



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL APPEAL NO 106 OF 2018**

**AGGREY MUKELE HILIMUKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgement (conviction and sentence of Hon. M. Munyekenye*

*delivered on 18/09/2018 by Senior Principal Magistrate's Court at Kimilili*

*in Criminal Case No. 3988 of 2018, R v. Aggrey Mukele Hilimuka)*

**JUDGEMENT**

***[Pursuant to section 201 (2) as read with section 200(1) (a) CPC]***

1. The appellant has appealed against his conviction and sentence of five years' imprisonment in respect of the offence of handling suspected stolen property contrary to section 323 (2) of the Penal Code (Cap 63) Laws of Kenya.
2. Ms. Koech, counsel for the respondent has supported both the conviction and sentence.
3. In this court the appellant has raised four grounds in his petition of appeal.
4. In ground 1 the appellant has faulted the trial court in convicting him without concrete evidence to link him with the offence. In ground 2 the appellant has faulted the trial court in convicting him without considering his defence. In ground 3 the appellant has faulted the trial court for failing to consider that the case was not investigated before judgement. In ground 4 the appellant has faulted the trial court for imposing a manifestly harsh sentence.
5. The appellant has also filed written submissions in support of his appeal. In his submissions, he has stated that being a lay man he pleaded guilty. He has stated that he now has reformed and has gained skills of a mason after five months training while in prison. He has also stated that he now has certificates in theology and biblical studies.
6. Furthermore, the appellant has also stated that his wife gave birth to twins, while he was in prison and he is an orphan. Additionally, the appellant has also stated that he is the sole bread winner for his family. He has therefore pleaded for a lenient sentence.
7. The appellant was convicted on his own plea of guilty to a charge of having in his possession a bull which was suspected to have been stolen or unlawfully obtained. The facts as outlined by the prosecutor were that the appellant arrived in Misikhu market in possession of a white bull with brown spots which he was selling at kshs 5,000/= . People became suspicious that the bull may have been stolen. He was asked to show that he was the owner. He was unable to explain. The crowd wanted to lynch him. By good luck the county askaris saved him. As a result, the appellant was taken to Webuye police station and charged with this offence.
8. The bull was photographed and the photographs were produced as exhibit 1.
9. The owner of the bull has not been found.
10. I have re-assessed the facts as outlined by the prosecutor and accepted by the appellant. The court did not warn the appellant of the penalty that was to be imposed following his plea of guilty as required by law. The failure to do so made the plea equivocal. It therefore

follows that the trial was fatally defective.

11. The appellant's appeal succeeds with the result that the conviction and sentence are hereby quashed. It is not necessary to consider the grounds of appeal.

12. The only issue for me to determine is whether I should order for the re-trial of the appellant., pursuant to this court's powers under section 354 (3) (a) (i) of the Criminal Procedure Code (Cap 75) Laws of Kenya. The appellant has been in custody for about one year and six months.

13. The prosecutor informed the court that the appellant was a first offender. The report of the probation officer that was called for by the court indicated that the appellant had a criminal record. The administration chief according to the probation report confirmed that he had a criminal record, because he was imprisoned for six months for stealing. In view of this conflicting information it was incumbent upon the court to require the prosecutor to produce a certificate from the criminal records office to confirm whether the information was true or not. It was wrong for the court to rely on the probation officer's report. It may be that the appellant appealed and his appeal was allowed, hence the necessity for the certificate from the criminal records office.

14. In the circumstances, the appellant must be treated as a first offender. The trial court did not make an order in respect of the mode of disposal of the bull which had been produced as exhibit 1. It is therefore open to this court to make an order in that regard. The procedure in a case such as this is as follows.

15. The owner of the bull is unknown. In the circumstances, the doctrine of *bona vacantia* does not apply. According to **Rewells, Swinburne –Hanham v. Howard (1933) Ch.29**, the doctrine does not apply to property in respect of which the owner is unknown. It therefore follows that the ownership of the property will not be vested in the state. And for that reason, the OCS Webuye station is hereby directed to hold the custody of the bull as a court exhibit pending its sale by public auction. The proceeds of sale shall be deposited in the deposit account of the court. Needless to mention that the OCS Webuye police station does not have grazing and veterinary facilities, hence the necessity of a public auction.

16. In view of the period the appellant has been in custody and the fact the he is a first offender with family responsibilities, I find that it is not in the interests of justice to order for a re-trial of the appellant.

17. Liberty is hereby granted to the owner of the bull once he is found to claim the proceeds of sale of the bull. Notice of this lost bull should be put on the notice board of the court and in the offices of the local administration chiefs.

18. In the premises, the appellant is hereby ordered released unless otherwise held on other lawful warrants.

**Judgement signed and dated at Narok this 19<sup>th</sup> day of December, 2019.**

**J M Bwonwong'a**

**Judge**

**19/12/2020**

And

**Judgement signed, dated and delivered in open court at Bungoma this 13th day of February, 2020.**

**S. N. Riechi**

**Judge**

**13/2/2020**