

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. E083 OF 2024

ROBERT MUTHAURA

APPELLANT

VERSUS

REPUBLIC.....

RESPONDENT

JUDGMENT

***(Being an appeal from the Judgment of Hon. T.A. Sitati
SPM in Githongo Law Court Criminal Case No. E581 of 2023
delivered on 26/7/2024.)***

1. The appellant was charged before the lower court on three counts.
2. In the first count he was charged with injuring animals contrary to Section 338 of the Penal Code. The particulars are that on the 21st day of October 2023, at around 23:00 hours at KarindineVillage, Karindine sub-location, Kiiria location, Imenti Central Sub-County within Meru County, he

willingly and unlawfully wounded two (2) Freshian cows valued at Ksh. 250,000/- the property of David Kithinji.

3. In the second count the appellant was charged with the offence of stealing farm produce, contrary to section 8(1) of the Stock and Produce Theft Act. The particulars herein are that on the same date, time and place, he was found stealing animal feed namely banana leaves valued at Ksh. 500/- the property of David Kithinji.
4. In the alternative, the appellant faced a charge of handling stolen goods contrary to Section 322(1) of the Penal Code. The particulars are that on the same date, time and place, otherwise than in the course of stealing, he dishonestly retained animal feeds namely banana leaves valued at Ksh. 500/- knowing or having reason to believe them to be stolen goods.
5. After a full trial, the lower court convicted the appellant on the two main counts. He was sentenced to five (5) years and one (1) year imprisonment respectively.

6. Being aggrieved by both conviction and sentence, the appellant filed a memorandum (sic) of appeal, which set out the following grounds;

1) That the learned trial magistrate erred in law and facts by rejecting the appellant's defense without any consideration or judicial basis.

2) That the learned senior principal magistrate erred in law and facts by failing to consider relevant factors when convicting the accused person in his judgment.

3) That the senior principal magistrate erred in law and facts by taking the prosecution's evidence of recognition and other evidence to be beyond reasonable doubts despite the appellant's opposition.

Appellant's Submissions

7. The appellant contended that the trial magistrate erred by failing to properly consider his defense and his alibi. He submitted that he was framed due to personal differences with the complainant, David Kithinji.

Respondent's submissions

8. The Prosecuting Counsel submitted that the appellant was well identified at the scene by the complainant and two other witnesses.

Analysis and determination

9. Being a first appeal this court is required to re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion. (See **Okeno v Republic (1972) EA 32**).
10. During the trial, the complainant stated that he and the appellant did some work for a person known as Paul. Paul promised to pay later that day. They went home and then went to Kariene Market to meet Paul. When he met the appellant, he refused to accompany the complainant to go and meet Paul, claiming that the complainant had already been paid and was withholding the money. The appellant then stormed out. The complainant then went home. Later, at around 11 p.m. the appellant went to the complainant's home while armed with a panga. He demanded his money, but the complainant told him that he had not received any payment. Fearing for his life, the complainant refused to

come out of the house. He saw the appellant go around the house and he proceeded to cut his cows. The complainant raised an alarm and Muchui (PW2) arrived at the scene. On seeing him, the appellant fled from the scene. He reported the matter to the police and the appellant was arrested.

11. PW2 was Patrick Muchui. He stated that on the material day he was at his shop. The appellant arrived and asked for cigarettes which he did not have. The appellant was carrying a panga. The appellant asked him about the whereabouts of the complainant, and he told him that he was not aware. The appellant left. Later, as he was closing the shop he heard the complainant raise an alarm. He went to his home and as he approached the gate, he saw the appellant jumping over the fence, exiting the complainant's compound, still carrying the panga. He asked the appellant what he up to but the appellant told him to mind his own business then sped off. He entered the complainant's homestead and when they went to the cowshed, he saw the injuries that had been occasioned upon them.

12. Patrick Murithi (PW 3) testified that on the material day he was in his home. He heard the complainant's distress calls. While responding to the alarm, he encountered Robert walking away from the vicinity of the complainant's home. He asked the appellant about the alarm but he denied hearing any disturbance. On arrival in the complainant's home he saw the injuries that had been inflicted on the animals.
13. Police Constable Felister Kinoti (PW 4) was the investigating officer. She narrated how the report was made and the action taken. She visited the scene and had photographs taken. They went to the appellant's home from where they recovered a dismembered cow's tail and animal fodder. The accused was subsequently arrested.
14. The appellant gave sworn evidence, denying all the charges. He stated that on the material day he went to construct a house for Jennifer Mwari. At 7.00 p.m. he went home and slept. He denied going to the complainant's home on the night in question.

15. The appellant further stated that on the next day, the complainant visited his home demanding to know why he had attacked his animals. He told him that he had not. The complainant left and returned with police officers. He led them to his fodder point and planted the cow tail on him. He acknowledged a prior, unresolved wage dispute with the complainant but asserted that it was unrelated to that day.
16. Jennifer Mwari was DW 2. She testified that on the material day, the appellant worked at her home during until 5.00 p.m. and returned for milk at 7:00 p.m. That on the following morning she met the complainant carrying a cow's tail and was headed towards the appellant's home.
17. Irene Gatwiri (DW 3) was the appellant's wife at the material time. She stated on the material day, the complainant had gone to their home and asked her husband if he was aware of the incident herein. The appellant denied any knowledge. Later he was arrested.
18. There is no doubt that the animals were viciously attacked. The question that needs to be answered is whether the appellant was identified as the perpetrator.

19. The prosecution's case rested on the direct evidence of three witnesses- PW1, PW2 and PW3. The complainant testified to seeing the appellant clearly under a security light as he was cutting the cows. This testimony was corroborated by PW2, who saw the appellant jumping over a fence while armed with a panga, and PW3, who encountered him walking away from the scene shortly after the alarm was raised.
20. There is consistency in the testimony of these three witnesses on the core fact regarding the appellant's presence in the complainant's home on the material day and time. All these witnesses knew the appellant well. They all had flashlights and saw him clearly. PW2 and PW 3 even spoke to him.
21. Section 143 of the Evidence Act (Cap. 80) provides that no particular number of witnesses is required for the proof of any fact. The trial court was therefore correct in finding that the testimony of these three witnesses, which remained unshaken in cross-examination, was sufficient to establish the presence of the appellant at the scene. He was seen by

two witnesses carrying a panga. I have no reason to doubt the evidence of the two witnesses.

22. The appellant raised a defence of alibi. It is trite law that once the prosecution places an accused person at the scene of a crime with credible evidence, the evidential burden shifts to the accused to prove the alibi raised. The appellant's alibi was weak and unspecific. His own witness, DW3, admitted she did not see him at the actual time on the night of the incident. As for Jennifer's evidence, it only accounts for the appellant's whereabouts up to 7.00 p.m. the incident took place at around 11.00 p.m. The trial magistrate was entitled to find that the alibi did not displace the solid prosecution evidence.
23. Consequently, I find that the prosecution proved the charge of injuring animals beyond reasonable doubt. The conviction on Count 1 is hereby upheld.
24. The only valid issue raised by the appellant was on the finding that he was found with stolen banana leaves. Now, there is no evidence that connects the said leaves to the complainant's farm. It is common knowledge that this is a

region that has plenty of bananas. The appellant himself had a farm so he could have been found with his own crop. Therefore, I find the conviction on the 2nd count is not sustainable. The conviction is quashed and the sentence is set aside.

25. As regards to the sentence for count 1, I find that the same was not excessive. The injured animals fall under section 278 of the Penal Code, for which the maximum sentence is fourteen (14) years imprisonment. The appellant took out his frustration on innocent animals. I uphold the same.

26. From the court record, it is not clear if the appellant was ever released on bond after he was granted a personal bond. Without such evidence, the court is to take it that he was in custody. Therefore, under section 333(2) of the Criminal Procedure Code the court ought to have taken account of that time.

27. In conclusion, the appeal partially succeeds and the following orders do issue;

a) The appeal against conviction on Count 1 of injuring animals contrary to Section 338 of the

Penal Code is dismissed. The conviction and sentence by the trial court are upheld.

b) Under section 333(2) of the Criminal Procedure Code, the sentence will be deemed to have commenced on 23rd October 2023.

c) The appeal against conviction on Count 2 of stealing farm produce, contrary to section 8(1) of the Stock and Produce Theft Act succeeds. The conviction is hereby quashed and the sentence is set aside.

Dated, signed and delivered at Meru on this 29th day of January 2026.

**H. M. NYAGA
JUDGE**