

REPUBLIC OF KENYA

HIGH COURT AT MOMBASA

CRIMINAL APPEAL 231 of 2003

ELIJA M. MWASHUMBE APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

J U D G E M E N T

The Appellant, Elijah Mwamughanga Mwashumbe, was charged before the Resident Magistrate at Wundanyi in the first two counts with stealing stock contrary to Section 278 of the Penal Code and in the alternative count with handling stolen property contrary to Section 322 (2) of the Penal Code. After trial he was convicted on the alternative charge of handling and sentenced to four years imprisonment. He has appealed against conviction on four grounds which raise one point namely that the trial magistrate erred in failing to find that the appellant was a livestock trader and that the sheep found in his possession were bought in the course of his business.

On 24th April 2002 PW1 Christopher Kiti woke up to find that his three sheep had been stolen. He reported the matter to the area chief and later to Wundanyi Police Station. In May 2002 Felix Kitonga PW2 also lost three sheep and made a report to the chief and police. In early July PW2 was called to the Chief's camp and he identified one sheep he found there as his. PW2 also identified one sheep at Wundanyi police station as his. The sheep had been found in the Appellant's possession by A.P.C. Anthony Kariuki PW6. Asked about the sheep the Appellant told PW6 that they had been sold to him by someone he did not name. In his unsworn statement the appellant said that one sheep belonged to one Bagdad and another to Bagdad's mother. Later he said he had bought the sheep from one Manyasi. The Appellant's two witnesses, his wife and brother both confirmed that the sheep were found in Appellant's possession. Earlier on the appellant had sold two of the sheep to Sarah Kizambo but he went and collected one from her when she failed to pay the balance of the purchase price. She also identified the sheep found with the appellant as the one he had sold to her. The Appellant himself in his an unsworn statement admitted having been found in possession of the sheep. It is therefore not in dispute that the Appellant was found in possession of sheep stolen from PW1 and PW2. The issue I need to consider is whether or not the appellant was in possession of the sheep with a guilty mind. In other words did he know that the sheep had been stolen? If so at what point in time did he know they were stolen? The time when he knows or has reason to believe this is important. In *Ratilal -vs- Republic* [1971] E.A. 575

Sir William Daffus P. stated at p. 578 that:- "The necessary mens rea must exist at the time of receipt of the stolen goods so that it must be established that the accused person knew at the time of the receipt that the goods were stolen or that he had reason to so believe." The alternative charge for which the Appellant was convicted reads as follows:-

"HANDLING STOLEN PROPERTY CONTRARY TO SECTION 322(2) OF THE PENAL CODE PARTICULARS

ELIJAH MWAMUGANGA MWASHUMBE: on the 15th day of July 2002 at Wanyanga village of Mbale Location, in Taita Taveta District of the Coast Province otherwise than in the course of stealing dishonestly received or retained three sheep knowing or having a reason to believe to be stolen properties" There was no evidence at all to show when or from whom the appellant received the sheep to determine whether or not at the time of receipt he knew or he received them in circumstances giving him reason to believe they were stolen. The particulars of the charge state that he received or retained them on the 15th day of July 2002. This was the date they were found in his possession. As I have already said

when the Appellant was arrested by PW6 APC. Anthony Kariuki he said he had bought the sheep from someone. He did not identify the “someone”. But the record does not show that APC. Anthony Kariuki asked him to identify the seller. He only asked for a sale agreement which the Appellant did not have. In his unsworn statement in the court appellant said he had bought the sheep from one Manyasi. The trial magistrate was not convinced with that explanation. Referring to the Appellant’s explanation he said:-

“He has nothing to show that he bought the said sheep from the alleged Manyasi. DW1 and DW2 confirmed that it was the accused person who went home with the sheep and they didn’t know where he got them from. DW2 Titus confirmed in his cross-examination that it was not Manyasi who brought the sheep. Both of them also confirmed having seen the sheep at the compound of the accused person. In view of the www.kenyalawreports.or.ke J6 foregoing I find the accused person guilty of the alternative charge of handling stolen property contrary to Section 322(2) of the Penal Code.” It is clear that the trial magistrate did not address the issue of the guilty knowledge of Appellant. He dismissed the Appellant’s explanation on the ground that the Manyasi is not the one who went to appellant’s home with the sheep and that the Appellant had nothing to show that he had bought the sheep from Manyasi. With respect to dismiss the Appellant’s explanation like that is to suggest that the appellant had to prove his innocence. That would be shifting the burden of proof to him. In cases of handling stolen property, like in all other Criminal cases, the burden of proof rests with the prosecution. A similar situation arose in *Mwaula & Muthoka –vs- the Republic* [1980] KLR 127 The Court of Appeal stated at P.129 thus:

“The position as we see it is that Joseph, having admitted being in possession of property proved to have been recently stolen, should not be convicted of handling if his explanation for such possession was one which is reasonable and which might possibly be true; he did not have to convince the court that it was in fact true (*Kipsaina v The Republic* [1975] EA 253) . This is much the same as saying that a person accused of handling is entitled to be acquitted if, on consideration of the evidence as a whole, a reasonable doubt is raised whether, at the time he received the property, he did so with a guilty mind, knowing or having reason to believe it to have been stolen. No onus is placed on the accused person in this respect; but if he has offered an explanation, it will only avail him if it is both reasonable and credible.”

I find that the Appellant’s explanation was reasonable and credible and one “which might possibly be true”. Why do I say this? The record has evidence which in my view, the learned trial magistrate did not take into account. Appellant said he was a dealer in livestock. In cross examination DW1 stated:- “My husband is the one who brought the sheep home. He bought one first. He went and bought another one. I was not there when he bought it. I was told they are from Manyasi’s place. There was a boy who came and said there was sheep for sale. I wouldn’t know if they were stolen.” (emphasis is mine) DW2 talked of Manyasi going to their home and talking with the Appellant after which the Appellant went home with the sheep. PW3 Sarah Kigambo on her part stated:- “I recall I was in school at Figinyi Nursery School. I saw the wife of the accused called Mwachao. I knew Elijah i.e. the Accused. He had sold a goat to us in school. When I saw the wife I asked her if her husband had a goat. She said he had sheep he came home with sheep and a young one.”

These pieces of evidence corroborate the Appellant’s statement that he was indeed a livestock trader. He had previously sold a goat to PW3 in school. Wishing to buy another goat PW3 asked Appellant’s if the Appellant had goats for sale. He did not have goats but he had sheep. He took them to PW3 who after negotiations bought one at Shs.1,500/= and another, on a later date, at Shs.1,200/= because it had had a miscarriage. When PW3 failed to pay the balance of the purchase price the Appellant went and took away one sheep and sold it to someone else, probably Bagdad or his mother. This is not the conduct of someone who knew he was handling stolen property. One would have expected the appellant to clandestinely sell the sheep at throw away prices and duck if he knew they were stolen. But that is not what he did. He sold the sheep to PW3 in a school. An open place where one could expect to be seen by other teachers or students. He also sold the sheep at reasonable prices at Shs.1,500/= and Shs.1,200/= bearing in mind that the complainant’s had given the value of each sheep as Shs.2000/=. When PW3 failed to pay the balance of the purchase price the Appellant took away the sheep. Surely he must have known that PW3 would complain and report the matter to the authorities or in some way try to recover the sheep thus exposing him. Manyasi went to Appellant’s home and they talked. Later appellant went home with sheep. Before

that a young boy had gone to Appellant's home with a report that there was sheep for sale. This in my view is because whoever sent the boy, like PW3, and probably the community around, knew the Appellant to be a livestock trader. I find that the Appellant bought the sheep from Manyasi and that he did not know they were stolen. Had the learned trial magistrate considered these pieces of evidence and the fact that there was no evidence to show the appellant's guilty knowledge in handling the stolen sheep he could not have convicted the Appellant. Consequently I allow this appeal, set aside the sentence of four years imprisonment and order that the Appellant be released forthwith unless otherwise lawfully held.

DATED this 6th day of February, 2004.

D.K. MARAGA

AG. JUDGE