



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 04 OF 2018

MIKE LEKIMIT.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 503 of 2017 delivered on the 7th day of November, 2017 by Hon. S.O. Temu, PM]

JUDGMENT

1. The appellant was on 7/11/2017 sentenced to imprisonment for 5 years for the offence of stealing stock contrary to section 278 of the Penal Code, the particulars of which offence were that he “on the 6th day of July 2017 at Perkerra Sub-Location in Baringo South Sub-County within Baringo County stole a bull valued at Ksh. 20,000/= the property of Dominic Lekesho.”

2. The appellant appealed setting out grounds of appeal that:

1. That, the trial Court erred in both law and fact when he failed to observe that the case was not proved as required by the law.
2. That, the trial Magistrate convicted me without considering that there was variance between particulars of the charge and evidence adduce.
3. That the Magistrate erred in law and fact by convicting me on contradictory and forged evidence by prosecution witnesses.
4. That, I was not accorded fair trial in pursuance of article 50 of the constitution.
5. That, the trial Court failed to appreciate that the accused was not properly identified by witnesses.

3. The DPP opposed the appeal from conviction but did not oppose appeal from sentence which it considered excessive as shown in the proceedings.

“Appellant

I have submission. I wish to add the stolen cattle was not recovered from my place. We have a grudge with the complainant.

DPP

Appeal opposed on conviction but not opposed on sentence.

Stock theft contrary to section 278 of Penal Code and sentenced to serve 5 years on 7/11/17.

Evidence against the appellant is overwhelming as he was seen with the stolen bull on the date that the bull disappeared.

The witnesses knew the appellant well as he was their neighbor.

PW2 also knew the bull as he was the herdsman employed by PW1 to herd it.

He described the bull as brownish and with two cuts on one ear.

PW3 knew the bull well as belonging to PW1. He saw the appellant chasing the bull and thought he had been sent by PW1. The said bull was in his compound when the appellant came and chased it. He therefore saw the bull but not the appellant.

Sentence of 5 years for theft of one bull is on the higher and; I urge Court to upheld conviction and review the sentence.

Appellant

I did not steal the bull. I pray the Court to examine the evidence before the Court. I pray that the Court help me in the matter.”

4. I have considered the evidence before the trial Court in accordance with the duty of a first appellate Court. The defence raised an alibi that “on the date of incident, I had gone to my place of work preparing charcoal.” It is for the prosecution at all times to prove the charge beyond reasonable doubt and the accused in raising an alibi does not therefore assume the duty to prove it.

5. From the Prosecution’s evidence, PW2 who testified that he knew the accused well said that:

“On 6.7.18 at 8.00 am I was at Nene’s home. The accused herein Mike Lekimit came there with one bull. The [accused] passed into the compound and he asked to chase it out but refused. The accused came into the compound and he had taken the bull which was brownish and it had no cuts on one ear. I used to know the bull as it was Lekesio’s. The accused had taken the bull. On 8.8.17 Lekesio had asked me where the bull was and I had informed him that I had seen Mike taking it. I also take care of Dominic Lekesio’s cows and so I knew the bull well.”

6. PW3, the complainant’s neighbor who knew the accused as a neighbor testified as follows:

“On 6.7.17 at about morning hours at 8 am I was outside my house taking tea with my children.

I had seen one person chasing a brown cow within my compound.

The cow had gone out of the sale and the person who is the accused had gone with it. I had then gone to my shamba and I went back home for lunch. At 3.00 pm I received a report from Dominic that the said cow had been sold. The bull was outside my compound and it had entered into my compound and the accused had followed it and he went out with it. I was able to identify the said bull as the cow’s ears were cut twice as per our family marks. I had informed Dominic that I had seen the accused with the cow. Dominic had then informed me that he was to take a report at the police station and I was to be a witness.”

Conviction

7. On weighing the evidence led by the Prosecution against the alibi defence of the appellant, I find that the Prosecution had proved the loss of the PW1’s bull and its being sighted with the appellant by the two neighbours PW2 and PW3 who knew both the bull and the appellant well. The bare alibi defence does not in the circumstances of the consistent evidence of PW2 and PW3 raise any doubt as to the Prosecution’s case. I find the charge of stealing stock proved against the appellant.

Sentence

8. However, as urged by the DPP, I agree that the sentence of imprisonment for 5 years is excessive for the theft of one bull valued at Ksh.20,000/=. In accordance with the test in **Wanjema v. R** (1971) EA 493, I feel justified to interfere with the sentence imposed by the trial Court. I consider that an imprisonment term for 3 years is appropriate punishment for the offence of stealing stock in the circumstances of this case.

Orders

9. For the reasons set out above, the Court makes the following orders:

(1) The appellant’s appeal from conviction for the offence of stealing stock contrary to section 278 of the Penal Code is dismissed.

(2) The appellant’s sentence of imprisonment for 5 years is reduced to imprisonment for 3 years from the 7/11/2017 the date of sentence in the trial Court.

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.