



**Gachoka & another v Republic (Criminal Appeal E022 & E028 of 2022 (Consolidated)) [2023] KEHC 19691 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19691 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL APPEAL E022 & E028 OF 2022 (CONSOLIDATED)**

**MW MUIGAI, J**

**JUNE 22, 2023**

**BETWEEN**

**DAVID MACHARIA GACHOKA ..... 1<sup>ST</sup> APPELLANT**

**GEORGE WAMBURA NGANGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment, conviction and sentence of Honourable B Kasavuli Principal Magistrate dated 27th April 2022 in the Chief Magistrate's Court at Mavoko Cr Case No.751 of 2018)*

**JUDGMENT**

**Trial Court Record**

1. The charge sheet/Information dated 26<sup>th</sup> March, 2019, the Appellant David Macharia Gachoka, George Wambura Nganga, Francis Thiani Ndungu, Mutende Meibako Silalo & Kashu Oile Parmeres were charged with the offence of stealing contrary to Section 278 of the Penal Code.
2. Particulars of the offence were that the accused on the night of 29<sup>th</sup> October, 2018 at Syokimau area of Mlolongo Township in Athi River Sub-county within Machakos County, stole eleven (11) bulls valued at Kshs 880,000/= the property of Jackson Kireria Matura and ferried [them] using Motor Vehicle registration number KBQ xxx U make ISUZU FSR white in color.

**The Application for Bail Pending Appeal**

3. Vide Notice of Motion dated 15<sup>th</sup> July 2022 the applicant sought orders that he be set free on a bond/ cash bail pending the hearing and determination of the Appeal. Which application vide ruling dated 15<sup>th</sup> December, 2022 this Court dismissed the application.



## Appeal

4. Dissatisfied with the judgment the Appellant vide petition of Appeal and attached grounds of Appeal filed on 10<sup>th</sup> March 2022 sought to have the Appeal allowed the conviction quashed and sentence set aside on the grounds that:
  1. The trial Magistrate erred in both law and facts for failing to find that what would be essential prosecution witnesses were not produced
  2. The trial Magistrate erred in both law and facts by not considering the defense of the Appellant.
  3. The learned Magistrate erred in matters of law and facts by failing to consider that the case was not proved to the required standard provided by law
  4. The learned Magistrate erred in law and facts for not according the Appellant fair hearing
5. The matter was canvassed by way of written submissions.

## Submissions

6. The Defense Team, Counsel Mr. Kimathi for Appellant George Wambura Nganga in HCCrApp E022 of 2022 and Mr. Mogambi for the Appellant David Macharia Gachara in HCCrApp E028 of 2022 and the Office of Director of Public Prosecution (ODPP) represented by Mr. Mwongera opted to orally highlight written submissions and proceeded on 14/3/2023.

## Appellant's Submissions

7. Appellant's vide his submissions dated 13<sup>th</sup> March, 2023 raised the following issues for determination.
  - a. Was the ownership of the alleged stolen bulls proved by the complainants/prosecution?
  - b. Did the evidence provided to prove that indeed the Appellant herein stole the bulls?
  - c. Taking regard to the evidence tendered by the prosecution, whether the Appellant should have been placed on his defense.
8. On the issue of proof of ownership of the alleged 11 stolen bulls it was submitted that the evidence tendered by the prosecution did not in any iota prove that the 11 bulls which were alleged to have been stolen belonged to the complaints herein. Reliance was placed on Section 268 of the Penal Code which provides
  - “Section A person who fraudulently and without claim of right takes anything capable  
268 of being stolen, or fraudulently converts to the use of any person, other than  
(1) the general or special owner thereof, any property, is said to steal that thing or  
(1) property.”
9. It is contended that under Section 268 of the Penal code, the prosecution must prove first the animals were stolen from the complainant and indeed the animals in question in the criminal proceedings belonged to the very complainant urging that the allegation of theft of one's property must be supported by tangible evidence in form of exhibits and not mere evidence which otherwise amounts to hearsay.



10. It is the position of the Appellants that a description of the animals which were stolen and such description must meet the description of the recovered animals. Reliance was placed in the case of *David Rumpass Olepelo v Republic* (2020) eKLR, the court had this to say in that regard.

Section 278 provides specifically for stealing stock, which includes cows or cattle, with a sentence not exceeding fourteen (14) years. To prove this charge, the prosecution must establish that;

- i. The complainant had a thing capable of being stolen, in this case, either twelve (12), thirteen (13) or fourteen (14) cows, one of which was a bull,
- ii. That the appellant took those cattle away in what amounted to theft.

11. It was submitted that no evidence at all was produced to support the allegation that the complainant had sixty-three (63) or seventy-one (71) heads of cattle which were stolen. PW1 and PW2 testified that they reported to the AP camp and anti-stock Theft Unit. There is no evidence of any such initial report and more importantly of any description of the alleged stolen cattle that was given to the police a part from the breed. That even the ones that had been slaughtered, no hides were found to match whatever description fitted the complainant's cattle. Urging that such testimony cannot be relied upon to sustain a conviction. Reliance was placed on *Derrick Korir Chuma & Another v R* (2007) eKLR.

“I would not have allowed this appeal solely on the above ground. I am however, not satisfied with the evidence by the complainant regarding the identification of the stolen animal although photographs were produced which were taken when the animal was recovered, the same photographs were not matched with similar photographs taken before the animals were stolen to prove that they are the same animals that belonged to PW1. The complainant also did not describe and give distinctive features of the animals. The tag which was meant for identification were not found on the animal which was recovered. I find the conviction of the 1st appellant unsafe and I accordingly allow the appeal. The upshot is that the appeal in respect of both the 1st and 2nd appellant is allowed, the conviction and sentence is quashed and unless otherwise lawfully held they are to be set at liberty forthwith.”

12. It was submitted that the learned Trial Magistrate failed to consider the pertinent issue before anything else; the proof of ownership of the bulls by the complainants which were alleged to have been stolen. Hence the magistrate misdirected himself thereby reaching a wrong conclusion.
13. As to the issue of whether the evidence provided to prove that indeed the Appellant herein stole the 11 bulls, it was averred that the evidence tendered by the prosecution has no proof that the Appellant stole the bulls; contending that PW5 PW6 did state that the Appellant was the driver of the motor vehicle which was alleged to have ferried the alleged stolen bulls. That PW5 specifically stated that he was the turn boy narrating how he was called by the Appellant and the owner of the lorry PW4 to go and accompany the Appellant Herein. Reference was made to page 42 of the proceedings. Contending that the Appellant was at home when the alleged offence occurred if at all. In the case of *JMN v Republic* (Criminal Appeal E017 of 2021) (2022) KEHC 279

..... *Uganda v Sebyala & Others*,<sup>6</sup> the court stated: -

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.



The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi.

Once an accused person discharges the evidential burden of adducing evidence of alibi, it's the duty of the prosecution to disprove it. The duty of the court is to test the evidence of alibi against the issue adduced by the prosecution and if there is doubt in the mind of the court the same is resolved in favor of the accused.”

14. It was submitted further that the accused person did successfully raise the defense of alibi which indeed was never disproved by the prosecution but instead the testimony of PW4 corroborated it and therefore we pray that the court does find for the Appellant to that effect. He quoted the case of *Patrick Wandurua Mbaria v Republic* (2017) eKLR.

“The appellant has been charged with having stolen these cattle. No witness saw the appellant lead the cows out of the Ngongongeri Farm. Neither was the appellant found in actual possession of the stolen cows...”

15. It was the Appellant's case that there is no evidence that indeed the Appellant was seen stealing the cows the prosecution did not prove that indeed the Appellant stole the cows the cows and therefore the Appellant was wrongly convicted.

16. On the Issue of whether the Appellant should have been placed on his defence, it was averred on behalf of the Appellant that looking at the prosecution case, PW1, PW2 and PW3 testified that their bulls were stolen yet did not produce evidence as to ownership or that the said animals were stolen, the complainants further stated that they followed the foot prints up to the place where they found long wheel prints and cow dung yet no evidence to that effect was produced; that mere production of a CCTV camera showing the movement of the lorry which is alleged to have ferried the animals does not prove that indeed the bulls were alleged to have been stolen indeed were stolen and ferried by the Appellant herein. That the CCTV cameras do not show the cattle were indeed loaded into the vehicle; the investigating officer did not investigate the case to establish the relationship between the accused persons now that this was a joint charge. Reliance was placed in the case of *David Rumpass Olepelo v Republic* (2020) eKLR;

“30. By placing the appellant on his defence the trial court did just what is prohibited in criminal trials. Putting the accused on his defence to fill in the gaps in the case for the prosecution. There is no point in the case for prosecution where any witness pointed at the accused and placed him at the scene of crime. In fact, even PW1 said she did not know David. That he had been mentioned adversely but mere suspicion can never amount to proof.....”

32. What is also evident is that PW9 the investigating officer did not investigate the case. It is said that Accused 2? Joshua? was an employee of the complainant and was on duty the day the cattle disappeared. The investigating officer said he had a muster roll showing who was on duty at that time of the sixteen (16) employees, however he did not produce it, why? There was no explanation and the only deduction is that it is not in support of his position. The investigating officer did not investigate the case to establish the relationship between the accused persons now that this was a joint charge. How come they were charged jointly? What was their relationship to warrant a joint charge? Further he



testified that the cows were slaughtered, yet he produced no such evidence that had actually happened. He made no recoveries or found evidence that could support these positions that he took in order to charge the appellant.

34. My view is that on the basis of the facts alone, the trial court did not have sufficient evidence to place the appellant on his defence let alone, make a finding of guilt.
35. I find that the conviction was not safe.

It was urged that the court allow the appeal, quash the conviction and set aside sentence against the Appellant.

### **Respondent's Submissions**

17. Respondent's vide their submissions dated and filed on 24<sup>th</sup> November, 2022 opposed the appeal and submitted on the following grounds.
18. On the ground that the trial court failed to find that essential prosecution witnesses were not produced, it was submitted that the prosecution availed seven witnesses who implicated the appellant as the driver of the lorry (KBQ xxx U). PW4 clearly identified the Appellant as the driver of the lorry. Contending that PW5 adduced direct evidence in court that they were together with the Appellant from Dagoreti to Syokimau where the 11 bulls were taken back to Dagoreti and proceeded to Limuru slaughter house where the bulls were offloaded. Hence the Appellant's ground of appeal is not justifiable.
19. On the issue that the trial Magistrate erred in law and in fact by not considering the Appellant's defense, it was contended that the Trial Court considered that the Appellant's defence was not corroborated by any witnesses. Averring that the Appellant offered a defence of alibi which cannot be tested hence it was a mere afterthought. Reliance was placed on the case of *Victor Mwendwa Mulinge v Republic*, the Court of Appeal rendered itself on the issue of Alibi thus: -

“It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja v Republic* this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”

20. As to the issue that trial Court failed to consider that the matter was not proved beyond reasonable doubt, it was averred that trial court scrutinized the evidence adduced by the prosecution in its entirety; urging that the prosecution adduced very cogent evidence in establishing a prima facie case against the Appellant. Relying in the case of *Stephen Nguli Mulili v Republic* (2014) eKLR

“it is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP v Woolmington*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa v R*, (2013) eKLR.”



21. Submitting on the issue of whether the trial Magistrate erred in law and facts for not according the appellant a fair hearing, it is contended that the trial court adhered to the dictates of Article 50 of the Constitution. Urging that the Appellant was given a fair hearing by the Trial Court.
22. It was the position of the state on the issue of proof beyond reasonable doubt that the relevant provision which the Appellant was convicted and sentenced which provides as follows: -

Section 278 of the Penal Code Provides If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, weather, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen year.
23. The Court was urged by the state to uphold the conviction and sentence.

### **Criminal Appeal E028 Of 2022 Attached To This File George Wambura Nganga v Republic**

24. Vide memorandum of appeal dated 8<sup>th</sup> June 2022 and filed on 20<sup>th</sup> June,2022, the Appellant appealed against the whole Judgment of the Trial court on the following grounds.
  - a. That the trial court erred in law and fact, since no identification parade was conducted. The police had arrested another George Wambura Gichuru whom he shared the 1<sup>st</sup> two names with the Appellant and later arrested the Appellant at his daily working environment.
  - b. That the trial Court erred in law and in fact as there was no exhibit of the stolen bulls, the DCI should have produced the skin, heads, or feet of alleged slaughter bulls.
  - c. That the trial court erred in law and in fact by accommodating the evidence of PW8 whereas the Appellant was not served with the said PW8 witness statement.
  - d. That the trial Magistrate erred in law and in fact as it failed to appreciate that there were four slaughter houses namely: Co-operative slaughter house, Nyongarau slaughter house, Thiani slaughter house and Muma slaughter house which were 100m apart as the prosecutor never established in which slaughter bulls were slaughtered in.
  - e. That the trial court erred in law and in fact as it failed to appreciate the fact that the permit issued to customers before slaughtering the livestock is not proof of ownership but is to confirm the bulls are in good health for customers.
  - f. That the trial court erred in law and in fact as it failed to consider that the prosecution had failed to prove that there was any communication between the Appellant and a co-accused person hence no link that the theft was proved.
  - g. That the trial court failed to consider that the investigating officer never visited the scene of crime.
  - h. That the trial court erred in law and in fact by not considering that the key witnesses were not called who includes the arresting officer PC Mailu and PC Kariuki among others.
  - i. That trial court erred in law and in fact by not considering that no single witness would describe the color of the bulls, no single photo of the bulls was produced and no recovery was done.
  - j. That trial court erred in law and in fact by the failing to consider that no communication was proved to have taken place that linked the Appellant with the offence he was charged with



25. The Appellant and the State herein highlighted to this Court on 14<sup>th</sup> March, 2023 the written Submissions filed on 13<sup>th</sup> January, 2023.
26. The matter was canvassed by way of written submissions.

## Submissions

### The Appellant's Submissions

27. The Appellant vide his submissions dated and filed on 13th January,2023 submitted that the Prosecution case fell short of Section 63 of the Evidence Act which provides that: -

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- (1) Oral evidence must in all cases be direct evidence.
- (2) For the purposes of subsection (1) of this section, "direct evidence" means—
  - (a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;
  - (b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;

28. It was the position of the Appellant that no witness tendered his evidence that the Appellant was seen or heard at the scene where the alleged bulls were stolen.
29. Further, it was the case of the Appellant the Prosecution did not satisfy the provisions of Section 9 of the Evidence Act contending that the ownership of the alleged bulls was not well settled by the evidence tendered by PW1 and PW2 in which according to PW 1 the alleged stolen bulls belonged to his father (reference made to page 19 lines 7-8) while PW2 stated that of the 11 bulls alleged to have stolen only 6 out of them were his. Contending that the alleged father was not called to testify to support that two of his bulls were among the stolen stock and even the 3<sup>rd</sup> person named by PW2 never appeared to tender such claim to support ownership of the 3 remaining bulls which were among the alleged stolen 11 bulls.
30. Submitting on the uncorroborated, contradicting and inadequacy in prosecution evidence, it was submitted that evidence of PW6 that he was a worker at Limuru slaughter house and that the alleged stolen bulls were brought to the slaughter house by the Appellant. Urging that PW 7 clearly stated that the bulls were taken to Limuru slaughter without a permit because accused number 3 was from the same village as Pw6. (reference was made on page 52 lines 12-15 of the trial records pw7).
31. Contending on the unreliable witnesses, it was the position of Appellant that PW5 and PW2 were not credible and thus the Trial Magistrate erred in not thoroughly scrutinizing their evidence to test the credibility of these witnesses. PW 5 stated that he heard 1<sup>st</sup> accused talking through a phone to a person called George about the progress of the mission stating that they were conversing in a kikuyu language which he could not understand except the names. Urging that PW6 told the court at the slaughter house, the alleged stolen bulls were brought by the accused number 3 a cousin to PW6(reference was made to page 52 of the proceedings). Submitting that it is clear that PW6 did not mention his cousin's involvement but unfairly implicated the Appellant as one who brought the alleged animals to Limuru slaughter house.
32. It was contended that this two witnesses tendered unreliable evidence to draw an inference of guilty to the Appellant because they are the only witnesses who mentioned the Appellant in the whole trial hence are of doubtful integrity. Reliance was made in the case of Abel Morari & Another v Re Cr APP.



No. 86 of 1994, in which Court of Appeal stated that “if a witness is unreliable none of his evidence can be relied upon. Such evidence is indeed evidence in a case although generally of little value. Obvious no court can find a conviction solely on the evidence of such witness because his reliability must introduce itself an element of reasonable doubt.”

33. Averting further that PW6 allowed the animals be slaughtered in the slaughter house without the required permit. No document or entry record from the said slaughter house was produced to confirm that these bulls to be slaughtered.
34. As to non-production of vital witnesses required to support a case, it was the Appellant’s submission when a reliable witness is not called it is detrimental to the prosecution case. he quoted the case of *Daitany v Rep* (1953) EACA 493 “that the prosecution has in general discretion to call someone as witness. If it does not call a vital and reliable witness one runs a risk of the court presuming that his evidence could be, and not produced, would be if produced have been unfavorable to the Prosecution”
35. It was submitted that the prosecution failed to call a vital witness mentioned by PW3 (reference was made on page 27 last paragraph), opining that it was mischief for the investigation and also for the prosecution not calling this vital witness to shed light in case at hand owing to the fact that he was the one who took the alleged bulls to graze and the one who knew the number of the animals.
36. On the issue of inept investigations, it was contended that miscarriage of justice happens due to poor investigation of a case leading to an innocent person being arrested without a cause; urging that what the investigating officer relied on is what she was told by PW5 and PW6 whose credibility are questionable and that the CCTV footage produced in court was a mock to the fundamental principles in fair administrative justice. Averting that the said CCTV footage proved not the offence but a vehicle along a very busy Mombasa road contradicted by evidence of PW5.
37. As to the issue of prosecution proving their case beyond reasonable doubt, it was the Appellant’s case that golden thread is for the prosecution to prove their charges beyond any reasonable doubt. Contending that there are contradictions, inconsistencies and inadequacies in the prosecution case which the trial was entitled solve. Reliance was placed on the case of *Elizabeth Waithiegeni Gathimu v Republic* (2015) eKLR, “To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea.”
38. Summary of the witness testimony in the trial court was equally highlighted by the Appellant in his submissions. Urging this court to allow the Appellant Appeal, conviction be quashed, sentence be set aside and the Appellant set at liberty.

### **Respondent’s Submissions**

39. Respondent (state) filed its submissions dated and filed on 15<sup>th</sup> February, 2023 in which the appeal was opposed on the following grounds:
40. As regards the ground that the Trial Court erred in law and fact, since no identification parade was conducted by police, it was the position of the state that the Appellant was properly identified by PW6 who stated that he brought the 11 bulls to Limuru Slaughter house. Urging that the police did not have to conduct the identification parade since the prosecution offered direct evidence linking the Appellant to the crime.



41. As per the ground that the trial Court erred in law and in fact as there was no exhibit of the stolen bulls, the DCI should have produced the skin, heads, or feet of alleged slaughter bulls, it was averred that PW5, PW6 availed direct evidence in which PW5 witnessed the bulls being loaded in the lorry (KBQ xxx U) which was transported to Dagoretti and later to Limuru slaughter house. Contending that PW6 received the bulls at Limuru slaughter house where the bulls were slaughtered. Urging that prosecution relied on the circumstantial evidence such as CCTV footage in order to prove the Appellant's guilt.
42. On the ground of the trial court erred in law and in fact by accommodating the evidence of PW8 whereas the Appellant was not served with the said witness statement, it was the case of the state that Appellant was supplied with the witness statement, on 11/1/2019 and the issue was disclosure was properly undertaken by the prosecution. Submitting that the Appellant had an opportunity of raising his issue before PW8 testified in court
43. As regards the ground the trial Magistrate erred in law and in fact as it failed to appreciate that there were four slaughter houses namely: co-operative slaughter house, Nyongarau slaughter house, Thiani slaughter house and Muma slaughter house which were 100m apart, it was the position of the state that prosecution offered direct evidence of PW5 and PW6 who testified that indeed the 11 bulls were offloaded in Limuru slaughter house,
44. On where the trial court erred in law and in fact as it failed to appreciate the fact that the permit issued to customers before slaughtering the livestock is not proof of ownership but is to confirm the bulls are in good health for customers, it was the contention that the trial court was right to confirm that indeed cattle permit is proof of ownership.
45. As to the ground that the trial court erred in law and in fact as it failed to consider that the prosecution had failed to prove that there was any communication between the Appellant and the A CO-accused person hence no link that the theft was proved, it was submitted that trial court was right in convicting the appellant and the co- accused. Urging that PW6 clearly places both the Appellant and the co-accused in Limuru slaughter house averring that PW5 testified that he heard the driver (accused1) talking to the Appellant when they left Syokimau, heading to Dagoretti.
46. Urging on the ground that the trial court failed to consider that the investigating officer never visited the scene of crime it was submitted that the prosecution adduced cogent evidence in establishing a prima facie case against the Appellant. Contending that the investigating officer visited the scene of crime and gateway mall in order to get the CCTV footage.
47. Contending on the ground the trial court erred in law and in fact by not considering that the key witnesses were not called who include the Arresting officer PC Mailu and PC Kariuki, it is urged that prosecution cannot be directed by the defense on the witnesses to call for evidence as the evidence on record was cogent and sufficient to prove the guilt of the Appellant. Reliance was made on Article 157 (10) of the Constitution, the Director of Public Prosecutions shall not require the consent of any person or authority for commencement of criminal proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority,
48. As regards the ground that trial court erred in law and in fact by not considering that no single witness would describe the color of the bulls, no single photo of the bulls was produced and no recovery was done, it was the case of the prosecution that PW5 and PW6 testified that indeed the 11 bulls were offloaded in Limuru slaughter house.
49. On the ground that trial court erred in law and in fact by the failing to consider that no communication was proved to have taken place that linked the Appellant with the offence charged, it was submitted



the Appellant was properly identified by PW6, as the person who brought the 11 bulls to Limuru slaughter house hence the prosecution availed direct evidence linking the Appellant to the offence.

50. As regards the ground of proof beyond reasonable doubt, it was contended that the Appellant was convicted and sentenced. Reliance was made on Section 278 of the *Penal Code* which provides:

If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, weather, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.

51. Contending that the trial court acted within the law in sentencing the Appellant to 5 years' imprisonment, urging this Honorable Court to uphold the conviction and sentence.

### **Determination**

52. This Court Considered the Memorandum of Appeals the oral high lights of/and written Submissions of the parties through respective Counsel and Trial Court record and the issues raised for determination are whether the grounds of appeals by both Appellants will be upheld and appeal allowed or the grounds of appeal and the appeal dismissed.

The Appellant's submitted that on the issue of the applicable law, legal principles and evidence he stated that this Court has an obligation to consider the appeal at the first instance. The Court of Appeal in the case of *Okeno v Republic* [1972] EA 32 of the obligation of the first appellate court stated as follows:

"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 v Republic* [1957] EA 336) and to 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. Rulwala v Republic* [1957] EA 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 findings and conclusions; 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."

### **Proceedings In Trial Court**

53. The case for the prosecution was anchored on the evidence of eight (8) witnesses. John Kasili Mose gave his sworn evidence as PW1 stating that on 28/10/2018 at 6pm he had brought livestock from grazing and that livestock were his father's; that he locked the 27 bulls in the Boma. PW1 stated that they rested and slept at 11:00pm and that in the morning he woke up at 6am and upon checking there were bulls missing; he went around the area and did not find them. He testified further that he counted and found 11 bulls missing and noted that there was path on the fence which they followed for 1 ½ km to Katani and noted long wheel prints stopped there. They went to Syokimau Police Post to report since they did not know who had stolen the livestock. Police visited the Boma the same day and took photographs of the boma/scene of crime.
54. In cross examination by the accused persons he testified that he is a herdsman and that he did not know who took the missing livestock; that they were there in the Boma fenced with thorny bush and also



- was at the gate and that they were three herdsmen slept in one room of which the two had not reached eighteen years; that he was not able to hear when livestock were being stolen.
55. On further cross examination by the accused person's Counsel he stated that bulls were 27 and the rest were mixed and stated that he did not know the price of stock bulls and that he did not know 4th and 5th accused persons. He stated the herdsmen Lungai and Kisai were 15 & 14 years and they grazed livestock together. When Lungai brought the livestock PW1 counted all livestock. He followed the livestock foot prints and cow dung for about 11/2 Km and noted the bulls were carried away using a lorry. Jackson Kituna Matura was/is brother from same parents.
  56. In re- examination PW1 testified that Kisai was his cousin and they slept in one house the three of them and that he did not know price of bulls but he estimated at Kshs 550,000
  57. PW 2 Jackson Kiuna Matura gave his sworn evidence and testified that on 29/10/2018 he was called by PW 1 his younger brother at 6:45 to 7:00am; that they tried counting livestock and 11 bulls were missing. PW2 told him to follow their foot prints and reached where their foot prints ended and there were motor vehicle wheels prints of motor vehicle towards the Airport side. Upon reaching, he confirmed that 11 bulls were missing and went with his brother Stephen to see their friend at Gateway Mall. They told their friend their ordeal and he gave them clear footage of all vehicles that went to/on Airport Road. They viewed the CCTV footage and were able to see a lorry that passed at 2a.m and took the Mombasa-Nairobi Road which was suspected to have carted the bulls away. They reported the matter to Mlolongo Police Station and the lorry Reg KBQ xxx was impounded and detained by Police and the owner one Lucy residing in Kikuyu who was arrested. After investigations the accused persons were arrested and charged. The bulls were slaughtered at 5 am. He stated that the livestock is grazed together for the family and he is manager of the livestock and are grazed collectively. There were/are 27 bulls and cows 45-50 and only 11 bulls were stolen. Each bull was going for Ksh 80,000/- and total was Ksh 880,000/-
  58. In cross examination by the accused persons he testified that he was called by his brother that 11 livestock had been stolen and that he knew who stole after police investigated. He stated that the livestock were taken to Dagoretti slaughterhouse but refused because of lack of permit and was taken and slaughtered in Limuru. He testified that ICD camera showed registration; further that his livestock were removed from his Boma and the foot prints indicated where they were taken in a motor vehicle as there were wheels of moving Lorry at the place where the bulls were.
  59. On further cross examination by the accused persons counsel, he testified that two boys were in charge of the livestock; Lungai and PWI because he lives in Kiserian; that livestock are for the family, his father has his own livestock and he has his own livestock and that 6 stolen bulls were his'2 bulls were his father's and 3 bulls his brother's. He is the manager of the whole livestock. John Kasirimu was/is his brother. Kisai is a neighbor Lungai herdsboy from their clan and Stephen Sasine his stepbrother. There were wheel marks, cow dung and dust where the bulls were taken at an airport field that has no construction. The Police were not there as he watched CCTV footage. He did not know the 4th & 5th Accused persons the driver identified them as the Maasai stealing livestock from Kitengela and Syokimau. The Accused removed the Livestock and took to other Accused persons. The Police took their numbers and from the Call Register confirmed they took livestock. Police took photographs.
  60. In re-examination, he testified that they bought livestock using their own money in which he bought 6 bulls 2 bulls for his father and 3 bulls for his brother bought with their own money.
  61. PW 3 Stephen Sasini Ntare gave his sworn evidence and testified that on 29/10/2018 he received a call from his other brother who herds cows with his other father who told him that when the cows were counted in the morning, 11 bulls were missing; that he told his brother to report to police and that



they headed to Syokimau where cows were being raised and was briefed by his brother that the brother together with the members of the public had followed the foot prints and a fresh cow dung which led them to place where it looked like a lorry had parked and cows carried away. He testified that they requested Gate Way Mall Security Department to help them access CCTV which they viewed and saw at around 1:05 am a white lorry Isuzu type which joined Airport road from main Mombasa Road and by 2:01am the same lorry drove off from Airport Road joining Mombasa Road. He stated that the CCTV camera could not clearly capture Reg. No. of the Lorry and they went to Mlolongo DCI and made the report; that their lorry tyre mark at the scene which made them suspect that lorry could have been used to carry the bulls; that the 11 bulls were worth 880,000/=.

62. In cross examination, he testified that he was not with the police officer when they went to watch CCTV; and that the footprints were from their compound; that their compound was lit and the gate was not broken; testifying that 11 bulls passed through the fence. Jackson was not present when the theft occurred he was Manager. He got the soft copy of the CCTV footage and he shared with the Police. The livestock was stolen from Jackson but the bulls belonged to the family.
63. In re-examination he stated that the foot prints were from their homestead and that Lengai and John were herders that night and that Jackson is the overall manager; that the bulls belong to the family and that his father is at Kiserian.
65. PW4 Lucy Wangare Munyiri in her sworn testimony stated that on 28/10/2018 she had hired Appellant David Macharia who called her at 9am and told her that he had found work to carry cattle. She had hired him as her driver of lorry Reg.KBQ xxxH FHR and he told her he was to carry cattle from Mlolongo to Dagoretti. She asked why the Appellant had decided to carry cattle instead of ballast and sand and told him (the Appellant) to be careful of the job. She testified that she had told him not to be carrying cattle, timber or charcoal and that she called the Appellant to bring the lorry for tyre change which he did and as it was being changed she received a call from DCI officer asking if I could sell him ballast and introduced him to her driver (Appellant).
66. Testifying further that she asked the Appellant if they had done any illegal business which they denied. She left and as she was going away she saw the lorry being driven away and went back to find that the driver and the turn boy had been arrested. PW4 reported to OB Kikuyu Police Station over her lorry having been taken away and was referred to CID in which she was booked in cells at 8pm and escorted to Mlolongo Police Station where she was told her Lorry had carried stolen bulls. PW4 confirmed that David Macharia was the only driver for that lorry and did not tell her who was to carry the bulls. PW4 said that on that day David had sent her 13,000/=, and on 29th he sent her the money for the day.
67. In cross examination she testified that she knows Appellant as David Macharia; that her lorry was to carry construction Materials only and that he called her to say he was to carry cattle and that she did not know if he carried them. She further testified that it was on 28th October 2018, when the driver told her he was to carry cattle; that her vehicle has car track and that she cannot tell if the lorry went to Mlolongo and that the lorry is her personal property.
68. Upon further cross examination by the 2nd accused she testified that she had never delivered construction materials to the 2nd accused and that she spent a day at Mlolongo cells and that the 1st accused told her that he had cattle work to do that day; further that she did not know the 4th and 5th accused and that her driver never told her who hired him. She never saw the CCTV footage showing her lorry and that the car truck had a history of previous movements further that she did not call the company which installed to tell her where the lorry was on 29th October, 2018 and that she never went to car track dealer to give her the history and that the lorry was released to her.



69. In re-examination she testified that she was arrested and her phone confiscated and was released because she was sick; that she told the police that she had given Appellant the lorry that is why she was not charged and that she has never used car track to check the history of the lorry.
70. PW5 Evans Sichangi Nyongesa gave his sworn evidence and testified that on 28/10/18 he was called by the Appellant David Macharia whom he used to work with; that he (Appellant) was David Macharia and that David called him saying there was some work to do hence he should join him. He testified that they used to carry sand and stones and that he was turn boy of Reg KBQ xxx lorry. That he joined the Appellant and they drove all the way to Syokimau then he turned on a rough road near Gate Way Mall. He further testified that the Appellant had called somebody Kashu while on their way; that he asked the Appellant what they were going to do but he told him to remain silent. They entered a certain compound that in a short moment he saw 11 bulls being brought and the Appellant told him to open the lorry door which he did. Kashu and the other man drove bulls into the lorry. After that they drove back to Dagoretti and on the way he heard the Appellant call one George telling him that they were progressing with the journey. They spoke in Kikuyu and he heard the names.
71. When they reached slaughter house where they were asked for permit but they argued for long then they left and drove along bypass; that it was around 1am to 2am. He testified further that they drove to Limuru slaughter house where they offloaded the bulls and that they were not asked the permit and that Kashu and his colleague whom they were together with asked for Kshs 30,000/-. They went away and the following day he asked for his pay and was given 250/= only. The Appellant told him that the police were looking for the lorry and one day they had gone to Kikuyu to exchange tyres and they were arrested; he identified David Macharia (Appellant), Kashu and his friend [accused 1 accused 4 & accused 5] who drove the bulls in the lorry.
72. In cross examination he testified that Kashu was the owner of the work done; that he saw KASHU pay the Appellant for the work done and that the owner of the lorry told him that the Appellant had found work. He identified George as he heard the Appellant call him and told him the cargo was in the lorry. He stated that George told the Appellant to drive to Limuru. He testified that at Limuru he did not see any payment it was dark and that Kashu asked for 30,000/= and that he had counted the bulls were 11. At Mlolongo they were Thiani, David & George and he identified Thiani very well. I knew 5th Accused person as Kashu. He identified 4th & 5th accused to the Police at the Police Station but it was not in an identification parade. He was also charged in Court. He recorded his statement 5 months after the incident.
73. In re-examination testified that he knew the accused 4's name at the Police Station. Accused 1 and Accused 5 talked in Kiswahili and he understood what they were saying. He was never told the work they were going to do. He met George at Ndonyo market Accused 1 called him George. George was the one to buy. There was security light at the slaughter house and he saw George.
74. PW6 Alex Mburu another witness testified that he was the slaughter manager of Limuru slaughter house and that he recalled on 29/10/18 at 4am one George brought 11 bulls at the slaughter house. He knew George before. Testifying that he took details of the lorry and mobile number and then slaughtered the bulls and he took them.
75. That later police went to the slaughter house and asked if the subject lorry had had delivered any bulls at the slaughter; the lorry Reg KBQ xxx U is the one that brought the bulls and a3rd vehicle carried away the by- products. He was arrested and shown the picture of George and they went to Dagoretti slaughter house and found George was arrested. He provided the police with necessary information they wanted and identified the 2nd accused as the person who took the 11 bulls to Limuru slaughter house.



76. PW6 was cross-examined by the accused persons. He stated he did not know the Appellant [1st accused person] but knew George who brought the bulls as his and they recorded the details of the lorry.
77. He said he knew Accused 2 he knew him as businessman within Dagoretti and he was present when he was arrested in his compound. It was the 1st time he heard he was involved in stolen cattle. He identified the complaint by Police as the Reg of the lorry that they mentioned. He confirmed that they ask for permit from the person availing cattle and details of the owner and the 2nd Accused was bringing the permit so since he knew him he agreed. He confirmed that there was George Mathaka but it was him and he did not fabricate the case against him.
78. On further cross examination, he stated that he saw Accused person at 3 – 4 am in Limuru Slaughter house and he recorded the details of the lorry and George and the Police made a copy of his book. He stated he did not know 4th & 5th accused persons
79. He did not see those who drove cattle from the lorry but he saw 1st 2nd & 3rd Accused persons. He did not participate in an identification parade and he did not know the owners of motor vehicle carrying by products of cattle he slaughtered.
80. They came on a Friday to the slaughter house Jothari is a butchery in Dagoretti. He identified 2nd accused in Court and 3rd Accused Thiani associate of 2nd Accused person. He did not know Nyongesa. There was No re-examination.
81. PW7 No 91932 PC Betty Muthoni working with the DCI at Makadara gave her sworn evidence and testified how the report of stock theft was made by the complainant. That PW1 reported that on 29/10/2018 at around 6.30 am he went to check cattle and he found 11 bulls missing. There was a hole at the cattle boma. They followed the marks along Airport Road about ½ km away and suspected unknown motor vehicle had ferried the cattle. PW6 & PW12&3 traced CCTV camera at Gate Way Mall and she also saw the CCTV footage and noted a suspicious motor vehicle white in color with high body that passed between 1-2 am on 28th-29th Oct 2018.
82. PW7 wrote to IC3 for footage and circulation of CCTV and from the IC3 she got the registration as KBQ xxx make Isuzu Lorry white in color. PW7 wrote to NTSA to confirm details of the owner of the lorry and conducted investigations by recording witness statements and viewing CCTV footage from Gate Way Mall and were able to spot the subject lorry as the one suspected to have carried the bulls. PW7 thereafter called the owner who led to the arrest of the driver (Appellant) and other suspects involved in the matter. PW7 produced exhibits; Letter dated 30/11/2018-EX1; CD CCTV FOOTAGE- EX-2, Letter to NTSA EXH-3 COPY of LOGBOOK-EX4.
83. A CCTV footage was played in court showing the motor vehicle heading to Mombasa Road and the footage showed that it was in Mlolongo at 2.09 am the motor vehicle was going back from Katani to southern Bypass. She testified that the evidence showed that the accused persons were at scene of crime.
84. In cross-examination by Accused 1, the witness stated that she visited the scene and the lorry carried the cattle because of evidence of the slaughterhouse and the CCTV footage came from IC3. They did not take photos at a stationary lorry.
85. In cross examination by Accused 2, the witness stated that she visited the scene after the report. The 2nd Accused was arrested at Dagoretti and she did not recover anything from him but took phones for investigations. She stated there is no George Gitau in the statement but George Wambura and met him in Limuru. PW5's charge was withdrawn so that he could be a witness.



86. In cross examination by 3rd Accused's advocate, PW7 stated that Accused 3 was arrested at Dagoretti who at the slaughter house on the night of the scene. He was the organizer on how cattle was delivered and slaughtered at Limuru slaughter house. He was related to PW6.
87. In cross examination by 4th & 5th Accused persons, PW7 stated they conducted investigations as a team Cpl Farida Baraza, David Kariuki & John Maru but did not name them in the Investigation Diary. PW7 obtained CCTV Footage from IC3 and not from GateWay Mall. She did not conduct Identification Parade of the 4<sup>th</sup> & 5th Accused persons.
88. PW8 No 229515 Chief Inspector Fred Gichuki based at I.G Director of Integrated Command Center (IC3) told the Court that on 30/10/2018 he received a request from PW7 for CCTV footage along Mombasa Road at Gateway Mall Mlolongo for 29/10/2018 between 00100hrs and 00200hrs; that he downloaded the CCTV footage as per the Request and handed over to PW7. That his role was to provide CCTV Footage to PW7 to see if the subject lorry was on the road at that time and that it was not his duty to identify the registration number of the subject motor vehicle. He produced in evidence the CCTV footage and certificate as exhibits.
89. At the close of the prosecution case the defense submitted their submissions and upon consideration of the same each accused person was placed on his defense.

### **Defense Case**

90. In defence, the accused persons denied committing the offence. The Appellant alleged that he was in the house a sleep when the alleged offence was committed. It was the testimony of the Nyongesa that he was called by both the Appellant and PW4 and told that there was work to do. The Appellant had already told the PW4 that he was going to carry cattle from Mlolongo to Dagoreti.
91. Nyongesa gave detailed account on how he joined the Appellant at Dagoreti market and they drove all the way to Syokimau, branched off at Gateway mall and on entering a certain compound they were joined by Kashu and another man who drove the 11 bulls into the lorry.
92. That there was no guarantee that PW5 would have easily identified the 4th and the 5th accused having been allowed to do so in an identification parade and that the 3rd accused's alibi was not shaken by the prosecution.
93. Vide a judgment dated 27th April, 2022, the Appellant together with 2nd accused therein were convicted jointly to have committed the offense. 3rd, 4th and 5th accused therein being acquitted.
94. The Court considered the principles on standard and burden of proof under the *Evidence Act* as follows;

Hon. R. Nyakundi J. in *Republic v Ismail Hussein Ibrahim* [2018] eKLR stated:-

“...the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt and there is no burden on the part of the accused to prove his innocence at any one given time. The law only permits very few statutory exceptions where an accused person can be called upon to give an explanation in rebuttal. However, this does not shift the burden of proof from the prosecution”

Burden & Standard Of Proof

(Section 109-111 *Evidence Act*)



109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

111. Burden on accused in certain cases

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.....

95. Lord Denning on proof beyond reasonable doubt in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 stated:-

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

96. The Appellant David Macharia Gachoka raised the following issues on appeal

**The trial Magistrate erred in both law and facts for failing to find that what would be essential prosecution witnesses were not produced.**

97. It was submitted that the herdsboy Lengai was not called as a witness to confirm that 11 bulls were stolen on the night of 28/10/2018. There was no eye witness to prove the Appellant stole the bulls.

**The trial Magistrate erred in both law and facts by not considering the defense of the Appellant.**

98. The judgment by the Trial Court the accused persons defense was not considered.

**The learned Magistrate erred in matters of law and facts by failing to consider that the case was not proved to the required standard provided by law.**

99. The Prosecution did not prove 11 bulls were stolen from the Complainant. Ownership of the bulls was not established. There was no proof of ownership of the 11 bulls. There was no tangible evidence or exhibits to prove ownership. There was no description or identifying marks of the animals or photographs of the animals or cowhides that should have matched the description of the animals before they were stolen. There was no exhibit of the stolen bulls, the DCI should have produced the skin, heads, or feet of alleged slaughter bulls.

100. Section 278 of the *Penal Code* prescribes the ingredients of the offence which were not proved by the Prosecution.

101. The evidence of PW1 PW2 & PW3 was inconsistent and contradictory on ownership of the bulls. Their father was not called to confirm the bulls he owned.



**The learned Magistrate erred in law and facts for not according the Appellant fair hearing.**

102. There was no proof of that the Appellant stole the 11 bulls.

103. I have evaluated and analyzed the evidence on record and find as follows;

**Whether the ownership of the alleged stolen bulls was proved in compliance with Section 278 of the Penal Code.**

**The evidence of PW1, PW2 & PW3 on ownership of the 11 bulls was as follows;**

104. PW1 stating that on 28/10/2018 at 6pm he had brought livestock from grazing and that livestock were his father's; that he locked the 27 bulls in the Boma. They rested and slept at 11:00pm and that in the morning he woke up at 6am and upon checking there were bulls missing.

105. PW2 stated that the livestock is grazed together for the family and he is Manager of the livestock and are grazed collectively. There were/are 27 bulls and cows 45-50 and only 11 bulls were stolen. Each bull was going for Ksh 80,000/- and total was Ksh 880,000/- His father has his own livestock that 6 stolen bulls were his bulls, 2 bulls were his father's and 3 bulls his brother's. He is the manager of the whole livestock.

Section 268 of the Penal Code provides definition of stealing

- (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
- (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—
  - (a) an intent permanently to deprive the general or special owner of the thing of it;
  - (b) an intent to use the thing as a pledge or security;
  - (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
  - (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
  - (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;

and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.....

106. From the evidence of PW1 PW2 & PW3, PW2 was special owner of the cattle that belonged to various members of the family; their father, brothers, step brothers etc and PW2 as Manager was the special owner and Complainant.

107. With regard to the existence of the 11 bulls and that they were the ones stolen on the night of 28/10/2018, the evidence on record by PW5 and PW6 confirms 11 bulls were loaded onto the lorry on the night of 28/10/2018 and PW6 confirms that 11 bulls were offloaded from the same lorry at Limuru slaughterhouse. 2 witnesses saw the bulls.



108. The cases cited *David Rumpass O Lepelo v Republic supra* & *Derrick Korir Chuma & Another supra* as the livestock theft ownership and sale were contested. The cows from the farm in the 1<sup>st</sup> case were not recorded anywhere, no identification of the specific cows as belonging to the Complainant. The Appellant therein was a livestock businessman who sold livestock for 10 years. The investigations were not conducted and PW2 a crucial witness was not recalled to testify after the Appellant was arrested and charged with other Accused persons. The circumstances are different to the present appeal as in those cases livestock was recovered and ownership contested whereas herein, the bulls were never recovered.
109. One cannot possibly produce that which is not available non-existent. Assuming skins were availed the contest would reign whether it/they are for the said bulls or other bulls and so on and so forth. Suffice is that the Police visited the scene established there was a Boma of cattle and some among them were missing.

**Whether there is proof the Appellant David Macharia Gachoka stole 11 bulls.**

110. From the witnesses who testified, PW5 Evans Sichangi Nyongesa gave direct evidence as to the events leading to the stock theft of 11 bulls on the night of 28/10/18. The Appellant called PW5 was called by the Appellant David Macharia whom he used to work with and told that there was some work to do hence he should join him. PW5 joined the Appellant in Reg KBQ xxx lorry and they drove all the way to Syokimau then he turned on a rough road near Gate Way Mall. They entered a certain compound that in a short moment he saw 11 bulls being brought and the Appellant told him to open the lorry door and drove bulls into the lorry. They drove back to Dagoretti, where they were asked for permit, they drove to Limuru slaughter house where they offloaded the bulls and that they were not asked the permit.
111. The Court of Appeal in *PON v Republic* [2019] eKLR had this to say on direct evidence;
- “In its ordinary meaning, direct evidence would be that which directly links a person to a crime; that which is based on an eyewitness account, on personal knowledge or observation. The direct evidence sought in the matter the subject of this appeal is - who saw how the deceased meet her death. There is no such evidence hence the recourse to circumstantial evidence...”
112. G.V.Odunga J. in *Republic v Martin Kiio Ngei* [2019] eKLR 52 stated that:
- “Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eye witness, asserts actual knowledge of a fact, that witness' testimony is direct evidence.”
113. In defence, the Appellant denied committing the offence. The Appellant alleged that he was at home with his family and the went to church. The Prosecution presented the evidence of PW5 that he was called by both the Appellant and PW4 and told that there was work to do. The Appellant had already told the PW4 that he was going to carry cattle from Mlolongo to Dagoretti.
114. PW5 gave detailed account on how he joined the Appellant at Dagoretti market and they drove all the way to Syokimau, branched off at Gateway mall and on entering a certain compound they were joined by Kashu and another man who drove the 11 bulls into the lorry.
115. Secondly, PW4 Lucy Wangare Munyiri registered owner of lorry Reg. KBQ xxxH FHR confirmed that the Appellant David Macharia Gachoka was her driver and on 28/10/2018 he called her at 9am and



- told her that he had found work to carry cattle. He told her he was to carry cattle from Mlolongo to Dagoretti.
116. Thirdly, both PW4 & PW5 knew the Appellant before the incident, PW4 was Appellant's employer and PW5 the turnboy of the lorry. It was recognition and not identification as they knew each other before the incident and there was no case of mistaken identity.
117. Fourthly, PW6, Manager at Limuru Slaughter house that on Monday 29/8/2018 in the morning at 4 am the lorry Reg KBQxxxU brought 11 bulls for slaughter.
118. The evidence of PW4 & PW5 is corroborated by PW6 & PW7 who saw and produced the CCTV footage of the lorry on along Mombasa Road at Gateway Mall Mlolongo for 29/10/2018 between 00100hrs and 00200hrs. It is not disputed the Appellant was the driver of the lorry on 28/10/2018 and PW5 the Turnboy.
119. The Appellant raised the issue of the alibi in his defense was not considered during trial. It is trite that the onus remains with the Prosecution to prove the alibi.
120. The Court of Appeal in *Charles Anjare Mwamusi v R* CRA No. 226 of 2002 stated that:

“An alibi raises a specific defense and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. *Kimotho Kiarie v Republic* (1984) KLR 739 at page 745 paragraph 25.”

In *Kimotho Kiarie v Republic* [1984] eKLR, the Court mandates;

“that an alibi raises a specific defense and an accused person who puts forward an alibi as answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the Court a doubt that is not unreasonable.”

121. The Appellant's defense that he was home with his family on the eventful day, is juxtaposed with evidence outlined above that the Appellant was driving Lorry Reg KBQxxxU to Mlolongo as he informed PW4 that he was going to carry cattle. He went with PW5 the turn boy of the lorry and they ferried the bulls. PW4 & PW5 were cross examined on their evidence and the Trial Court found their evidence credible. The accused told the Trial Court that he would call witnesses but he never called any witnesses although he was not under a legal obligation to prove his alibi.
122. This Court finds that the evidence adduced by the prosecution is that the Appellant was recognized by Pw4 his employer who gave him the lorry and Pw5 the turnboy (whose case was withdrawn and he became a prosecution witness). He may be considered an accomplice and his evidence requires corroboration.
123. However, the evidence of Pw6 is that while he was at the Limuru slaughter house that motor vehicle/ lorry Reg. KBQ xxx U brought the bulls the said lorry was driven by the Appellant and he recorded the Reg. No. of the lorry. The 2<sup>nd</sup> Appellant approached him to have the bulls slaughtered and said that he would bring the Permit later.

Pw4 and Pw6 recognized and identified the 1<sup>st</sup> Appellant and they corroborated the evidence of Pw5. This is compelling evidence by the Prosecution and the defence the alibi put by the 1<sup>st</sup> Appellant cannot controvert the prosecution evidence.



124. An accomplice's evidence must be corroborated by other evidence – In Republic v Jane Muthoni Mucheru & Isaac Nganga Wamburia alias Gikonyo HC 45 of 2018 NKR, High Court No.89 of 2016 Kiambu High Court Hon. J. Ngugi J referred to the case of Republic –v- Taibali Mohamedbhai [1943] 10 EACA 60 where it was held;

“ what is required is that there should be independent testimony corroborative of the evidence of the accomplice in some material particulars implicating the accused (person) or tending to convict him with the crime with which he is charged. The principle is that if an accomplice is so corroborated not only may that part of his evidence which is corroborated be relied on, but the part which is not corroborated.

125. Pw5's evidence is corroborated by Pw4 owner of the lorry who had hired 1<sup>st</sup> Appellant and he said he had the lorry and she said 1<sup>st</sup> Appellant told her on that day 28/10/2018 he was going to Mlolongo to collect/ferry cattle.

127. Pw6 saw the lorry at Limuru slaughter house on the same night 29/10/2018 and saw the 11 bulls which were brought for slaughter.

128. Pw7 who testified that– CCTV footage showed the lorry on Nairobi – Mombasa Road on the same night 29/10/2019 at 1 – 2 a.m. The alibi is ousted by the Prosecution evidence.

129. On whether, the Prosecution failed to call crucial witnesses or not, Section 143 of *Evidence Act* provides for sufficiency of evidence based on a single witnesses' testimony. In *Samuel Kagiri Njuguna v Republic* [2016] eKLR the Court held that all that the prosecution is required to do is to call such a number of witnesses as it thinks is sufficient to prove its case. Secondly, the prosecution is in conduct of its case on the best way how, the defense similarly so and the court to determine guilt/conviction/acquittal based on the evidence on record and legal principles applicable.

130. With regard to alleged inconsistent and contradictory evidence by Prosecution witnesses the Appellant was not specific which witness stated what evidence that was contradictory or inconsistent. However, on the issue of ownership of the bulls PW1 PW2 & PW3 gave their take as to who owned what within the family but PW2 was the one incharge managing the livestock on behalf of the family.

131. In *Philip Nzaka Watu v Republic* [2016] eKLR, the Court of Appeal held:-

“ However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question”.

### **Evaluation & Analysis Of Evidence For George Wambura Nganga**

132. That the trial court erred in law and fact, since no identification parade was conducted. The police had arrested another George Wambura Gichuru whom he shared the 1st two names with the Appellant and later arrested the Appellant at his daily working environment.

133. The Court finds evidence on record that PW5 confirmed that 2<sup>nd</sup> Appellant was not in the lorry as he and 1<sup>st</sup> Accused/Appellant drove to Syokimau. On that night 28/10/2018, 1<sup>st</sup> Appellant called KASHU



- and informed him they were coming. On turning on a rough road near Gate Mall and the driver 1<sup>st</sup> Appellant stopped and called Kashu who came. In a short moment he saw 11 bulls and he Kashu and another slender man pushed the bulls onto the lorry. Clearly, 2<sup>nd</sup> Appellant was not there.
134. PW5 stated that after that they drove back to Dagoretti, on the way he heard the Appellant call one George telling him that they were progressing with the journey. They spoke in Kikuyu and he heard only the names.
135. PW5 identified George as he heard the Appellant call him and he told him the cargo was in the lorry. He stated that George told the Appellant to drive to Limuru slaughter house. This Court finds the evidence quite uncertain, if 1<sup>st</sup> accused spoke to George on phone how did PW5 identify him as the George whom the 1<sup>st</sup> Accused referred to on phone and/or that he knew of the theft of the bulls? He did not hear and understand the whole/full conversation as it was in vernacular.
136. If assuming they met at the Limuru slaughterhouse to have the bulls slaughtered how would the 2<sup>nd</sup> Appellant know the bulls were stolen yet he was not at the scene when and where the bulls were put in the lorry?
137. At the Limuru slaughterhouse, PW5 stated that at the Gate there were 2 men and he heard 1<sup>st</sup> Appellant call the fat man –Thiani (3<sup>rd</sup> accused released). They offloaded the bulls to the slaughterhouse and they were not asked for a permit. In Court during trial PW5 identified 1<sup>st</sup> Accused, 4<sup>th</sup> & 5<sup>th</sup> Accused persons as those who he was with when they collected the bulls.
138. PW6 stated that it was the 2<sup>nd</sup> Appellant who brought the bulls to the slaughterhouse and since he knew him as a businessman in Dagoretti, he allowed the bulls to be slaughtered without the permit as he said he would bring the permit later. PW6 confirmed there was another George Mathaka but he dealt with the 2<sup>nd</sup> Appellant who brought the bulls.
139. PW7 who investigated the case confirmed arrest of 2<sup>nd</sup> Appellant as he was said to have taken the bulls for slaughter at Limuru slaughterhouse. PW6 agreed to have the bulls slaughtered through 3<sup>rd</sup> Accused who is his relative and 2<sup>nd</sup> Appellant who he knew before.
140. The Court of Appeal in *Samuel Kilonzo Musau v Republic* [2014] on identification parade indicated thus:
- “The purpose of an identification parade, as explained in *Kinyanjui & 2 Others v Republic* (1989) KLR 60,
- “is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion.” It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness’s attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification.”
141. In light of allegations made by the 2<sup>nd</sup> Appellant of another George who was arrested earlier, PW6 confirming existence of another George but he knew and dealt with the 2<sup>nd</sup> Appellant and PW7 on



cross examination claiming that there was no George Gitau in her statement, all these anomalies would have been resolved by an Identification parade.

142. In the case of 2<sup>nd</sup> Appellant, the evidence on record confirms that he was not in the lorry with 1<sup>st</sup> Appellant and PW5 and 2 others (4<sup>th</sup> & 5<sup>th</sup> Accused persons were the persons identified by Pw.5 when the bulls were hurled onto the lorry and ferried to the slaughter house). The charge of stealing stock contrary to Section 278 Penal Code against the 2<sup>nd</sup> Appellant is not supported by the evidence on record adduced against the 2<sup>nd</sup> Appellant.

**That the trial court erred in law and in fact by accommodating the evidence of PW8 whereas the Appellant was not served with the said PW8 witness statement.**

143. All persons are entitled to fair hearing in Article 50 2 (c) & (j) of [CoK2010](#) which includes adequate facilities to prepare for defence and to be supplied with the evidence the Prosecution intends to rely on in advance during trial.
144. Whereas this is a Constitutional right the Court finds that the issue of provision of the Witness Statement by PW8 before hearing was not raised before the Trial Court. If the Trial Court granted orders for Witness Statements and Documents to be availed on 4/1/2019 other witness statements were availed how would the Trial Court know and address the issue if not raised by the Defence that the prosecution had not provided pw.8's statement and ask for time to prepare for trial/defence.
145. At this stage, The Court finds the issue an afterthought and raised for the 1<sup>st</sup> time on appeal.
146. The Trial Court record confirms the bulls were slaughtered at Limuru Slaughterhouse and the evidence of PW6 was not controverted by any other evidence.
147. The Trial Court Record confirms that PW7 visited the scene and PW1 confirmed the said fact in his evidence.
148. From the totality of the evidence on record this Court finds no evidence to connect the 2<sup>nd</sup> Appellant with the offence of stock theft, the only part he featured is at the slaughterhouse. He was not in the lorry and/or at the scene where the bulls were hurled onto the lorry to the slaughterhouse.
149. At the Limuru Slaughterhouse, PW6 & PW7 confirmed that the 3<sup>rd</sup> Accused was PW6's relative and 2<sup>nd</sup> Appellant facilitated the bulls to be slaughtered and were handed over to PW6. That by and of itself does not confirm stock theft on the part of 2<sup>nd</sup> Appellant unless common intention is proved. He is acquitted of the charge as the conviction is not safe unless lawfully held he is released.
150. With regard to 1<sup>st</sup> Accused /Appellant, the Court finds from the Trial Court record he was involved in stock theft, he was the driver of the lorry Reg. No. KBQ xxx U that ferried the bulls to the slaughterhouse. He is recognized and known by the owner of the lorry PW4 his employer and he was in the company of PW5 turnboy on the night of 28 & 29/10/2018. This Court reading the Trial Court Record is satisfied the 1<sup>st</sup> Appellant did not execute the offence alone but with others now not in custody and find the sentence of 5 years on him alone is excessive in the circumstances. The Trial Court record shows he is a 1<sup>st</sup> offender, a young man with a family on considering mitigating circumstances of sentencing. 1<sup>st</sup> Appellant's sentence is reduced from 5 years to 2 years imprisonment.

**Disposition**

1. 1<sup>st</sup> Appellant's appeal is partly dismissed conviction upheld but sentence reduced from 5 years to 2 years imprisonment.



2. 2<sup>nd</sup> Appellant's appeal upheld and both conviction and sentence quashed and the 2<sup>nd</sup> Appellant is acquitted.

**DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 22/6/2023. (VIRTUAL/  
PHYSICAL CONFERENCE)**

**M.W.MUIGAI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

In The Presence Of:

Mr.david Macharia Gachoka - 1<sup>st</sup> Appellant

Mr.george Wambura Nganga - 2<sup>nd</sup> Appellant

Mr. Mogambi - For The 1<sup>st</sup> Appellant

Mr. Kimathi For The 2<sup>nd</sup> Appellant

Mr. Mwongera - For The Respondent

