



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL No. 114B OF 2010**

**LOKOMEI LOMALAKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**JUDGMENT**

1. The Appellant, LOKOMEI LEMALAKI was charged jointly with another of two counts of robbery with violence Contrary to Section 296(2) of the Penal Code. The Appellant faced one count in the Alternative of Handling Stolen property Contrary to Section 322(2) of the Penal Code.
2. After a full trial the Appellant was convicted of the alternative count of the handling stolen property and sentenced to 10 years imprisonment on 22<sup>nd</sup> September, 2010.
3. Being aggrieved by the conviction and sentence he filed a request for revision. This court directed that the request for revision be treated as a petition and grounds of appeal.
4. The Appellant had sought an order of revision. However that request is not in the file. Nonetheless I will consider this appeal.
5. Mr. Gichunge for the Appellant urged one point that the cow on the basis of which the Appellant was committed was identified by PW2 and 3 both who claimed the cow was there on basis of different markings. The Appellant's advocate urged that the Appellant's defence that he bought the cow already branded ought to have been accepted and the Appellant acquitted.
6. Mr. Mungai for the state conceded to the Appellant on the grounds the prosecution failed to prove that the mark on the cow in question was special and exclusive to the complainant.
7. I have carefully considered this appeal and have subjected the entire evidence adduced before the lower court to a fresh valuation and analysis and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I have given due allowance for same.
8. I am guided by the court of Appeal Case of **OKENO V REP. 1972 EA 32** where the court set out the duties of a first appellate court thus:

**“An Appellant on a first appeal is entitled to expect the evidence as a whole to be resubmitted to a fresh and exhaustive examination (Pandaya v R. (1957) E.A 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 v R.(1957) E.A. 570). It is not the function of a first**

**appellate court merely to scrutinize the evidence to see if 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 themagistrate'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 v Sunday Post (1958) E.A 424."**

9. The brief facts of the prosecution cases were that some 8 Borana herdsmen with 815 heads of cattle took their cows to water at Jaffa Gafasa. At the watering point they met over 30 Samburu herdsmen armed with rifles also with several heads of cattle watering their animals. After about 30 minutes the Samburus shot one of the Borana men with a rifle then drove all their cows away. That was on 2<sup>nd</sup> June 2009. On 2<sup>nd</sup> July, 2009 the Appellant and his co-accused were seen taking a bull to the Nanyuki slaughter house. They were arrested. PW2 and 3 identified the bull as theirs by marks "JP" and "KAF" respectively. PW4 identified same cow by name JP.

10. The Appellant in his defence said he bought the bull in question at Machini market in Wamba, in May, 2008. His witness DW2 William Leseti, stated that he was with the Appellant when he bought the bull at Archers Post Market in May, 2008.

11. The Appellants advocate urged that the complainant has not proved that the recovered bull was his because there were two people who claimed the bull, PW2 and PW3. Mr. Mungai for the state brought in a new angle and urged that in any event the complainant had not proved that the mark on the cow belonged exclusively to him.

12. Both counsels are correct. PW2 and 4 identified the bull by the mark JP while PW3 identified it by the mark KAF and which he also said was PF which was Arabic and inverted form of JP. There was confusion regarding the actual marking on the thigh of the bull in the evidence of PW2, 3 AND 4. The learned trial magistrate did not deal with the inconsistency in the evidence of the three witnesses regarding the identification mark on the bull. Consequently the inconsistency remained unresolved at the end of the judgment.

13. Regarding the exclusive use of the identification marking on the cow as raised in prosecution counsel's submission the same was not considered. It was a valid point because it was important for the court to satisfy itself that the identifying mark on the recovered bull was placed by or for the complainant and that there is no possibility the mark may have been used by others.

14. The issue is identification of the bull as the complainant's property. It is clear that the learned trial magistrate did not address that issue and therefore the issue of identification was not resolved.

15. The basis upon which the Appellant was convicted was the identification of the bull as the property of PW2. I have come to the conclusion that the evidence of the prosecution on the issue of identification was controversial. Such evidence cannot found a conviction.

16. Even though the Appellant's defence was also controversial, the burden of proof lies on the prosecution and never shifts to the accused person.

17. I have come to the conclusion that the conviction entered against the Appellant was unsafe and cannot be allowed to stand. **Consequently, I allow the Appellants' appeal, quash the conviction and set aside the sentence. The Appellant should be set free unless otherwise lawfully held.**

**DATED AT MERU THIS 10<sup>TH</sup> DAY OF JULY, 2014**

**LESIT, J**

**JUDGE**