

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 531 OF 1981

THOMAS MATHEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Thomas Matheka, was charged with Boniface Kizomba Wambua and Paul Ngei with stealing a cow contrary to section 275 of the Penal Code on February 16, 1983 being the property of Paul Yenge Nguli, his father. The appellant was convicted after trial and sentenced to three years' imprisonment being the maximum sentence that can be imposed under section 275 of the Penal Code. The other two accused were acquitted.

The accused, Boniface Kizomba Wambua, in his statutory statement to court, said that it was the appellant who sold him the cow on February 16, 1983 being the day it was found to be missing from the complainant's premises. On the same day Boniface Kizomba said he sold the cow to James Mutiso who in turn sold it to Kiarie Mubova where it was found. When Paul Ngei came to testify he elected to give evidence on oath. His evidence upon which the learned trial magistrate has heavily based his finding does not upon reading it amount to anything for he says:

“When these cows got lost my father PW 1 asked me whether I know where the cows were I said the cows were being taken by Thomas and Boniface and then sold at Kithioko.”

It is not at all clear how Paul Ngei came to know about what he purported to testify to: was it hearsay? Did he see he does not say so his evidence is valueless. In any event he was prepared to keep quiet about the matter which makes his evidence suspect and in need of corroboration.

Evidence given by a co-accused person against another should only really be considered if it is believed and if it is corroborated in a material particular by independent evidence pointing to the guilt of the accused and if it also implicates the person giving the evidence of the crime, which was not so in this case. In this regard amongst other cases I refer to the case of *R v Hamisi bin Saidi & Another* (1942) 10 EACA 50.

“When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as well as against such other person as well as against the person who makes such confession. Such a statement by an accused can only be used as evidence against his co-accused if it is sufficient by itself to justify the conviction of the person making it of the offence for which he is being jointly tried with the other person against whom it is tendered.”

The appeal of the appellant must accordingly be allowed and is hereby allowed and the conviction entered against the appellant is quashed and the sentence imposed is set aside.

Dated and Delivered at Nairobi this 14th day of December 1983.

J.H.S.TODD

JUDGE