



**Mwalili & another v Republic (Criminal Appeal E002 & E007 of 2022
(Consolidated)) [2024] KEHC 1012 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1012 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E002 & E007 OF 2022 (CONSOLIDATED)**

GMA DULU, J

FEBRUARY 7, 2024

BETWEEN

MICHAEL KIMBICHI MWALILI 1ST APPELLANT

SAMSON JOSPHAT NGOMBE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Criminal Case No. E976 of 2021 at Voi
Law Courts delivered on 23rd November 2021 by Hon. D. Wangeci (PM))*

JUDGMENT

1. The two appellants were charged in the Magistrate's court with another with stealing stock contrary to Section 268(1) as read with Section 278(1) of the [Penal Code](#).
2. The particulars of offence were that on 25th June 2021 at Luakenyi Ranch, Mwadobo Location Mwatate Sub County within Taita Taveta County stole ten (10) cattle valued at Kshs. 560,000/= the property of Abdulahi Abdi Bule.
3. The three (3) accused denied the charge. After a full trial, the trial Magistrate convicted the appellants herein who were the 2nd and 3rd accused persons of the offence of handling stolen property. The trial court however acquitted John Mwaluma Mwachiro the 1st accused. The trial court, in particulars stated as follows:-

“The totality of the evidence on record is that the 2nd and 3rd accused persons are guilty of handling stolen property contrary to Section 322 of the [Penal Code](#) and I therefore convict them accordingly under Section 215 [CPC](#).”



4. Upon the above conviction for handling stolen property, the trial court sentenced each of the two (2) appellants to seven (7) years imprisonment.
5. Dissatisfied with both the conviction and sentence, the two appellants filed these two appeals; and relied on similar grounds of appeal as follows:-
 1. They did not plead guilty to the charge.
 2. The learned trial Magistrate erred in law and facts by failing to find that crucial witnesses were never summoned to court to clear the alleged charges that were facing the appellant.
 3. The learned Magistrate erred in law and fact by failing to realize that the adduced evidence was full of controversy and inconsistent.
 4. The learned Magistrate erred in law and facts by failing to realize that the prosecution evidence was not sufficient enough to institute a conviction and only intended to cast suspicion instead of water tight evidence in order to prove the case the appellant were facing beyond any reasonable doubt.
 5. The learned trial Magistrate erred in law and facts by convicting the appellant by relying on poor investigations and contradicting evidence.
 6. The learned Magistrate erred in law and facts by failing to consider the mitigation given by the appellants and instead relied fully on the prosecution adduced evidence.
6. The appeals were canvassed through written submissions. In this regard, I have perused and considered the submissions filed by each of the two appellants as well as the submissions filed by the Director of Public Prosecutions. I note that the submissions of both appellants are similar.
7. This being the first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno vs Republic* (1972) EA 32.
8. In determining the appeals also, I have to bear in mind that under Section 107 of the *Evidence Act* (Cap.80) the burden was on the prosecution to prove the offence for which the appellants were convicted.
9. This being a criminal case also, the standard of proof was beyond any reasonable doubt see *Miller vs Minister for Pensions* (1947) ALL ER.
10. In proving their case, the prosecution called nine (9) witnesses. On their part, each of the appellants tendered sworn defence testimony and did not call any additional witnesses.
11. I observe that the trial Magistrate relied on the opening the slaughter house at night and slaughtering the cows, to be the basis of handling stolen property, and in this respect it relates to only two (2) cows, as there is no evidence on record with regard to what happened to the other eight (8) cows.
12. Samson Josephat Ngombe was 3rd accused at the trial. This is the person whom PW2 Mzee Mwarenga testified to as Samuel Ngombe whom he knew very well and who on 28th June 2021 at around 6p.m brought him two cows, which were branded DR and NA and asked him to keep the cows for him and provide them with fodder.
13. It was this witnesses (PW2) evidence that Ngombe told him that the cows were from Luakenyi and that Ngombe did not have enough grass to feed the cows. It was this witnesses further evidence that on 2nd July 2021, the same Ngombe came at 8p.m on a motor cycle with two other men and they took away the two cows.



14. PW4 Antony Kimori Mwasingo a meat seller at Bura, testified to Kimbichi, who was 2nd accused, being involved in dealing with the two cows, which were sent to the slaughter house at Bura and slaughtered.
15. PW3 Moses Mwakio Nyambo, a worker at Bura station County Government slaughterhouse, testified that the two cows being delivered to the slaughterhouse at 4:47a.m at night and immediately slaughtered. He did not identify the people who brought the two cows as it was dark but they were three people.
16. PW1 Abdullahi Aden Bule, the complainant testified in evidence that his ten (10) cows marked “MDR” were stolen on 25th June 2021, and he tried to trace them and made a report to the Bura slaughter house. Thereafter, on 3rd July 2021 at 6a.m, he was called on phone to go to the slaughter house and on arrival, he saw two (2) slaughtered cows and the skins which still had his identifying mark “DR”.
17. In their defences, Michael Kimbichi testified that he was a livestock buyer and seller, but knew nothing about this case. It was his testimony that he was called by the incharge Bura Police Station and locked up for no reason.
18. The 3rd accused in the trial, who described himself in his defence as Samuel Ngonda Ngombe but who was throughout trial described as Samson Josphat Ngombe without any complaint, stated that he was a farmer owning four (4) cows, and that on 28th September 2021 at 3p.m he saw two (2) cows in his farm and drove them out. Thereafter, on 3rd July 2021 policemen came with the complainant herein and said that they were looking for missing cows. It was his defence that though they only found his four cows at his farm, they arrested him and took him to Bura Police Station.
19. In my view, considering all the evidence on record, the prosecution proved beyond reasonable doubt that two (2) cows of the complainant PW1 were stolen and slaughtered at Bura slaughter house.
20. The prosecution also proved that the said two cows were the same cows that had earlier been left with PW2, and later taken by 3 people.
21. The prosecution also proved that both the appellants herein were at one point or other in possession of the said two cows, which were recently stolen from PW1. The burden thus shifted to each of the appellants to explain how they came into possession or were involved in the movement of the two cows. In holding so I rely on the case of *Kelvin Nyongesa & 2 Others =versus= Republic* eKLR, wherein the court stated as follows:-

“Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be plausible.”
22. In my view, from the evidence on record, the trial court cannot be faulted for finding that the two appellants herein were guilty of handling stolen property, and convict them, as the evidence did not establish that any of them stole the ten (10) cows as alleged. However, the offence of handling stolen property was only in respect of two (2) cows, not on the ten (10) cows as the Magistrate seems to have found. I will uphold the conviction for handling stolen property but only in respect of two (2) cows.
23. With regard to sentence, I note that the maximum sentence for the offence under Section 322 of the *Penal Code* is fourteen (14) years imprisonment.



24. The appellants having been first offenders, and in view of the remorse each of them showed in mitigation, in my view, the sentence imposed by the trial court was excessive, in respect of handling the two cows. I will reduce the sentence to four (4) years imprisonment from the date they were imprisoned by the trial court.
25. I thus uphold the conviction of the trial court for handling stolen property contrary to Section 322 of the *Penal Code* in respect of two (2) cows. I vary the sentence, and order that each of the appellants will instead serve four (4) years imprisonment from the date they were sentenced by the trial court. Right of appeal explained.

DATED, SIGNED AND DELIVERED THIS 7TH DAY OF FEBRUARY 2024 AT VOI IN OPEN COURT.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistant

Both Appellants

Mr. Sirima for State

