have been stolen or unlawfully obtained.

He now appeals against both the conviction and sentence on the grounds that he was not identified by the complainant as the person who stole from him and that the evidence adduced before the lower court did not in any way connect him to the offence. He also says that he was not found in possession of the stolen item.

At the hearing of the appeal, the appellant told this court that the complainant did not testify and that one Philip who was said to have been arrested together with the appellant was not tried. He submitted that the prosecution did not prove its case against him and has asked this court to evaluate the evidence adduced at the trial and find that the conviction and the sentence were not supported by any evidence.

In reply the learned State Counsel Mr. Koech conceded the appeal on the basis that the prosecution's case was conducted by one Police Corporal, Kipsang who was not qualified to do so. He asked this court to note that the appellant has already served six years in jail and for those reasons he wished not to make any submissions on the appeal itself.

I have studied the record of the lower court and have noted that the appellant was convicted on the evidence of two key witnesses. It is not correct for the appellant to say that the complainant did not testify at the trial. The record shows that he did so as PW1. The facts of the case were properly set out in the judgment of the lower court and I need not replicate the same in any detail herein. The learned trial Magistrate carefully considered the evidence of PW1 who said that he locked up his herd of cattle on 29th October 2001 as he went to sleep. He woke up to find one black bull missing.

PW2 testified that the appellant tried to sell him a bull at a cost of KShs. 19,000/= for slaughter. The appellant quickly agreed to reduce the price to KShs. 9,000/= a fact which caused PW3 to suspect that the bull had been stolen. He alerted the chief and tricked the appellant to collect the purchase price in the

presence of the chief. The appellant was arrested as he came to collect the money the following day when he found PW1, the owner of the bull, who had also been alerted, waiting at PW2's premises. PW2 testified that PW1 called the bull by its name and it responded thus proving ownership.

In passing judgment, the learned trial Magistrate considered these facts against the appellant's defence that he was arrested for a different offence and that he came to learn of the present charges when he was charged in court. Throughout the proceedings, the appellant did not question any of the witnesses concerning the alleged theft of the bull particularly the allegation that he had attempted to sell the bull to PW2, and was arrested as he came to collect the money.

I find that the findings of the learned trial Magistrate were properly arrived at and were based on sound evidence. However, it is clear from the record that the prosecution's case was conducted by a person not authorized by the law to do so, and in breach of section **85 (2)** of the **Criminal Procedure Code** which requires that prosecutions in criminal trials be by persons duly authorized by the Attorney General and that such a persons be either Advocates of the High Court or police officers not below the rank of an Assistant Inspector of Police. The prosecution of this case by corporal Kipsang rendered the entire proceedings null and void with the result that the conviction and sentence by the lower court were illegal. The same cannot be upheld. In passing, I have noted also that the learned trial Magistrate sentenced the appellant to receive two stokes of the cane notwithstanding that corporal punishment was abolished by a statutory amendment under **Act No. 5 of 2003**. That too was an illegal sentence.

In view of the above, I have no alternative but to declare the entire proceedings of the lower court **null and void**. Consequently, I hereby **quash** the conviction and set aside the sentence passed against the appellant. Noting that appellant has already served over five years of his term, no retrial will be ordered. Instead I hereby order that he be set free forthwith unless he be otherwise lawfully held.

DATED at Kericho this 22nd day of May 2008.

M. G. MUGO

JUDGE.