

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

Criminal Appeal 245 of 2003

(Appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Vihiga in Criminal Case No.1180 of 2003. (F. M. Kinyanjui, SRM))

ESHIVUKHO ONGANYI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGEMENT

The appellant, Eshirukho Onganyi, was the 2nd accused in Vihiga SRM Criminal Case No. 1180 of 2003 in which the appellant and his two co-accused were charged with stealing stock Contrary to Section 278 of the Penal Code with an alternative charge of handling stolen property contrary to Section 322(2) of the Penal Code. The particulars of the charge of stealing stock were that the appellant and his co-accused,

“On the 13th day of August 2003 at Ebusamia sub location/East Bunyore Location in Vihiga District within Western Province jointly stole two (2) goats valued at Kshs.4000/= the property of Corcas Kweyu.”

The particulars of the alternative charge were that the appellant and his co-accused at the said sub location;

“otherwise than in the course of stealing dishonestly received or retained a black goat skin knowing or having reason to believe them (sic) to be stolen goods.”

The prosecution called three witnesses. PW1, Dorcas Kweya, the complainant, did not know who had stolen her two goats. PW2 Nyongesa Wanjir, an administrative Police Constable found the appellant and the 3rd Accused in a house making super. He said he suspected them but did not say why. He did not have evidence that they stole the goats.

PW3, C.P.I. Nyongesa did not find the appellant with his co-accused where the latter were said to be having a feast of meat. The evidence adduced by the prosecution when it closed its case did not establish a prima facie case against the appellant to warrant his being put on his defence. By putting the appellant on his defence when there was no prima facie case made out, the trial magistrate shifted the burden of proof to the appellant. The appellant was in effect being called upon to show his innocence. It was a misdirection on the part of the trial magistrate to put the appellant on his defence and in these circumstances conviction in such circumstances can be sustained. The appellant in his sworn evidence denied the charge.

There was no basis for the rejection of the Appellant's defence by the trial magistrate. And even in the absence of such defence, still the prosecution evidence did not prove that the appellant was involved in the theft of the two goats. The findings by the trial magistrate were not supported by evidence and the conclusions reached were erroneous.

Mr. Karuri was quite right to concede this appeal. I quash the conviction and set aside the sentence

against the Appellant. Unless otherwise lawfully held, the appellant shall be released and set at liberty forthwith.

Dated at Kakamega this 22nd day of April, 2005.

G. B. M. KARIUKI

J U D G E