



**Njeri & another v Republic (Criminal Appeal E003 & E012 of 2023  
(Consolidated)) [2023] KEHC 21967 (KLR) (1 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 21967 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL APPEAL E003 & E012 OF 2023 (CONSOLIDATED)  
HI ONG'UDI, J  
SEPTEMBER 1, 2023**

**BETWEEN**

**FRANCIS MUNGAI NJERI ..... 1<sup>ST</sup> APPELLANT**

**PETER KINYANJUI KIMANI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the Judgment by Hon. E. Wanjala delivered on 7th  
December 2022 in Engineer SPM's Court Criminal case No. E1101 of 2022)*

**JUDGMENT**

1. Francis Mungai Njeri & Peter Kinyanjui Kimani hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively were charged with the offence of stealing stock contrary to section 278 of the [Penal Code](#). The particulars being that the appellants on June 15, 2022 at about 10.34hrs at Ndunyu Njeru primary school at North Kinangop Sub County within Nyandarua County stole one (1) cow valued at Kshs 150,000/= the property of Grace Wanjiku Ngahia. They faced an alternative count of handling stolen goods contrary to section 322(1) & (2) of the Penal Code. The particulars were that the appellants on the June 15, 2022 at about 10.34hrs at Ndunyu Njeru primary school at North Kinangop Sub County within Nyandarua County otherwise than in the course of stealing dishonestly retained a cow (black) worth Kshs 150,000/= knowing or having reason to believe it to be stolen property.
2. The prosecution called two (2) witnesses while the appellants gave unsworn statements without calling any witnesses. Thereafter the court found both appellants guilty of the principal count and sentenced each to 7 years imprisonment.
3. Being aggrieved by the Judgment they filed separate appeals. The 1<sup>st</sup> appellant filed HCCRA No. E003 of 2023 raising the following ground:



- i. That, the learned trial magistrate erred in law and fact by convicting the appellant without considering that he was not arrested while in possession of suspected exhibits
  - ii. That the learned trial magistrate erred in both law and fact for convicting him twice for the same offence
  - iii. That the reporter of the incident did not link him in any way to the offence.
  - iv. That he prayed that this honorable court quashes the sentence as it lacks basis and he be set at liberty
  - v. That other grounds be adduced during the time of hearing.
4. The 2<sup>nd</sup> appellant filed HCCRA E012 of 2023 raising grounds, which are an exact duplicity of those in HCCRA No. E003 of 2023.
5. In view of the fact that the two appeals arise from the same subject matter G. Nzioka J on April 26, 2023 consolidated them with HCCRA No. E003/2023 as the lead file. The appellants appear as follows:
- Francis Mungai Njeri.....1<sup>st</sup> Appellant
- Peter Kinyanjui Kimani.....2<sup>nd</sup> Appellant
6. The respondent through M/s Serling Joyce senior prosecution counsel filed the following undated grounds of opposition on March 17, 2023
- i. That the appellants were arrested while in possession of the stolen heifer which did not belong to them.
  - ii. That the complainant was able to identify the heifer as her property and proved to the required standards of ownership
  - iii. That the appellants were intercepted at the scene of crime by the anti-stock theft unit while loading the heifer into a car.
  - iv. That the trial court exercised its discretion and sentenced accused to seven (7) years instead of 14 years as stipulated in the Penal Code.
  - v. That she implored the court to dismiss this appeal and allow the appellants to complete their sentence.
7. PW1 Grace Wanjiku Ngahia is the complainant. She testified on how she woke up on June 15, 2022 and found her cow missing. She reported to Ndunyu Njeru and Engineer Police Stations. The next day on her way to report to Murungaru police station she received information of recoveries of cows, and they were to go to Mirera Police Station. Together with other complainants they went to Mirera and found their cows while the thieves were in the cells. Statements were recorded at Murungaru. She had 3 photos of herself and the cow which she presented to the police. The said photos were later produced by PW2. She was therefore able to identify her cow. It is black and white in colour.
8. In cross-examination she said she was called upon the recovery of her cow. The rest it's the chief who knows. The police officers from Mirera Anti Stock Theft informed her that the appellants were found with the cow.
9. PW2 No. 227148 PC Albert Kadima of Ndunyu Njeru police station testified that he received a report of a missing cow from a lady from Ndunyu Njeru primary school. This was on June 15, 2022. Two days later they received a report of two (2) cows having been spotted at Mai Mahiu and intercepted. He thus



- sent the reportee (PW1) to go and confirm if her cow was among the recovered ones. The answer was in the affirmative and so she recorded a statement. Photos of the cows were taken and witness statements recorded. The appellants were then charged. He produced photos of the cow plus one exhibit memo and certificate of the scene of crime (Pexb 1-5).
10. In cross-examination he stated that he did not visit the scene of crime. He only visited Ndunyu Njeru primary school where the cow had been tied. The person who called him from Murungaru was not a witness, same to the Anti Stock Theft officer who intercepted the cows.
  11. The 1<sup>st</sup> appellant in his unsworn defence stated that on June 14, 2022 he was at his place of work when two men requested him to assist them load a cow on a motor vehicle. He went with them and he assisted them. Police officers from Murungaru arrived and arrested them and took them to Murungaru police station. He denied the charge. He wondered why the several officers involved never testified.
  12. The 2<sup>nd</sup> appellant also unsworn stated that he was instructed by his employer to go and receive a cow and while receiving the cow they were arrested by an officer from Murungaru. They were taken to Murungaru Police Station. While there the OCS directed that he be charged. He did not know the 1<sup>st</sup> appellant. He wondered why the OCS and others did not testify.
  13. The appeal was canvassed by way of written submissions. The appellants filed undated joint submissions which were filed on April 26, 2023. These are the submissions that the court will consider. The first issue raised is that they were never arrested while in possession of the exhibits. That there was also no inventory form produced to show the recovered items. They submit that the learned trial magistrate acknowledged that they had been arrested on June 14, 2022 and the offence is said to have occurred on June 15, 2022 at 10.34hrs. Further that they were already convicts in another case. They refer to the evidence in chief of PW2 and submit that the cow that was allegedly lost was stolen on June 15, 2022 and recovered two days later.
  14. Reference was made to the case of *Bukenya & Others Uganda* (1972) E.A 549 where the court stated
    - “(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
    - (ii) That the court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
    - (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered (sic) to be adverse to the prosecution.”
  15. The appellants have further submitted on the link between two matters before Engineer Law Courts one of which is the subject matter of this Appeal. The two matters relate to a charge of stealing stock contrary to section 278 of the *Penal Code*. The date of the alleged offences is June 15, 2022 at 10.34hrs. The two matters are Nos E1102 of 2022 and E1101 of 2022 of Engineer Law Courts. In the former one they were convicted and fined Kshs 200,000/= in default to serve three (3) years imprisonment. They filed for Revision vide High Court Revision No. E134 & E135 of 2022 respectively. The two Revisions were consolidated and the 3 years period was reduced to one year. It's their contention that the two matters before the lower court should not have been handled separately as it amounted to double punishment as held in
    - i. *Myano s/o Ileme v Republic* (1951) 18 EACA 316 and
    - ii. *Salim Bin Karama* (1951) 18 EACA 304



16. They additionally submit that they were not linked by the reporter of the incident to the said incident. Referring to the judgment by the trial court they argue that it was wrong for the Magistrate to assume and suggest that the cow may have been stolen on June 14, 2022. It's their submission that the prosecution did not prove its case beyond reasonable doubt.
17. The respondent's submissions which are undated were filed on March 17, 2023 by M/s Serling Joyce prosecution counsel has submitted that the prosecution was able to prove that the complainant's heifer was found in possession of the appellant and his accomplice and did not belong to him. That the police officer who testified informed the court that the appellants were intercepted at the scene of crime while loading the stolen heifer into a car. She therefore submits that the sentence meted out to the appellants was very lenient.

### **Analysis and Determination**

18. After due consideration of the evidence on record, grounds of appeal, parties submissions, case law and the law I find the main issue for determination to be whether the prosecution proved its case to the required standard.
19. As a first appeal court this court has the duty to re-evaluate and reconsider the evidence on record and arrive at its own conclusion. It must also bear in mind that it did not see nor hear the witnesses. This is the law as stated in a number of decisions like; *Okeno v Republic* 1972 EA 32, *Gabriele Njoroge v Republic* (1982 -88) 1KAR 1134; *Ngui v Republic* (1984) KLR 729, *Muthoka & another v Republic* (2008) KLR 297.
20. The prosecution case is that the appellants stole PW1's cow valued at Kshs 150,000/= on June 15, 2022 at 10.34hrs. The evidence of PW1 is that she reported this matter to several police stations and on June 16, 2022 she was notified that the cow had been recovered. The cows were found in Mirera and they went to record statements in Murungaru.

In re-examination she said police officers told her it's the appellants who had the stolen cows. PW2 is an officer who received PW1's report on the missing cow. He only visited the place where the cow was stolen from and nothing more.

21. Under the *Evidence Act* sections 107,108 & 109 it is provided as follows :-

Section 107:

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108 - The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 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.

The burden of proving a criminal case is always on the prosecution as per the *Evidence Act*. The burden never shifts. An accused only comes in after this burden has been discharged and he/she makes a defence.

The only evidence that was adduced by the prosecution is as follows;



- i. PW1 had a black & white cow which was stolen
  - ii. She made a report as confirmed by PW2
  - iii. She was able to identify her cow
  - iv. The cow was recovered by the police
22. There are several gaps in the evidence namely
- i. Where was the cow found?
  - ii. Who was found with the cow?
  - iii. Why were crucial witnesses like officers from Mirera, Murungaru Anti-stock Theft Unit not called to testify?
  - iv. How were the appellants linked to this stock theft?
  - v. In real sense what investigations were carried out by PW2?
  - vi. Why were two different files (E1101 & E1102 of 2022 opened at Engineer Law Courts over the same offence, same accused persons, same time of occurrence of the offence? Why were they not charged in one file, one charge sheet with two counts?
23. I am asking all these questions just to highlight the carelessness exhibited by the court and prosecution at Engineer Law Courts, in handling this matter. In the first place there was no iota of evidence to make the learned trial magistrate place the appellants on their defence. There was no evidence adduced at all to link the appellants with the charge facing them.
24. After declining to grant the prosecution an opportunity to introduce new statements, the best and most reasonable thing to the learned trial magistrate should have done was to request the prosecution to close its case. Infact the record shows that the prosecution never at any point closed its case. The court simply gave a Ruling date. The Ruling that came up after a month placed the appellants on their defence.
25. After doing the above analysis I find that the prosecution never proved its case to the required standard and the appellants should never have been convicted let alone being placed on their defence
26. I find a lot of merit in the appeal which I hereby allow in its entirety. The conviction is quashed and the sentence set aside
27. The appellants to be released forthwith unless otherwise lawfully held under separate warrants.
28. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1<sup>ST</sup> DAY OF SEPTEMBER 2023 IN OPEN COURT AT NAIVASHA.**

**HEDWIG ONG'UDI**

**JUDGE**

In the presence of:

The Appellant present, virtually

Mr. Atika for the Respondent



Ms Ogutu- Court Assistant

