



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 104 OF 2011**

**ELIUD WABOMBA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(An Appeal from the Judgment of the Senior Resident Magistrate Honourable A. Alego in Eldoret  
Criminal Case No. 10168 of 2007, dated 1<sup>st</sup> December 2010)*

**JUDGMENT**

1. The appellant was charged in the lower court with the offence of stealing stock contrary to **Section 278** of the **Penal Code**. The particulars of the offence alleged that on the 14<sup>th</sup> day of March 2007 at Savala village Markuri sub location, Lugari District of the Western province, the appellant jointly with another not before the court stole three cows valued at Kshs. 30,000/- the property of *Jeniffer Esolio*.
2. The appellant also faced an alternative charge of handling stolen goods contrary to **Section 322(2)** of the **Penal Code** in which it was alleged that on the 14<sup>th</sup> day of March, 2007 at Lukori village, Lukori location in Bungoma District in the Western province, otherwise than in the course of stealing, the appellant arranged the retention and disposal of three cows for the benefit of *Nerbert Tachi*.
3. After a full trial, the appellant was acquitted of the main charge but was convicted on the alternative count. He was sentenced to ten years imprisonment. He was dissatisfied with his conviction and sentence. He thus proffered the instant appeal to the High Court through a petition of appeal dated 4<sup>th</sup> July, 2011 filed on his behalf by his advocates *M/S D.L Were & Were & Company Advocates*. The appeal was filed outside the statutory period limited for the filing of criminal appeals but with leave of the court.
4. In his petition of appeal, the appellant raised a total of seven grounds which can be condensed into the following three grounds.
  - i. That the learned trial magistrate erred in law and fact in failing to find that the charge for which the appellant stands convicted was not proved beyond reasonable doubt.
  - ii. That the learned trial magistrate erred in law and fact in failing to consider the appellants defence.
  - iii. That the conviction and sentence were illegal as the trial court's judgment did not conform to the requirements of a judgment set out in **Section 169** of the **Criminal Procedure Code** (hereinafter the **code**)
5. When the appeal came up for hearing on 27<sup>th</sup> April, 2015, learned counsel *Mr. Wamboba* who held brief for *Mr. Were* for the appellant and learned prosecuting counsel *Mr. Mulati* for the state agreed that

the appeal be prosecuted by way of written submissions: Those of the appellant were filed on 12<sup>th</sup> June 2015 while those of the respondent were filed on 2<sup>nd</sup> July 2015.

6. Briefly, in their written submissions in support of the appeal, the appellant's advocates submitted that the learned trial magistrate erred in convicting the appellant on evidence which did not support the offence charged in the alternative count. Counsel argued that the particulars of the charge alleged that the appellant handled three cows allegedly stolen from the complainant on 14<sup>th</sup> March, 2007 while the evidence of PW2, PW3 and PW4 was to the effect that the appellant was arrested at his home after 2<sup>nd</sup> December, 2007.

It was further submitted that the prosecution case was riddled with many contradictions regarding the alleged sale of one of the stolen cows to PW3 and regarding the number of cows found in the appellants homestead at the time he was arrested. Counsel asserted that the learned trial magistrate erred in making findings which were not supported by evidence and in failing to find that the prosecution had not proved its case against the appellant beyond any reasonable doubt.

Lastly, it was submitted that the learned trial magistrate's judgment failed to comply with the provision of **Section 169** of the **Code** and that this occasioned the appellant injustice. For the foregoing reasons, counsel urged the court to find merit in the appeal and allow it.

7. In opposing the appeal, the state through its brief submissions filed on 2<sup>nd</sup> July, 2015 urged the court to find that the appellant's conviction was sound and ought to be confirmed since there was documentary evidence to prove that it is the appellant who sold one of the stolen cows to PW3 who in turn sold it to PW4 who was subsequently arrested as he attempted to sell it in a market.

The state also pointed out that the sentence imposed on the appellant was within the law and that therefore the appeal should be dismissed for lack of merit.

8. This being a first appeal to the High Court, I am enjoined by law to reconsider and re-evaluate the evidence tendered before the lower court in order to draw my own independent conclusions. I should however give allowance for the fact that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses.

**See: *Akeno V Republic (1977) EA 32, Kiilu & Another V Republic (2005) KLR 175.***

I have considered the rival submissions made by the parties, the grounds of appeal, the evidence on record and the trial court's judgment.

I find that the main issue for determination in this appeal is whether the evidence adduced by the prosecution before the trial court supported the charge of handling stolen goods which is the offence in respect of which the appellant was convicted and if so, whether it proved the charges beyond any reasonable doubt.

9. In order to address this issue, it is important to outline the essential ingredients of the offence of handling stolen goods. The offence is created under **Section 322 (1)** of the **Penal Code** which states as follows:-

***“ A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.”***

From the above provision, it is clear that the essential elements of the offence which must be proved in order for the prosecution to sustain a safe conviction are that the goods in question had been stolen and

that the accused being aware of this fact or having reason to believe that the goods were stolen either;

- a. Dishonestly received or retained the goods.
- b. Dishonestly undertook or assisted or arranged for their retention, removal, disposal or realization by or for the benefit of another person.

10. In this case, the prosecution called a total of six witnesses. From the recorded evidence, the prosecution's case is that on 13<sup>th</sup> March, 2007, PW1 woke up to find her three female cows missing. She did not know how they left their shed. PW3 testified that on 3<sup>rd</sup> April 2007, she bought a cow from the appellant at a cost of Kshs.13,500. She found the cow in the appellant's home. According to PW3, the appellant told her that the cow she had bought belonged to his friend. He was in the company of a friend when he sold the cow to her.

11. The sale transaction was reduced into writing but the sale agreement though marked for identification in court was not produced in evidence as an exhibit. PW3 subsequently sold the same cow to PW4. PW4 took it to the market on 3<sup>rd</sup> December, 2007 intending to sell it but was arrested when PW1 identified it to be one of the three cows which had been stolen on 13<sup>th</sup> March, 2007. The matter was reported to the police. PW3 helped the police to trace the appellant after which he was arrested and charged with the offences which formed the subject of the trial in the lower court.

When put on his defence, the appellant gave a sworn statement in which he denied having committed the offences charged.

12. Having analysed the evidence recorded by the trial court, I have no doubt in my mind that it fell short of establishing the essential ingredients of the offence of handling stolen goods which I have enumerated above. For starters, though there was evidence from PW3 that the appellant is the person who sold to her PW1's stolen cow, the evidence did not disclose the circumstances under which the appellant initially got possession of the cow or the circumstances surrounding his sale of the cow to PW3. This was a gap in the prosecution case because without such evidence, the prosecution was not able to prove that the appellant dishonestly retained or sold the cow to PW3 knowing or having reason to believe that it was stolen property or that it had been unlawfully obtained.

Besides, according to PW3's evidence the appellant when selling the cow to her told her that it belonged to his friend. PW5, the police officer who re-arrested the appellant at Milimani police patrol base, corroborated PW3's claim when he stated in his evidence that after interrogating the appellant, he alleged that the cow had been taken to his compound by one **Nobert** his uncle.

13. Given the claims by PW3 and PW5, I find it disturbing that the police did not investigate this claim further in order to establish as a fact whether the appellant sold the cow knowing or having reason to believe that it was stolen property or innocently without any knowledge that it had been stolen. The learned trial magistrate in her judgment only reproduced the evidence tendered by the prosecution witnesses but failed to subject it to proper scrutiny with a view to ascertaining whether it met the threshold of satisfying the essential elements of the offence for which she convicted the appellant. This omission by the learned trial magistrate led her to arrive at the erroneous conclusion that the prosecution had proved the alternative count against the appellant beyond reasonable doubt while in fact the evidence fell short of even establishing the offence.

I therefore concur with the submissions made on behalf of the appellant that the trial court erred in law and in fact by convicting the appellant on a charge which was not supported by evidence. Consequently, my finding is that the appellant was wrongly convicted.

14. Having reached this conclusion, I do not consider it necessary to delve into the issue raised by counsel for the appellant to the effect that the judgment of the trial court did not comply with the provisions of **Section 169** of the **Code** and that failure to so comply occasioned to the appellant a miscarriage of justice.

Suffice it to say that the judgment satisfied some but not all of the dictates of **Section 169 of the code**. In

the context of this case, I find that the omission by the learned trial magistrate to fully comply with the provision was an irregularity which was curable under **Section 382** of the **Code**.

15. As must be clear by now, the upshot of this judgment is that the appeal is merited. It is accordingly allowed. The appellant's conviction is hereby quashed and the sentence set aside. He shall be set at liberty forthwith unless otherwise lawfully held.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 6th day of October, 2015**

In the presence of:

The appellant

Lesinge court clerk

Mr. Wamboba for the Appellant Absent

No appearance by the state