



**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO.161 OF 2013**

**Appeal from the conviction and sentence by Acting Senior Resident Magistrate (V.A Otieno, Acting. SRM) at Mwingi in Criminal Case No.124 of 2012**

MUSYOKA

MUTEMI.....APPELLANT

VERSUS

REPUBLIC.....

RESPONDENT

**JUDGEMENT**

**Background**

Musyoka Mutemi, known as the appellant in this judgement, was initially charged at the Mwingi Principal Magistrate’s Court with Mutemi Kimanzi and Mutembei Mwangi in Criminal Case Number 124 of 2012. The plea was taken on 2<sup>nd</sup> March 2012 when all the three pleaded not guilty. On 15<sup>th</sup> August, 2012 before the hearing commenced, the prosecutor withdrew charges against Mutembei Mwangi who was 3<sup>rd</sup> accused person. Hearing commenced against the appellant and Mutemi Kimanzi who appeared as 1<sup>st</sup> and 2<sup>nd</sup> accused persons respectively in an amended charge sheet. The prosecutor called four witnesses in support of the case. At the conclusion of the trial the trial magistrate found the charge proved against the two accused persons and he convicted them. The appellant was sentenced to 3 years imprisonment. He has come to this court on appeal challenging the conviction and sentence.

**Petition of appeal**

In the petition of appeal filed on 7<sup>th</sup> November 2013 the appellant states that the trial magistrate made errors in law and fact in:

- i. Convicting him on a case that was withdrawn and in which the 3<sup>rd</sup> accused turned to be the complainant.
- ii. Failing to consider that the exhibit was produced in court.
- iii. Relying on uncorroborated evidence.
- iv. Relying on evidence of the arresting officer who was also the investigating officer.
- v. Failing to consider the appellant’s defence.

The appellant submitted in support of his appeal and asked the court to quash the conviction, set the sentence aside and acquit him.

The appeal was not opposed by the state. The learned state counsel told the court that he was conceding the appeal for reasons, among others, that it is not clear who the owner of the alleged stolen bulls was between Mutembe Mwange and Mutambuki Ngomo.

### Evidence

With respect to the trial magistrate, the court file record is mixed up. The initial charge sheet with three accused persons shows Mutembe Mwange as the 3<sup>rd</sup> accused person and one Mutambuki Ngomo as the complainant. After the withdrawal of the case against Mutembe Mwange and the amendment of the charges the complainant is indicated as Mutembe Mwange.

The evidence in support of this case is that Mutembe Mwange was invited by one Mutemi Kimanzi who was 2<sup>nd</sup> accused to his home to buy two cows. He bought both cows at Kshs 40,000. He was later called by the Chief and informed that the cows belonged to someone else. He took the owner to the home of the Mutemi Kimanzi who led them to the appellant whom Mutemi Kimanzi claimed had sold him the cows. This led to the arrest of the three accused persons and the charge.

In his brief defence the appellant asked for forgiveness and said the charges had been fabricated against him.

### Determination

I have critically read the evidence. As I have indicated above, one Mutambuki Ngomo who is indicated as the complainant in the initial charge sheet did not testify as to having lost his bulls through theft or in any other manner. This person comes into the picture only in as far as withdrawing the charges against Mutembe Mwange, the 3<sup>rd</sup> accused. After this he never testified. His statement is as follows:

**“My names are Mutambuki Ngomo. I am the complainant herein. I wish to withdraw the charges against the 3<sup>rd</sup> accused. I learnt the subject bulls were sold to him and he bought them with good faith and was not really involved in the theft (*sic*). Because I recovered my cow, I do not have a problem with the 3<sup>rd</sup> accused”.**

After the withdrawal, it was logical that the prosecution would call the same complainant to testify against the two remaining accused persons. Perhaps the prosecution would have called Mutembe Mwange as a prosecution witness to testify as to how he bought stolen bulls from the appellant and his co-accused. This was not to be. Instead, the prosecution amended the charge and indicated the bulls belonged to Mutembe Mwange. He was then called as PW1. His evidence seems to confuse who sold him the bulls which are referred to as cows casting doubts as to whether these were the same animals allegedly stolen from Mutambuki Ngomo.

Mutembe Mwange said the cows were sold to him in September 2011. One Mutemi Kaanga, who testified as PW2, told the lower court that he was called by PW1 and informed about how PW1 had bought alleged stolen cows on 24<sup>th</sup> February 2012. PW3 Muniyithya Mwange, PW3, told the lower court that he accompanied PW1 to buy cows in September 2012 and PC Tony Akungu, PW4, said he received a complaint from the Chief in company of the complainant that the complainant's two cows had been stolen on 1<sup>st</sup> March 2012!

The contradictions in the dates are obvious. It cannot have been September 2011; September 2012; 24<sup>th</sup> February 2012 and 1<sup>st</sup> March 2012! Those are varied dates and obviously this evidence is incredible.

The evidence does not establish who the complainant was. In fact, the evidence does not establish whether any bulls or cows were stolen from either Mutambuki Ngomo or Mutembe Mwange. None of them testified to this fact. Further, Mutambuki Ngomo cannot withdraw charges against a suspect and the same suspect turns out to be the owner of the alleged stolen bulls or cows. Even without considering the other grounds of appeal, it is my finding that the evidence is so flawed that it cannot support a conviction.

The learned state counsel was wise to concede this appeal.

I find that the appeal has merit. The complainant is not established; there is no evidence that the bulls or cows were stolen and whether it is the appellant who had stolen them. It is not even established if theft took place. There were no exhibits of the alleged stolen animals presented to the lower court. It is not lost to this court that the appellant was implicated by his co-accused and the investigations were not thoroughly carried out to ascertain the facts.

Finally, the trial magistrate did not properly evaluate the evidence. Had he done so he would not have found “the evidence of the prosecution cogent and credible” or the evidence of the prosecution witnesses “compelling” and “corroborated”. Obviously the case was not proved beyond reasonable doubt. On my own evaluation of the evidence, the case was not proved at all and the appellant ought not to have been found guilty. For this reason, this court hereby quashes the conviction against the appellant and sets the sentence of three years aside. The appellant, Musyoka Mutemi, shall be set at liberty forthwith unless for any other reason he is held in custody. It is so ordered.

**Dated, signed and delivered this 3<sup>rd</sup> day of June 2014.**

**S.N.MUTUKU**

**JUDGE**