



REPUBLIC OF KENYA



**Director of Public Prosecutions v Mtende (Criminal Case E098 of 2022)
[2022] KEMC 36 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEMC 36 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE E098 OF 2022
ZK KAGENYO, RM
SEPTEMBER 29, 2022**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

NDARO MTENDE ACCUSED

JUDGMENT

1. The accused person was arraigned on 29th March 2022 for the offence of stealing stock contrary to section 278 of the *Penal Code*.
2. The particulars were that on the 4th day January 2022 at around 2000 hours at Vyogato village, Kifyonzo location, Kinango sub-county, Kwale county within coast region stole three cows valued at Kshs. 106, 000 the property of Bakari Ndurya Mazera.
3. The accused denied the charges and a trial ensued.
4. The accused person was not represented. At all times of the trial, he was present in court. The matter was conducted in Kiswahili Language, the language of choice by the accused.

Prosecution's Case

5. The DPP to prove their case lined up a total of 3 witnesses.
6. PW 1 was Bakari Ndurya. In his area, it emerged that oxen are still used in ploughing land. On 4th January 2022, the accused came to him and requested him to enter into an agreement in the following terms; that in exchange of PW 1 giving out his cows to be used for ploughing the accused's land during the ploughing season, PW 1 would give the accused his cows and have the accused feed them uptill such ploughing season. PW 1 and the accused entered into what PW 1 believed to be a gentlemen's agreement, shook hands and he opened up his cowshed's gate and let out 8 cows to the accused. The accused person drove off the 8 cows given to him by the complainant to feed as per the agreement.



7. However, at around 2000 hours later that day, one Mwachupa Sanje knocked at the gates of PW 1. With him, he had 5 of the 8 cows given to the accused earlier in the day. He told PW 1 that the accused had given him the 5 cows to drive them to PW 1's house.
8. Immediately, PW 1 called the accused over phone and asked him why the cows were less by three and the accused told PW 1 that the missing three cows had mixed with other herds of cattle and followed them to their homes as they overpowered him as they were on heat, a phenomenon that was said to be locally known as mkwato.
9. The accused urged PW 1 to await dawn of the following day where they would follow up on the missing cows. At sunrise, PW 1 went out to look for the cows but contrary to their agreement, the accused was missing in action. Sensing foul play on the part of the accused, PW 1 reported the matter to the police. Upon his arrest, PW 1 said that he overheard the accused confess to the police that he had since sold the cows and bought a motorbike using the proceeds from the sale.
10. PW 3, one Dena Mazera testified and told the court that on the request of PW 1, he had given him 5 cows to use for ploughing and also milking. It therefore appeared that the 8 cows that were said to be stolen by the accused, he owned some but PW 1 had their possession. Upon the arrest of the accused person, the accused confided that he had sold the cows alleged to have been stolen and as such, since the accused and PW 2 are relatives, the OCS granted them a chance to solve the issue through other alternative dispute resolution mechanisms, a chance that the accused squandered necessitating the arraignment over the present charges.
11. PW 2, NPS Service No. 217975 Cpl Benjamin Kemeli investigated the matter. He said that as the investigating officer, he recorded witness statements and compiled the file leading to the arrest and charging of the accused. He said that his investigations revealed that the accused sold the cows and bought a motor cycle KMFV 902Z at the same period the cows went missing and hence he believed that the said motorcycle was proceeds of crime. After production of the motor cycle, due to the limited space at the court premises, it was returned to PW 2 for custody purposes. Further, PW 2 stated that his efforts to trace a witness namely Mwajumra Tsanje (sic) were futile and he had reasons to believe that the accused had a role in the non-attendance of this potential witness.

Defence Case

12. In his unsworn defence, the accused person told the court that he was a saviour in crucifixion. He said that at first, on 2nd January 2022, PW 1 came to his house and required him to help him make an application for the birth certificate of his daughter, help which the accused verily afforded PW 1 with ease.
13. The following day, PW 1 went back to him for further help but this time it was to hatch a fraudulent scheme on how the accused would help PW 1 swindle his own wife of a calf that she was standing on his way to selling it and which one Mkala Dena had been attempting, thrice, to steal at night albeit unsuccessfully due to the alertness of PW 1.
14. The accused agreed to enter into the plan and PW 1 made the calf to disappear and as his sole role was primarily to mislead the complainant's wife, when the latter called the accused, he told her that the calf got lost when it mixed up with other cows.
15. He said that upon his arrest, he was confused and did not know what he was telling the police and just knew so much later at 1600 hours when he was released on a cash bail.



16. After his release, he said that he went and purchased a motor bike on 10th January 2022 and started operating it as a bodaboda rider. He said that he did not operate it for long as he thereafter travelled to Kitale and was employed as an easy coach operator, and then his own milk vending business before he got unwell and came back to Kwale. To support his case, he produced as D.Exh 1 being treatment notes from Kitale County Hospital dated 6th September 2021.
17. To justify that he had not bought the motorbike after stealing from the complainant, he said that he had sold his everything including a household goods, trees and another motorbike to purchase the present one that was detained by the investigating officer and produced as evidence.
18. In the end, he told this court that the charges were a fabrication, being a scheme between PW 1 and PW 3 to exploit him and have a parcel of land from him having failed to extort Ksh. 120, 000/= at the office of the OCS.

Analysis And Determination

19. The accused is charged under section 278 of the [Penal Code](#) which states that;

If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.
20. On its part, section 268 (1) of the [Penal Code](#) defines stealing as;

A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
21. The DPP was duty bound therefore to prove beyond any reasonable doubt that the accused stole the cows that belonged to the complainant. This standard must meet the threshold stated and qualified by Lord Denning in *Miller -v- Minister of Pensions* [1947] 2 ALL ER 372 where he held that;

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt but nothing short of that will suffice.
22. To reach its conclusion, the court endeavored to answer the question on, was there an agreement between the accused and PW 1?
23. In its assessment, the court found PW 1 to be a credible and reliable witness. He was firm and forthright. He answered the questions put to him by the accused without any second guessing albeit a weary face of a hurt person. His evidence was clear cut and left no doubt in the mind of this court that in the morning of 4th day of January 2022, he gave the accused person 8 cows on a gentlemen’s agreement that the accused would return to him all the 8 cows, in good shape and health. The evidence adduced further satisfied this court beyond reasonable doubt that in the evening of that day, the accused person caused 5 cows to be returned to the complainant and he never made any efforts to aid the complainant recover the 3 missing cows.



24. Section 268 (2) (a) defines fraudulent to constitute, in part,

A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say an intent permanently to deprive the general or special owner of the thing of it;

And a special owner is defined as;

includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

25. From the foregoing, I find the accused person, on condition to return all the 8 cows, he took them from the complainant. However, contrary to what was expected of him, he caused only five of the cows to be returned and retained 3 of the cows. To hoodwink the complainant, he lied to him that the others had mixed up with other herds of cattle at the grazing fields due to their mating compulsions but he did not even attempt to aid the complainant trace these missing cows. This set of facts makes this court to make an inference that the reason for his actions or inactions was that he verily knew that his sole scheme was fraudulent and I find it to be so.
26. On whether the complainant was the owner of the stolen cows, PW 3 stated that the complainant had charge of his cows. In court, the complainant testified as such. He even described himself as a herdsman as his economic activity. I am therefore convinced that the complainant was the special owner of the cows belonging to PW 3.
27. When the complainant was testifying, he said that he gave the accused 8 cows. However, when the investigating officer was testifying, he said that the complainant reported 16 cows as having been given to the accused person. This discrepancy did not dislodge the evidence by the complainant that he gave the accused the 8 cows. Firstly, it has been established, even during the defence case stage that there was a discussion about cows between the accused and the complainant even though the purposes of such discussions differ between the defence and prosecution. Secondly, it has been established that the complainant had the cows with him thus capable of giving the accused some of the cows. Thirdly, while cross examining, the accused person intimated that he was given the cows by the complainant willingly, when he put it to him on whether he opened the gates for himself or it was the complainant who did so where the complainant admitted to freely and willingly opening up the gates for him and giving him the cows. And lastly, the unshaken evidence on oath by the complainant was credible and reliable.
28. Turning on to the defence by the accused person, I find the same to be a fancifully scripted theory which was an afterthought.
29. He leveled accusations on all those who he had interacted with before on this matter starting from the complainant, PW 3 and the OCS blaming each of them as being part of a scheme to frame him up in a bid either to extort him or aid in having him extorted. Such a defence is non-starter. Unbeknownst to him, such defence to acquire credence before a court, it has to be firmly grounded at the cross-examination stage of the prosecution witnesses. Surprisingly, in this case, none of the allegations that came out at the untested evidence by the accused person as DW 1, were put forth to the 3 prosecution witnesses by the accused person while they were at the witness stand.
30. He not only failed to cross examine the respective witnesses on those allegations but he also deprived the DPP from cross examining him on the same, which is his right anyway. The good book of Proverbs 18:17 reminds us all thus,

The first to present his case seems right, till another comes forward and cross-examines him.



- As such, I would end up considering the truthfulness of the allegations by the accused person with caution and having considered the entirety of his defence and the circumstances, his defence is to fail.
31. The accused person told this court that when he was being interrogated by the investigating officer, due to confusion, he did not know what he was saying. He said that he realized what he was telling the investigating officer later after he was granted bail. Again, he denied the DPP a chance to cross examine him which would help find out whether the now codified Miranda Rules were read out to him. He did not challenge that they were not and I have no reasons to believe that they were not.
 32. My concern is the timeliness of where he gained back his acumen from the state of confusion. He said that he gained it upon being granted the cash bail which means that it was immediately he gained back his freedom from the police detention. This scenario is giving me the impression that just as the accused swindled the complainant and took away his 3 cows, he was equally in a scheme to hoodwink the police and have him released on a cash bail if not released unconditionally. This he did with military precision and on the strength of the blood relationship between the general owner, PW 3, and the accused, the OCS unknowingly got into the accused's net and allowed an ADR process to take place, a process that never was. He now wants the court to believe him and disbelieve the disclosures made by him to the OCS as narrated by the investigating officer in his testimony. This is nothing less but a scheme to pervert the course of justice and I decline to get into the accused's net.
 33. The accused person in his defence had the audacity of misrepresenting facts before this court not only orally but by way of documentary evidence. Whereas he told the court and wanted it to believe that he went to Kitale, got employed and invested in his businesses post the stealing event, and that is one of the sources of his acquiring the motorbike, I make a finding that this time round he miscalculated his moves. The document he wanted the court to believe and rely on is dated 6th day of September 2021 which was 4 months to his fraudulent taking of the cows from the complainant. If anything, the court can only make an inference from this document of a person who was on a mission to restart his life, his fortunes out there at Kitale having been shattered, and not the other way round as he wanted this court to believe. His analogy herein fails on its face.
 34. In the end, I find that defence by the accused as just but a poorly imagined and developed script intended to mislead this court and avert justice. The script was poorly done and porously sealed that its porosity leaked the lies intended to conceal but unfortunately to him, but fortunately to the course of justice which is said to be naked, blind and open for everyone to see his scheme could not detract the finding of this court.

Disposition

35. From the foregoing, I make a finding that the DPP has furnished evidence before this court proving beyond reasonable doubt that indeed the accused person stole three cows which were lawfully in possession of Bakari Ndurya Mazera as the special owner and I thus find him guilty of the offence of stealing stock and convict him under section 215 of the *Criminal Procedure Code* for the offence of stealing stock which is proscribed under section 278 of the *Penal Code*.
36. At this stage, given the closeness of the time of the purchase of the motor cycle registration number KMFV 902Z and the time of the stealing of the cows, the explanation of the accused person during his defence and the totality of the facts of this case, I have reasons to believe that the same is a proceed of the offence of stealing the cows. As such, since under section 24 (f) of the *Penal Code*, forfeiture is one of the punishments that this court can mete against the accused, the court, pursuant to section 389A (1) of the *Criminal Procedure Code* shall require the Accused person or any such other interest person to show cause why the motor cycle registration number KMFV 902Z may not be forfeited to the state.



37. The court shall fix this case for sentence hearing on October 25, 2022 with the involvement of all the parties.
38. The accused who has been on a cash bail of Ksh. 20,000/= and who has now since been adjudged guilty beyond reasonable doubt shall have his cash bail cancelled. The cash bail shall be refunded to the depositor.
39. The accused person is hereby informed of his right to lodge an appeal against this judgment and the conviction in the High Court at Mombasa within 14 days from today's date if dissatisfied with this court's finding.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 29TH DAY OF SEPTEMBER 2022.

KIONGO KAGENYO

RESIDENT MAGISTRATE

In the presence of - :

Mr. Felix- Court Assistant.

Ms. Faith Luseno for the DPP

Ndaro Mtende -Accused

