



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CRIMINAL APPEAL NO. 16 OF 2019**

**STEPHEN ONYANGO NDEGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal case No. 552 of 2018 of the*

*Senior Resident Magistrate's Court at Mbita by Hon. J.C. Bii-Senior Resident Magistrate)*

**JUDGMENT**

1. Stephen Onyango Ndege, the appellant herein, was convicted of the offence of stealing stock contrary to section 278 of the Penal Code.
2. The particulars of the offence were that on the 30<sup>th</sup> day of October, 2018 at Milimani Estate, Gembe West location in Mbita Sub County of Homa Bay County, stole one cow valued at Kshs.35,000/= the property of Baraka Onyango.
3. The appellant was sentenced to serve seven years imprisonment. He has appealed against both conviction and sentence which he has contended was harsh.
4. The appellant was in person. He raised the following grounds of appeal:
  - a) That the trial magistrate erred in relying on circumstantial evidence.
  - b) That the learned trial magistrate erred in law and in fact in failing to consider that there existed a business grudge that led to his arrest.
  - c) That the sentence was harsh and excessive.
5. The appeal was opposed by the state through Mr. Ochengo, learned counsel. He contended that adequate evidence was adduced.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. The appellant contended that the trial magistrate erred in relying on circumstantial evidence. What is circumstantial evidence? Circumstantial evidence was restated in the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722 by Osiero J** as follows:

**Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.**

8. In the case of **Sawe vs. Republic [2003] KLR 354**, the Court of Appeal held as follows:

**1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.**

**2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**

**3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**

9. The evidence adduced by the prosecution was that when the complainant could not trace his cow, on the following day he went to the slaughter house. Before getting there, he saw some hooves which he recognized as those of his missing cow. The person who had them told him that he had purchased them at Upendo Butchery which was operated by the appellant. He went to butchery and the appellant ran away on seeing him.

10. In course of investigation it was established that the cow was driven to the slaughter house by Noah Ambuli Anguta (PW2). This witness narrated in details how the appellant engaged him to drive the cow to the slaughter house. He said that the appellant called him at 4 a.m. to drive the cow but when he told him it was too early, he insisted and told him he required to deliver the meat at Mbita high School early.

11. Ramadhan Ibrahim Faraji (PW4) testified that it was the appellant who picked the meat of the cow in question after it was slaughtered.

12. Margaret Anyango Onyango (PW6) was another witness who linked the appellant to the stolen cow. She testified that she was found with the head of the cow which was said to have been stolen. She said she had bought it at the Butchery of the appellant.

13. The evidence that was adduced against the appellant was overwhelming. It was incompatible with his innocence and incapable of explanation upon any other reasonable hypotheses than that of his guilt. His contention of a grudge was not availed to the trial court for consideration. It is therefore new evidence which he is bringing up at this stage.

14. Section 278 of the Penal Code provides:

**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.**

15. It is trite law of practice that an appellate court can only interfere with the sentence meted out by the trial court upon satisfaction of some circumstances as was spelled out in Those circumstances were well illustrated in the case of **Nilsson vs. Republic [1970] E.A. 599,601 as follows:**

**The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewity (1912) C.CA 28 T.LR 364.**

16. The accused was a first offender. The learned trial ought to have factored this before sentencing. I am therefore persuaded to interfere with the sentence. I set aside the sentence of seven years and substitute it with a sentence of 3 years imprisonment to run from when he was sentenced by the learned trial magistrate.

**DELIVERED AND SIGNED AT HOMA BAY THIS 19TH DAY OF OCTOBER, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**