

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 39 of 2004

PAUL MURIUKI KINYUA APPELLANT

Versus

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence by S. K. KOROS Resident Magistrate,

in the Resident Magistrate's Criminal Case No. 105 of 2003 at GICHUGU)

JUDGMENT

The appellant was charged in the lower court with an offence of stock theft contrary to **Section 278** of the penal code. He was convicted by the lower court and sentenced to 2 year imprisonment. Being dissatisfied with the conviction and sentence the appellant has brought this appeal.

This court is duty bound to reevaluate the evidence of the lower court. That duty is suitably set out in the case of OKENO vs REP (1972) EA 32 in that case the court of appeal had the following to say:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finds and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958)E.A. 424.”

On 25th January 2003 PW 2 said that at about 4 a.m. he went to his brother house looking for a match stick. As he passed where his mother's cow is normally kept he found that it was missing. He informed her of the same. His mother PW 1 confirmed that on being alerted of the missing cow she went to where she had tied it and confirmed that indeed it was missing. She reported the matter to the chief and the assistant chief. She gave them the description of the cow where she said that it had a deformed horn. She also reported the matter to the police. Later the police requested her to identify the remains of a cow that had been slaughtered. At the police station she found meat and was also shown legs, head and foetus of a calf. She was able to identify it as being her missing cow from the horns. PW 3 said that on the following day she saw the appellant and his co accused bringing a black cow into her compound. The co accused was a tenant in that compound. He had been a tenant from the year 2002. The two used to prepare soup for sale. They slaughtered the cow in that compound and the meat they wanted to sell it to farmers. On being cross examined by the appellant she confirmed that he was an employee of the co accused. PW 4 was the husband of PW3. He got information that a cow had been slaughtered at his home. He was informed that the meat was not inspected because the animal was suspected as being stolen. At his home he found the meat, skin and limbs of the cow. He described the cow as being black. PW 5 was the police officer who received information about the missing cow. On 25th January 2003 he received information of a slaughtered cow. He retrieved the meat and other parts of that animal and took them to the police station. Both accused persons were arrested. PW 6 is a meat inspector who was approached by the appellants co-accused at around 10.15 a.m. He described how before meeting him he had been informed that someone was looking for him to inspect meat. It was then that co accused of the appellant asked him to carry out inspection of a slaughtered cow. He requested the co-accused to comply with the department's requirement that of showing proof of ownership or of purchase of the cow. He did not have documents to show ownership and said that the cow was bought from a broker. Eventually the matter was handled by the police. The appellant in this defence by an unsworn statement said that he sold plots for a living. He denied being involved in the offence. He said that he was arrested from his home. In his appeal the appellant has faulted his conviction because as he stated he was not positively identified by the complainant. He further argued that the trial magistrate erred in law and fact in convicting him relying on circumstantial evidence which was not clear. In submissions counsel for the appellant stated that the appellant was an employee of his co accused and that being so he could not be convicted for having committed the present offence. The recovery of the slaughtered cow

which was identified by the complainant as being her missing cow brings the evidence against the appellant to one of recent possession of stolen goods. The court of appeal in the case of **OGEMBO vs REPUBLIC** (2003)1 EA held:

“For the doctrine of possession of recently stolen property to apply possession by the appellant of the stolen goods must be proved (Lamambia v Republic (1984) LLR 1789 CAK) followed) and that the Appellant knew the property was stolen.”

The Court of Appeal of East Africa in the case of R vs BAKARI s/o ABDULLA (1949) 16 EACA 84 made a finding that:-

“That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a case point no other reasonable conclusion, the presumption can extend to any other charge however penal.”

The evidence against the appellant is that he and his co accused were found in possession of a recently stolen cow. The evidence of PW 3 was not seriously contested in cross examination. It was incumbent upon the appellant to give explanation of his possession of that cow. In his defence he did not address the issue of his possession of that cow. His ground that he was an employee of his co accused although raised in cross examination he did not state it in his defence and how such employment related to the offence. I have considered all the grounds of appeal raised by the appellant and I find that I am in agreement with the lower court finding of guilt against the appellant. I also find that there is no reason to interfere with the sentence imposed on the appellant. Accordingly the appellants appeal is hereby dismissed.

DATED AND DELIVERED THIS 24TH DAY OF JUNE 2008

MARY KASANGO

JUDGE