



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**CRIMINAL APPEAL NO. 61 OF 2018**

**HOSEA CHIRCHIR CHEBOI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate’s Court**

**at Eldama Ravine Cr. Case no. 467 of 2017 delivered on the 14<sup>th</sup> day of December, 2018**

**by Hon. J.L. Tamar, PM]**

**JUDGMENT**

1. The appellant was charged with a main charge of theft of stock under section 278 of the Penal Code and alternatively with thereof conveying suspected stolen property contrary, to section 323 of the Penal Code as follows:

**“CHARGE SHEET**

**CHARGE: STEALING STOCK CONTRARY TO SECTION 278 OF THE PANAL CODE**

*PARTICULARS OF OFFENCE: HOSEA CHIRCHIR CHEBOI: On the night of 22<sup>nd</sup> – 23<sup>th</sup> day of March 2017 at EMKWEN village in KOIBATEK Sub-County within BARINGO County, jointly with other before Court stole 15 (fifteen) heads of cattle all valued at Ksh600 000 the property of JOAN KIPRUTO YAGAN.*

**ALTERNATIVE CHARGE**

**CONVEYING SUSPECTED STOLEN PROPERTY CONTRARY TO SECTION 323 OF THE PENAL CODE.**

*HOSEA CHIRCHIR CHEBOI – On the night of 22<sup>nd</sup> and 23<sup>rd</sup> of March 2017 at EMKWEN area in KOIBATEK Sub-County within BARINGO County, jointly with others before Court was found conveying 15 (fifteen) heads of cattle valued at Ksh.600,000 the property of JOAN KIPRUTO YAGAN in a motor vehicle with registration number KCE 788J ISUZU LORRY reasonably suspected to be stolen or unlawfully obtained.”*

2. The appellant was convicted for the offence of conveying suspected stolen property charged in the alternative and sentenced to imprisonment for two years on 14<sup>th</sup> December 2018. In its Judgment, the trial Court found the facts as proving the alternative charge as follows:

**“JUDGMENT**

.....

*In the analysis of the evidence the main culprit who stole the animals was one who goes by the name G.10 or revealed by the accused Cleopas Mugo.*

He was not arrested and has never been arrested to date. He is still on the ran. All the evidence points to him as the mastermind of the theft.

However, the slaughter house in Mulot the accused person who was identified by witnesses was the driver of motor vehicle Reg. No KCE 788J Isuzu lorry. Three witnesses were able to identify him as the driver of the said lorry. The witnesses also identified the lorry now detained at Eldama Ravine Police Station as the one that conveyed the animals to Mulot in Bomet.

**The accused in his defence agrees that he was indeed the driver of the said motor vehicle on the material date but did not know that the animals he transported were stolen. He told the Court that he was given work to transport the animals by his boss. The lorry which was used to transport the animals to Bomet was later found in Eldama Ravine forest and detained in the Police Station.**

I find that the charge against the accused in count one has not been proved to the standard required by law. All the evidence point to a different person. I therefore, acquit the accused of count one under section 215 CPC.

**However, with regard to count 2, the prosecution has successfully proved that the accused was the driver of KCE 788J Isuzu lorry and did transport or convey the stolen animals to Mulot in Bomet County. Witnesses were able to identify him as the one who delivered the animals. The accused himself admits to this and offers an explanation that he was merely transporting the animals. I do not accept his explanation. He never recorded statement at the Police Station when asked to do so.**

Consequently, I find the accused guilty of conveying suspected stolen property contrary to section 323 of the Penal Code and convict him as such.

Dated this 14<sup>th</sup> day of December, 2018.”

### **The Appeal**

3. The Appellant filed his petition of Appeal on grounds set out therein as follows:

#### **“PETITION OF APPEAL**

The appellant being aggrieved by the conviction and sentence of the honourable Tamar Principal Magistrate, Eldama Ravine delivered on 4<sup>th</sup> December 2018 in Eldama Ravine Court case in criminal case no. 467 of 2017 appeals to this honourable Court against the conviction and sentence on the following grounds:

1. The learned trial magistrate erred in fact and in law in failing to find that no proper investigation were conducted.
2. The learned trial magistrate erred in fact and in law in failing to find that the appellant was simply an employee and a driver and that transporting the cows was not a criminal act.
3. The learned trial magistrate erred in law in concluding that the act of transportation was a criminal act.
4. The learned trial magistrate erred in fact and in law in failing to find that the prosecution shifted the burden of proof to the accused to prove his innocence.
5. The learned trial magistrate erred in stating that failure to record a statement amounted to prove of the prosecution case.
6. The learned trial magistrate erred in failing to find that on arrest the appellant was bed ridden and that he volunteered to record a statement.
7. The learned trial magistrate erred in failing to make a finding on the fact the appellant had a movement permit procured by the hirer of the lorry and that payment for hire charges were remitted to the owner of the lorry.
8. The evidence of the appellant was not considered in its entirety.
9. Without prejudice to the a foregoing the learned trial magistrate mewed out a sentence that was too harsh in the circumstances.

Reasons whereof the appellant prays that the appeal be allowed and the appellant be set at liberty.

Date this 6<sup>th</sup> day of December 2018.”

4. By written submissions respectively dated 25<sup>th</sup> September 2019 and 14/11/2019, Counsel for the appellant and for the respondent urged their respective cases, principally, on the question of sufficiency of evidence to support the charge of conveying suspected stolen property.

## **Determination**

5. In discharge of its duty as a first appellate Court, see **Okeno v. R** (1972) EA 32, this Court has reevaluated the evidence before the trial Court and found no evidence at all as to appellant's involvement in theft as charged in the main charge set out above.
6. The evidence before the Court proved theft from her home at Mumberes Eldama Ravine and recovery of some of the complainant's cows at Mulot Slaughter house. The evidence did not, however, show the appellant as having been involved in the theft. The main charge of theft of stock contrary to section 278 of the Penal Code could not therefore be proved.

## ***Prosecution Evidence against the Appellant***

7. As regards the involvement of the appellant in conveying by lorry the suspected stolen animals, the key prosecution witnesses in this regards were PW6, 7 and 8 who testified as follows:

**"PW6**

*My name Mathew Kipkurui Koech resident of Bomet. I work in Mulot slaughter. I do recall on 23.03.2017 around 8:30 am, I was at the slaughter house at Mulot.*

*I was woken up by Samuel Kimani and told that there were some cows that had arrived from slaughter. Woken up and went to the lorry to off load the cows. The lorry was KCE 788J green body and white cabin. There were fifteen cows in the lorry.*

*The driver of the lorry was Hosea the accused person. I saw him clearly, he was at the steering. I had not known him before. The cows belonged to G.10. I knew him before. He had brought cows to the slaughter many times.*

*We offloaded eleven cows and the four that remained went with the lorry. Nine cows were placed on the waiting area for slaughter. Two were taken to the slaughter because they were weak.*

*I slaughtered the two. One was sold by G.10 at a nearby slaughter.*

*The lorry was being driven by the accused person.*

*Later that evening as we were going on with our work, at around 8.00 pm somebody came and said the nine cows had been stolen and that we shouldn't slaughter them.*

*The following day on 24.03.2017 I and others were arrested and taken to Police. We recorded our statements.*

*On 11.05.2017 around 4.30 pm. I was told that the lorry that transported the cows had been found and detained at Eldama Ravine Police Station.*

*I was able to identify the lorry as the one that transported the cows to Mulot. The same lorry that I saw. I recognized the lorry with Maritim and Kimani.*

*The driver of the lorry is in Court. I had seen him for close to about 30 minutes in Mulot. I even greeted him. He had not been injured at the time. That is all.*

***Hon. J.L. Tamar – PM***

**Cross examination by Mr. Rutto**

*I saw the accused for the first time on 22.03.2017 in Mulot. I have been working at slaughter house for the last eighty years.*

*I know G.10. He brings cows to the slaughter house. It is the responsibility of the managers who confirms that the livestock brought to the slaughter house have necessary permits.*

*G.10 gave us the name of the driver as Hosea. G.10 had not been seen since.*

*Hosea was with the turn boy in the lorry.*

***Hon. J.L. Tamar – PM***

**Re-examination**

*The lorry driver was then Hosea the accused in this case.*

**PW7**

*My name is Samuel Kimani Muigai resident of Mulot in Bomet. I slaughter in Mulot. I recall 23.03.2017 at 8:30 am G.10 called me and told me that I should go to slaughter house and off load some cows which he had brought. I went with my colleague Mathew. We went there and found G.10 and Hosea the driver. We off loaded the cows and kept them at a waiting boma. We off loaded eleven cows four went with the lorry. Two were slaughtered immediately because they were weak. One was sold in a nearby slaughter.*

*The driver of the lorry was the accused.*

*Later the veterinary told us to stop slaughtering because there was allegation that the cows had been stolen. We stopped. One Philomon came and told us that the cows belonged to him.*

*I then was arrested and taken to Police Station where I recorded my statement.*

*On 11.05.2017 I got informed that the lorry that had transported the cows was arrested and was called to identify it.*

*I went to Eldama Ravine where I positively identify the lorry as the one I had seen.*

*The lorry Registration number was KCE 788J green body and white cabin. The accused is the one who was the driver of lorry. I stayed with him for ten minutes.*

**Hon. J.L. Tamar – PM**

**Cross examination by Mr. Rutto**

*I had worked at the slaughter for two years. I know G.10. He brings cows. He told me that the cows were his.*

*The accused was the driver.*

*I don't know where G.10 took the other four cows.*

*I was arrested and charged. My case was later withdrawn and made a witness for the state.*

**Hon. J.L. Tamar – PM**

**Re-examination**

*The four cows were driven away by Hosea and G.10.*

**Hon. J.L. Tamar – PM**

**PW8**

*My name is David Kiplasoi Kones resident of Bomet. I am cleaner at Mulot slaughter house recall 23.03.2017 at 8:30 am I was at work. There was a lorry off-loading some cows. The lorry was Registration No. is KCE 788J green in colour two staff were off loading the cows Samuel Kimani and Mathew Koech G.10 the owner of the cows was there too. The driver of the lorry was also present. He is the one in Court. Identified I was able to positively identified him. I left home after lunch and came back at 6:00 pm and worked till 8:00 pm.*

*Later I heard that the cows that had been brought to slaughter house were stolen.*

*On 24.03.2017 the Police took me to Longisa with two others to record my statements. I recorded my statements later transferred to Bomet and Timboroa.*

*12.05.2017 I got information that the lorry that had ferried the stolen cows had been found and detained. I was not involved in identification.*

**Hon. J.L. Tamar – PM**

**Cross examination by Mr. Rutto**

*That was the first time I saw the accused. G.10 is known at the slaughter house.*

*I was arrested and charged with stealing stock. Later, my case was withdrawn and made witness.*

**Re-examination**

Nil.”

**Defence**

8. When put on his defence the appellant opted “to adopt his evidence in case NO. 246 of 2017 [so that] the same do apply in Cr. 467/2017 except as it relates to dates and complainant.” However, the defence in case no. 246 of 2017 was not enclosed in the record of the trial Court and could only be deciphered by this Court from the judgment of the trial Court as follows:

***“The accused in his defence agrees that he was indeed the driver of the said motor vehicle on the material date but did not know that the animals he transported were stolen. He told the Court that he was given work to transport the animals by his boss. The lorry which was used to transport the animals to Bomet was later found in Eldama Ravine forest and detained in the Police Station.”***

**Conclusion**

9. The evidence before the Court only pointed to the accused having been the driver of the lorry that transported the complainant’s stolen animals to the slaughter house. The appellant admitted that he was the driver of the lorry and explained that he had been given the work by his employer. The investigation officer (Pw13) confirmed that he had not interrogated the appellant “as he was sick at the time”, and that other suspects including the veterinary officer and attendants at the Mulot slaughter house had been arrested and later treated as witnesses against the appellant “as witnesses mentioned the accused as the driver of the lorry on the day of the incident.”

10. The person who was said to be the owner the animals when they were presented at the slaughter house, marked with his identity number G10 was at large, and as was the appellant’s employer, who was owner of the lorry, one Kiprotich Chemueno, according to (Pw12,) and who was not or charged with any offence or produced as a witness. At the time of the arrest of the lorry at Eldama Ravine, the vehicle was said to have been driven by another person, one Ndegwa, according to arresting officer (Pw12) giving credence to the appellant’s defence that he was only a driver and he had been given the work to transport the animals by his boss.

11. With respect to the trial Court, the explanation offered by the appellant that he had been assigned the work to transport the animals by his boss is a reasonable explanation which might be true, and, therefore, the benefit of doubt ought to have been given to the appellant. There is nothing in the evidence of the prosecution to show that the appellant was aware or could have led him reasonably to suspect that the animals were stolen. The animals which were being taken to a slaughterhouse at Mulot in Narok County from Eldama Ravine in Baringo County may have necessitated early morning departure and therefore the timing of the transportation before day break is no indicator of suspicion of theft. The report of suspected theft by the lorry driver Philip Chebungei, who was not called as a witness, and who according to the complainant (Pw1) had at 6.30am on 23<sup>rd</sup> March 2017 called her and told her he had seen her cows on the road, does not give an indication as to when the cows may have been stolen. If it was around that time it cannot be held to be suspiciously early for transportation of animals.

12. Neither the fact that the animals were milk cows as the slaughterhouse attendants (PW6) and (PW7) and the meat inspector veterinary officer (PW3) at the Mulot slaughter house confirmed that two of the animals were too weak leading to quick slaughter thereof. It could be that the owner wishing to dispose of them had sold the animals to G10, who was considered owner thereof by the slaughterhouse worker (Pw6), (Pw7) and (Pw8), who in turn hired the appellant’s boss to ferry the animals.

***The conclusion of the trial Court***

13. In the judgment of the trial Court, the Court rejected the appellant’s explanation giving no reason therefor and merely stating that the appellant had decline to give a statement to the police, as follows:

***“I do not accept his explanation. He never recorded statement at the Police Station when asked to do so.”***

14. With respect, I find that in so holding the trial Court fell into error. First, the appellant on the evidence refuse to record a statement at the police station when asked to do so. The Investigation Officer (Pw13) was on cross-examination clear that he had not “**recorded his statement. I did not interrogate the accused person. He was sick at the time**”.

On re-examination by the prosecutor Pw13 said that “**There was no need to take the accused statement.**”

15. Moreover, the Court is at the trial required to consider the explanation given by an accused in charge of conveying suspected stolen property and if the explanation is reasonable, acquit the accused, never mind that the Court doubts its truthfulness, because it is the duty of the prosecution at all times to prove the guilt of the accused beyond reasonable doubt. It is immaterial that the accused did not record a statement with the police.

16. I respectfully agree with the authorities cited by the appellant’s counsel as regards the duty of the prosecution to prove the charge beyond reasonable doubt (*Francis Munyiri Muriuki v. R* [2009] eKLR (per Makhandia, J. as he then was) and *James Kariuki Wachira v. R* [2015] eKLR (per Mshila, J.) citing *Kipsaina v. R* [1975] EA 253, that once an accused offers a reasonable explanation on how he came possession the goods, the Court cannot find him guilty of the offence (in that case of handling stolen property c/s 322 (1) of the Penal Code).

17. Similarly, Porter Ag. J. in **Kimanzi v. R.** [1983] KLR 325, 326, observed as follows:

*“[I]n the case of **Koech v Republic** [1968] EA at page 109 the whole procedure of putting a charge under section 323 of the Penal Code to the accused has been clearly outlined by the Chief Justice Sir John Ainley. The point which he makes very clear under section 323 of the Penal Code is that even though the accused admits all the assertions which are set out in the charge and assuming for the time being that the charge is properly drawn he must still be asked whether he has any explanation for his possession of the property. **The reason for this is because he commits no offence until he fails to give an account to the satisfaction of the Court of how he came by this suspected stolen property. It is not sufficient n property.** If the Court has failed to ask him to give such explanation he cannot be convicted of the offence.”*

18. Again, in **Chege v. R** [1983] KLR 425, the learned judge emphasised that –

*“Under section 323 of the penal Code, it is not sufficient that the charged person was merely in possession or was conveying in any manner anything which might reasonably be suspected of having been stolen or unlawfully obtained. He would in addition be guilty, if in addition, he admits to these facts and fails to give an account to the satisfaction of the Court of how he came by the property so suspected (Koech v. Republic [1968] EA 109).”*

19. In **Kipsaina v. R** [1975] KLR 253, the Court of Appeal for East Africa (Law, Ag. P., Musoke, J.A. and Trevelyan, J.) held that -

*“A charge of receiving stolen property is not established if the explanation given by the accused is reasonable and might possibly be true even if the Court is not convinced that it is true”.*

20. Having found the explanation for his conveying of the animals that he had been assigned by his boss to transport them reasonable, and there being no evidence upon which the appellant may be deemed to have been or become aware that the animals were stolen, I would find that the offence of conveying suspected stolen property contrary to section 323 of the Penal Code was not proved in this case.

### **Orders**

21. Accordingly, for the reasons set out above, the Court quashes the conviction of the appellant for the offence of conveying suspected stolen property contrary to section 323 of the Penal Code and sets aside the sentence of imprisonment for two years imposed on the appellant by the trial Court.

*Order accordingly.*

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF JANUARY 2020**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

M/S Kiboi Tuwai & Co Advocates for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent.