



Case Number:	Criminal Appeal 75 of 1981
Date Delivered:	24 Mar 1982
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Eric John Ewen Law, Cecil Henry Ethelwood Miller, Kenneth D Potter
Citation:	Longolemik v Republic[1982] eKLR
Advocates:	Mr Chunga for Respondent
Case Summary:	<p><b>Longolemik v Republic</b></p> <p><b>Court of Appeal, at Nairobi</b></p> <p><b>March 24, 1982</b></p> <p><b>Law, Miller &amp; Potter JJA</b></p> <p><b>Criminal Appeal No 75 of 1981</b></p> <p><i><b>Evidence</b> - evidence of offence - proof of offence of handling stolen property - stock theft - appellant claim that stock acquired in transaction - discrepancies in evidence of defence witnesses - evidence that appellant overly cautious in transaction - whether proper to draw adverse inference from appellant's conduct - whether discrepancies in the evidence normal - absence of sale receipts unrebutted - reliance on unrebutted evidence - reasonable doubt.</i></p> <p><i><b>Sentencing</b> - excessive sentence - additional sentence - appellant sentenced to seven years' imprisonment - appellant additionally sentenced to two weeks later to police supervision - magistrate functus officio at time of additional sentence - whether additional sentence was proper.</i></p>

**Jurisdiction** - *functus officio* - powers of the judge after pronouncement of sentence - power to order additional sentence - legality of such an additional sentence - revisional powers of the High Court.

On May 23, 1979, six head of cattle were stolen from a *boma* and about two weeks later, four of them found in the appellant's *boma*, who stated that they had been brought there by two people and he exchanged them for two of his own steers. The appellant was charged in a magistrate's court with, in the first count, stealing stock and in the second count, with handling stolen property. The appellant called three witnesses in his trial who deposed that they had witnessed the exchange transaction and that after enquiry from the persons who had brought over the cattle, they had found that the transaction had been proper. They deposed further that a memorandum was produced in evidence. The appellant deposed that one of the traders had told him that the animals had been bought at a certain trading centre at which no receipts were given for such sales, which evidence was unrebutted.

The trial magistrate observed that the appellant had "more than ample reason" to believe that the animals were stolen, basing his evidence on "small but significant" discrepancies in the evidence of the witnesses on the "apparently excessive precautions" taken before the transaction and on the failure of the traders who had brought the animals to the appellant to supply any receipts.

The appellant was acquitted of the first count but convicted on the alternative one for which he was sentenced to seven years' imprisonment.

Thirteen days after the sentence, he was brought back before the same magistrate and ordered to be subject to five years' police supervision after release. His appeal to the High Court was summarily rejected and he lodged a second appeal.

**Held:**

1. The order for police supervision was illegal as the trial magistrate was *functus officio* when

	<p>making it. The remedy should have been to submit the case to the High Court for the necessary order to be made in its revisional jurisdiction.</p> <p>2. The discrepancies in the evidence of the defence witnesses were such as could be expected in the circumstances and they were giving evidence to the best of their recollections.</p> <p>3. There was no justification for drawing an adverse inference from the fact that the appellant had taken “apparently excessive precautions” to satisfy himself that the animals were not stolen.</p> <p>4. The appellant’s evidence as to the absence of receipts for cattle bought at the trading centre was not rebutted; but the appellant’s explanation for the possession of the stolen cattle was reasonable and possibly true and as he was entitled to the benefit of the doubt. He should not have been convicted.</p> <p><i>Appeal allowed.</i></p> <p><b>Cases</b></p> <p><i>Kipsaina v Rep</i> [1975] EA 253 <b>Approved &amp; Applied</b></p> <p><b>Statutes</b></p> <p>Penal Code (Cap 63) Sections 278; 322(2)</p> <p><b>Advocates</b></p> <p><i>Mr Chunga</i> for Respondent</p>
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-

Advocates Against:	-
Sum Awarded:	-
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**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Law, Miller & Potter JJA)**

**CRIMINAL APPEAL NO 75 OF 1981**

**BETWEEN**

**LONGOLEMIK.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged in the court of the Resident Magistrate at Kitale with, in the first count, stealing stock contrary to Section 278 of the Penal Code and in the alternative, in the second count, with handling stolen stock contrary to Section 322(2) of the Penal Code. He was acquitted on the first count, but convicted on the alternative count and sentenced to the prescribed minimum sentence of seven years' imprisonment. Thirteen days after sentence, he was brought back before the same Resident Magistrate and ordered to be subject to five years' police supervision after his release from custody. Learned State Attorney, Mr Chunga, had doubts about the legality of the police supervision order as in his view the learned magistrate was *functus officio* when he made that order. We share that doubt and think the case file should have been submitted to the High Court for the necessary order to be made in its revisional jurisdiction. We propose to say no more about this aspect of the case for reasons which will become apparent.

The facts of the case are as follows. Six head of cattle were stolen from the *boma* of Richard Waswa on May 23, 1979. On June 7, 1979, four of these animals, two cows and two calves, were found in the appellant's *boma* by police officers and members of the Stock Theft Unit. The appellant at once told these people that these animals had been brought to his *boma* by two men called Peter and Lamilin and that he had exchanged them for two of his own steers. He has consistently adhered to this story from the beginning, in his explanations to the persons who arrested him, to Chief Inspector Kibiego to whom he made a charge and caution statement which he adopted at his trial, and in his sworn evidence at the trial. In addition he called three witnesses who deposed that they were among a number of neighbours and elders who were called by the appellant to his home to witness the exchange. They were satisfied after enquiry from Peter and Lamilin that there was nothing wrong with the transaction, and one of the people present drew up a memorandum in writing setting out the details of the transaction. The appellant was unable to produce this document at the trial. He deposed, and there is no reason to disbelieve him, that it was earlier produced in evidence in the No 2 court at Kitale in another case in which he was charged with uttering a false document and acquitted. No attempt seems to have been made to obtain that document from the other court, which we understand is in the same building.

The Resident Magistrate seems to have believed the appellant's story in general, as he found the appellant not guilty of stealing the animals. In convicting the appellant of handling, the learned magistrate expressed himself as satisfied beyond doubt that when the appellant came into possession of the four head of cattle, he had "more than ample reason" to believe they were stolen. He based this finding on

“small but significant” discrepancies in the evidence of the defence witnesses, on the “apparently excessive precautions” taken before the animals were exchanged and on the failure of Peter to supply receipts or other proofs of ownership. On this last point, the appellant had deposed that Peter had told him that he had bought the cattle at Cheptuya Trading Centre and that receipts are not given for sales at the Trading Centre, but only when cattle are sold by auction. This evidence was unrebutted.

The appellant appealed to the High Court, where his appeal was summarily rejected.

On this second appeal, Mr Chunga began by saying that he supported the conviction, but after exhaustively reviewing the evidence he altered his stand, and doubted whether the conviction should be supported. Mr Chunga cited the case of *Kipsaina v Rep* [1975] EA 253, in which it was held that a person charged with handling was entitled to be acquitted if his explanation was reasonable and possibly true. In this case the trial magistrate obviously accepted the appellant's explanation as reasonable, as he acted on it in acquitting him of stealing the cattle and in convicting him of handling. He did not believe the explanation to be true in that he rejected the appellant's assertion that he did not know or have reason to believe that the cattle were stolen. We again share Mr Chunga's doubts, this time as to the propriety of the appellant's conviction on the handling charge. The discrepancies in the evidence of the defence witnesses, which unfavourably impressed the trial magistrate, were in our view such as could be expected from honest witnesses, giving evidence to the best of their recollection of events which had taken place nine months earlier. For it to be held that the appellant had taken “apparently excessive precautions” to satisfy himself that the animals were not stolen property seems to us not to justify an adverse inference being drawn. The appellant's evidence as to the absence of receipts in the case of cattle bought at the Trading Centre was unrebutted.

In all these circumstances, we think that the appellant's explanation for his possession of the stolen cattle was reasonable and possibly true. That it was untrue was not, in our view, established beyond reasonable doubt.

We are of the opinion that he is entitled to the benefit of that doubt, and that he should not have been convicted of handling.

We accordingly allow this appeal, quash the conviction for handling, contrary to Section 322(2) of the Penal Code and set aside the sentences of seven years imprisonment and five years police supervision passed on the appellant.

**Dated and delivered at Nairobi this 24th day of March, 1982.**

**E.J.E LAW**

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**JUDGE OF APPEAL**

**C.H.E MILLER**

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**JUDGE OF APPEAL**

**K.D POTTER**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**DEPUTY REGISTRAR**



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