



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 176 OF 2011

CHARITY MUTHONI NJERU.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by A.N. TUTA District Magistrate II Siakago in Principal Magistrate Criminal Case No. 87 of 2011 on 4/10/2011)

J U D G M E N T

CHARITY MUTHONI NJERU the appellant was charged with another with the offence of **stealing stock contrary to Section 278 of the Penal Code**. The particulars as stated in the charge sheet are as follows:-

On the 6th day of February 2011 at Kogari village Kamarandi location in Mbeere North District within Embu County jointly stole one he-goat valued at Kshs.5,000/= the property of CATHERINE WANYAGA.

The matter proceeded to full hearing and learned trial Magistrate found the charge not proved and acquitted both of them of the said charge. She however found the appellant guilty of the offence of **handling contrary to Section 322(1) of the Penal Code** and convicted her and sentenced her to 2 years. Its important to note that the appellant had not been charged with this offence.

The appellant was aggrieved with the judgment and filed this appeal citing the following grounds through counsel:-

1. ***The learned Magistrate erred in law and fact in passing a sentence which was excessive and commensurate with the nature of the offence.***
2. ***The learned Magistrate erred in law and fact in finding the accused guilty of the offences charges despite the evidence adduced.***

The case of the prosecution is that PW1 sent her daughter to herd goats on 6/2/2011. In the evening she noticed that one he goat was missing. The next day she went to the field where her daughter had been and followed sandal marks. They led her to the home of Kithendu. The said Kithendu directed PW1 to the home of the appellant. Meanwhile the assistant chief (PW2) was called and he came. PW1 and PW2 entered the kitchen of the appellant where they found meat and intestines in a sufuria while the rest of the

goat was in a sack. PW1 was able to identify her he goat from the legs and back. Appellant told PW2 that the goat was brought to her by her co-accused who was acquitted. In her defence she denied having been found in possession of the goat. She made several allegations against the assistant chief (PW2) plus grudges with PW1's family.

When the appeal came for hearing Mr. Mutahi for the appellant argued that a crucial witness had not testified. And the learned trial Magistrate had wondered loudly about this. Secondly the learned trial Magistrate misdirected herself that that the appellant knew that the goat was stolen. The state through the learned state counsel Mr. Miiri opposed the appeal saying the evidence was overwhelming.

This being a first appeal this Court is enjoined to re-evaluate and reconsider the evidence adduced and come to its own conclusion. I am also not losing sight of the fact that I did not see nor hear the witnesses. I am giving allowance for that. I am guided by the case of **OKENO VS REPUBLIC [1972] EA 32** where the Court of Appeal stated:-

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (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 conclusion (Shantilal M.Ruwala v. Republic [1957] EA 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 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 v. Sunday Post, [1958] EA 424).”

The learned trial Magistrate analyzed the evidence very well and came to the right conclusion that the charge of stock theft was not proved against both the appellant and his co-accused. In her judgment at page 23 line 20-32 she states

“That omission leaves this court wondering who had stolen the goat in question. Is it that it died or was it killed in the grazing land or is it that it was stolen alive and killed elsewhere?”

There is no sufficient evidence from the prosecution witnesses that it was either the 1st and/or 2nd accused who stole the said goat. Nobody saw them committing the offence. In deed the said Kithendu could have been arrested and charged if not being called as a prosecution witness. He knows the best, who and where the goat was prior to recovery of the dead carcass”.

The appellant and her co-accused were not charged with the alternative count of Handling stolen goods contrary to Section 322(1) of the Penal Code, but the learned trial Magistrate went ahead to convict her on the said alternative count after exercising her powers under Section 179(2) of the Criminal Procedure Code. The state supported this move. Section 179(2) of the Criminal Procedure Code provides thus:-

“When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

This provision gives the court authority to reduce a charge to a minor one. The offence of stock theft which the appellant had been charged with carries a sentence of up to 14 years. The offence of handling stolen property also carries a sentence of imprisonment with hard labour for a term not exceeding 14 years. So would one say that handling stolen property contrary to Section 322(1) of the Penal Code is a minor offence of stock theft contrary to Section 278 of the Penal Code? The answer is obviously a big NO. If the prosecution had any evidence of a charge of Handling they would have charged the appellant with it.

My finding therefore is that the reduction of the charge was a misdirection. It cannot be left to stand. After acquitting them she should have left the appellant to go home. Kithendu ought to have been called

to explain how he knew that the appellant had the goat meat in her kitchen. The foot marks led to his home and not the appellant's. Could he and Harrison Kirangi Njeru have had a hand in the presence of that meat there? All these questions were left hanging because of the scarcity of the evidence available.

I find the appeal to have merit. It is allowed. The conviction is quashed and the sentence set aside. Appellant to be set free unless lawfully held under a separate warrant.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF JULY 2013.

H.I. ONG'UDI

J U D G E

In the presence of:-

Ms. Ing'ahizu for State

Appellant

Njue CC