



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CRIMINAL APPEAL NO. 15 OF 2015**  
**FORMERLY NAKURU CRIMINAL APPEAL NO. 251 OF 2011**

*(Being appeal from original Conviction and Sentence in the Chief Magistrate's Court at Naivasha  
Criminal Case No. 2739 of 2010 - E. BOKE, SRM)*

**SIMON KABURU MUNIU .....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. Simon Kaburu Muniu, the Appellant herein was charged before the Magistrate's Court Naivasha with three counts of Stealing stock Contrary to Section 278 of the Penal Code. In summary, particulars to the charges were to the effect that on different days in the month of October 2010, he stole 3 dairy cows from their respective owners, namely **Esther Njeri Ngugi, Anne Wairimu Githinji** and **John Thiong'o Kamau**.

2. In the alternative counts to the three main counts, the Appellant was charged with Handling stolen property Contrary to Section 322 (2) of the Penal Code. In summary, the particulars to the three alternative counts is that on 22<sup>nd</sup> October 2010 at Rironi Location Kiambu County the Appellant did, otherwise that in the course of stealing dishonestly retain two Ayrshire cows owned by **Esther Njeri Ngugi** and **John Thiong'o Kamau** respectively, and a Friesian cow owned by **Anne Wairimu Githinji**, while had reason to believe the same to have been stolen or unlawfully obtained.

3. Following a full trial, the Appellant was convicted in respect of the counts alternative to the 1<sup>st</sup> and 2<sup>nd</sup> counts but acquitted in respect of the third count entirely. He was sentenced to pay a fine of Shs 100,000/= in default to serve one year imprisonment with hard labour on each of the 1<sup>st</sup> and 2<sup>nd</sup> alternative counts. That was on 7/10/2011. He subsequently filed an appeal and on 17/11/2011 the Appellant was released on bail pending appeal. On 29/1/2015 the appeal was transferred to this court for hearing and disposal.

4. In the Petition of appeal filed by Mongeri & Co. Advocates on 27<sup>th</sup> October, 2011, the Appellant raised six grounds of appeal as follows:

**“1. THAT the learned trial Magistrate erred in law and fact in convicting the Appellant while relying on the contradicting evidence of the prosecution witnesses.**

**2. THAT the learned trial Magistrate erred in law and fact in convicting the Appellant on the**

evidence of PW1 which evidence was not collaborated by other witnesses.

3. **THAT the learned trial Magistrate erred in law and fact in failing to consider the Appellant's strong Defence.**

4. **THAT the learned trial Magistrate erred in law and fact in sentencing Appellant to 2 years imprisonment or a fine of Kshs 200,000/= which was excessive.**

5. **THAT the learned trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant.**

6. **THAT the learned trial Magistrate erred in law and fact in relying on the evidence of the complainant whose evidence on the date of commission of the offence is contradicted.” (Sic)**

5. The appeal was heard by way of written submissions. In his submissions the Appellant highlighted several contradictions which he asserted riddled the prosecution case. But first, the submissions take issue with variance between the charge sheet value of the cow in the first count and the evidence by **Esther Njeri Ngugi**.

6. On contradictions the Appellant submitted that **PW1, 2 and 3** gave contradictory evidence on the number of meetings convened by the chief and the circumstances of the viewing and identification of the recovered cows by the respective witnesses. Another aspect that is taken up is the number of cows found at the Appellants home, per the evidence by **PW4, 5, 6, 8 and 9**. Further that **PW5** having been found in possession of a stolen cow should himself have been charged. That the Appellant produced an agreement and accounted for his possession of the one cow found in his possession.

7. For their part, the Respondents opposed the appeal and reiterated the evidence of the prosecution witnesses at the trial, which, they submitted dislodged the defence put up by the Appellant.

8. The duty of the first appellate court was stated in **Okeno -Vs- Republic [1973] EA 32** to be

**“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 -Vs- R [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. Ruwala -Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see 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. See Peters -Vs- Sunday Post [1958] EA 424.”**

9. The prosecution case in the trial was as follows. **Esther Njeri Ngugi (PW1)**, **John Thiong'o Kamau (PW2)** and **Anne Wairimu (PW3)** are farmers in Kinangop and Engineer. On 19/9/2010, 11/10/2010 and 12/10/2010 each of the complainants woke up to find that they had lost a cow overnight. **PW1** and **PW2** each lost an Ayrshire breed cow while **PW3's** lost Friesian breed cow. They made reports to the area chief **Magdalene Wambui Kariuki (PW4)** as well as police.

10. Following information subsequently received by **PW4**, she proceeded with several other complainants to Gatimu area Limuru on 18/10/2010. **PW4** was led to the farm of the Appellant by an informer. She saw two cows at his home. She did not take immediate action but engaged the Appellant in a conversation generally. **PW4** left the home. The complainants had remained at Limuru town. The party returned to Kinangop.

11. Meanwhile on 21<sup>st</sup> October, 2010 **APC Felix Okoth Onyango (PW8)** and **APC Juma Ulaya (PW9)** of Gatimu Administration Police Post learned that one suspected stolen Friesian cow was at the home of

**Samuel Kiiru Nganga** (PW5) a resident of Rironi, Limuru. They proceeded to the home and confirmed the report. They took the Friesian cow with them and leaving an Ayrshire cow at the Appellant's home. **PW5** said the Friesian cow was sold to him by the Appellant.

12. According to **PW9** Ayrshire cow was found tethered close to the Administration Police Camp. The three cows were identified by the complainants when they returned to Gatimu on 22/10/2010. **PW1** identified the Ayrshire cow in the photograph Exhibit 1a, b while **PW2** identified the cow in photograph **Exhibit 2a, b** as hers. The third complainant **PW3** identified the Friesian cow recovered at **PW5's** home as hers (photographs **Exhibit 3a, b**). After photographs were taken, the cows were released to the complainant.

13. The Appellant gave a sworn defence statement to the effect that he is a farmer at Gatimu Rironi, Limuru. That his daughter operates a butchery at Engineer where she was married. He testified that his daughter had informed him that a certain Ayrshire cow was on sale and therefore he should send money for its purchase. He sent Shs 30,000/= to her and also obtained and sent her a permit. Subsequently the local chief accompanied by **PW4** came and questioned him about the number of cows in the home. They inspected the home and left. A few days later police accused him of selling a cow to another man (**PW5**) and put him in custody together with **PW5**. But **PW5** was released while he was charged in connection with theft of the cows.

14. The Appellant's submissions highlighted several evidential contradictions but only some are of moment and need to be considered. In the case of **Twehangane Alfred vs. Uganda, Criminal Appeal No. 139 of 2001, [2003] UGCA** the court said about contradictions that

**“with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”**

15. There were on the face of it, three visits to the Appellant's home, on 18<sup>th</sup> and 21<sup>st</sup> and 22<sup>nd</sup> October 2010. In the first visit, **PW4** was in the company of a local chief, as the Appellant himself confirmed. **PW4** said there were two cows at the home on that date. **PW4** however did not identify the type of cows at the time or relate them specifically to those recovered. That was partly due to the fact that she went to the home without the Complainants.

16. The second visit was by **PW8** and 9 on 21<sup>st</sup> October 2010. A Friesian cow had been recovered from **PW5's** home and another Ayrshire cow (**Exhibit 1a, b**) was found at the home of the Appellant when the police went there. The police officers left the said cow there but arrested the Appellant and **PW5**. However, according to **PW9** a second Ayrshire cow was found tethered at the post and nobody could tell how it got there.

17. When **PW1** identified her cow on 22<sup>nd</sup> October it was at the home of the Appellant. The cow Exhibit 1a, b was identified as the one left behind by **PW8** and 9 on 21<sup>st</sup> October. By the 22<sup>nd</sup> October, the Appellant was in custody in respect of the Friesian cow (**Exhibit 3a, b**) found with **PW5** on 21<sup>st</sup> October 2010.

18. With regard to the Ayrshire cow in count 3 and identified in photo **Exhibit 2a, b**, the court acquitted the Appellant because of the inconsistency regarding its recovery. While **PW9**, **PW4** and **PW6** said it was at the Appellant's home, **PW9** claimed it was tethered next to the police camp. **PW9's** colleague and companion on the material day, **PW8** did not refer to the matter at all in his evidence.

19. The trial magistrate observed in her judgment that:

**“Regarding exhibit 2, that is, photograph for 2<sup>nd</sup> Ayrshire cow belonging to PW2 Mr.**

**Thiong'o complainant in count three (C3), it is clear from evidence of PW9 APC Juma, that the cow was found tied on a tree near Administration Police Post and it was not clearly known who tied it there. Though the other witnesses, the chief PW4 and PW8 APC Felix put it like the exhibit two was also found in accused's home, PW9 told the court that it was found tied on a tree near the post and I believe that was the correct position even if accused person's home is also said not to be far from the post."**

She correctly proceeded to acquit the Appellant on the 3<sup>rd</sup> count.

20. Concerning **PW1's** Ayrshire cow therefore there was no dispute that it was found at the Appellant's home on 22<sup>nd</sup> October 2010. The Appellant's submission regarding the contradictions on the number of cows recovered seems to ignore the acquittal of the Appellant in respect of Count 3. Altogether there were 3 cows recovered. I do not think the contradictions relating to count 3 affect the court's findings in respect of count 1 as the Appellant himself admitted being found with one cow at his home, the Ayrshire identified by **PW1** as her stolen property. Other highlighted matters relate to the differences in the value of PW1's cow as stated in the charge sheet and in her evidence. That is not a significant variation to affect PW1'S evidence. The Appellant also claimed to have paid Kshs 30,000/= for the purchase of the cow, which value is not too distant from that on the charge or evidence.

21. I agree with the defence submission however that **PW5** was himself a suspect. His evidence required firm corroboration, which was not tendered in this case. Ultimately, in this case it was **PW5's** word against the Appellant's word. In my view the court erred by acting on **PW5's** evidence to found a conviction on the second count.

22. In the case of **Republic -Vs- Ndara s/o Kariuki & 6 others (1945) 12 EACA 84, at Page 86** the court stated that accomplice evidence is evidence of the weakest nature as follows:

**"A point which is sometimes lost sight of in considering accomplice evidence is, that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence feels that it cannot believe the accomplice it must reject his evidence and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending not connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief."**

**The trial court may have believed PW5 but there was no independent corroboration of the evidence. It was not enough that the Appellant had another stolen cow at his home in the same period when the Friesian cow was found in PW5's possession.**

23. This brings us with the Appellant's explanation on the possession of **PW1's** Ayrshire cow only a month since it was stolen. In **Simon Kangethe -Versus- Republic [2014] eKLR** the Court of Appeal had this to say:

***"Section 111 of the Evidence Act provides that: 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..."***

**In *Ogembo -Versus- Republic, [2003]1 EA*, it was held that:**

***"For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen."***

Recently, this Court in *Moses Maiku Wepukhulu & PAUL NAMBUYE NABWERA -Versus- Republic CR.A NO. 278 OF 2005 (Kooame, Mwera & Otieno-Odek, J.J.A.)* quoted with the approval what constitutes the doctrine of recent possession in the case of *Malingi -Versus- Republic, [1989] KLR 225*:

*“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. That the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was (from the nature of the item and the circumstances of the case) recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items.”*  
[Emphasis added]

The doctrine is a rebuttable presumption of fact. Accordingly, the accused is called upon to offer an explanation in rebuttal, which if he fails to do, an inference is drawn, that he either stole or was a guilty receiver.

As was aptly stated in the case of *Hassan -Versus- Republic, (2005) 2 KLR 151*:

*“Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver.”*

24. The trial court correctly observed that the Appellant’s claim thereto was that he bought the Ayrshire cow in Exhibit 1a, b. Clearly the said cow was stolen on 19/10/2010. There was no controversy on the date of the theft. Thus, for the Appellant to claim that he bought it on 16/9/2010 is not tenable. It had not left **PW1**’s home on that date. The explanation therefore could not hold.

25. Besides, the said **Felister Njeri** or **Agnes Njeri** (the purchaser per sale agreement) and alleged daughter of the Appellant in whose name a sale agreement dated 19/9/2010 is made, did not testify. The **Mpesa** records in respect of sale were not produced. The permit tendered by the Appellant and dated 20/9/2010 also predates the theft at **PW1**’s home. Further, as the trial magistrate observed, the permit is not specific to the Ayrshire cow but to “**a herd of cattle**”. The trial court correctly dismissed the documents.

26. I believe the stronger reason for disbelieving the Appellant’s explanation is that the date of the permit and the sale agreement predate the theft of **PW1**’s Ayrshire cow (as reflected in Exhibit 1a). His documents are false and were possibly prepared to cover for his own fear that the cow whether sold to him or not, lacked bonafides. The action of obtaining evidently false documents clearly reflects the Appellant’s guilty mind. He knew or had reason to believe that the cow had been stolen or unlawfully obtained. But he retained it and when confronted by police tendered the false documents. As the trial court found, the circumstances of the case particularly the lapse of time indicate that the Appellant was more likely a guilty receiver than a thief. He was properly convicted on the 1<sup>st</sup> count and I will dismiss his appeal in that regard.

27. I am however not persuaded that the evidence in respect of count two rose to the required threshold. I will therefore quash the conviction on the second count and set aside the sentence.

28. Regarding the sentence in respect of the first count, the same is illegal in so far as it ordered that the Appellant be subjected to hard labour. This is contrary to the law as at 2011. In my view, the sentence meted out in count one was no doubt influenced by the fact that the prosecution evidence connected the Appellant with the possession of two stolen cows. I believe the court would have viewed the matter differently had it acquitted him on counts two and three. In any event the fine of Shs 100,000/= or one year imprisonment in default appears rather excessive for a first offender. In **Wanjema –Vs- Republic (1971) EA 493**, the court stated:-

**“[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”**

29. I do set aside the sentence in respect of the first count and substitute therefor a fine of Kshs 50,000/= in default of which the Appellant will serve 6 months imprisonment.

Delivered and signed at Naivasha, this **16<sup>th</sup>** day of **November, 2016**.

In the presence of:-

State Counsel : Mr. Koima

For the Appellant : N/A

C/C : Barasa

Appellant : present

**C. MEOLI**

**JUDGE**