

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 49 OF 2018

(From Original Conviction and Sentence in Criminal Case No. 226 of 2015 by the Senior Principal Magistrate's Court at Mumias)

JOSEPH OKELLO OREMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon FM Nyakundi, Resident Magistrate, of stock theft contrary to section 278 of the Penal Code, Cap 63 of the Laws of Kenya, and was accordingly sentenced to five (5) years imprisonment. The particulars of the charge against the appellant were that on the 6th day of April 2016 at 4.00 pm at Sayangwe Village, Koyonzo Location, Matungu Sub-County of Kakamega County he stole a heifer valued at Kshs. 14, 000.00 the property of Gaudencia Chiruka Juma.

2. He had also faced an alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code. The particulars of the alternative charge were that on the same date and at the same place stated in the main count, he had, otherwise than in the course of stealing, dishonestly received or retained one heifer knowing or having reason to believe it to be stolen property.

3. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called six (6) witnesses.

4. Gaudencia Chiku Juma, the complainant, testified as PW1. She gave sworn testimony. She testified that her heifer got lost on 6th June 2016. She found it on 30th June 2016 with the appellant. When she informed him that it belonged to her, he asserted that it was his. The matter was then reported to the police. PW2, Washingstone Ndongya, was related to both the appellant and PW1. He was present when PW1 found her heifer with the appellant, and he heard him assert that the heifer belonged to him, despite his, PW2, confirming that the cow actually belonged to the PW1. David Onyango Wera (PW3) was the husband of the complainant. He testified that the heifer belonged to the family. Wesonga Nyongesa (PW4) was the village elder to whom the initial report was made. He escorted the appellant and the heifer to the local administration police camp. AP Sergeant Francis Mitau, testified as PW5, and was the administration police officer who rearrested the appellant from PW4, and took custody of the heifer. He handed the two over to the police officer commanding the Matungu Police Division. PC Mourine Opiyo (PW6) was the arresting and investigating officer, she testified on the steps she took on the matter after the same was assigned to her.

5. The appellant was put on his defence. He gave an unsworn statement and did not call witnesses. He merely denied the offence.

6. After reviewing the evidence, the trial court convicted him on the main charge, and sentenced him as stated in paragraph 1 of this judgement.

7. Being dissatisfied with the sentence the appellant appealed to this court and raised several grounds of appeal. He largely averred that the sentence was harsh and excessive. He further argued that the court did not take into account that he was a first offender. He also said that the trial court ought to have considered alternative sentences.

8. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic (1972) EA 32*** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

9. The appeal was canvassed on 25th October, 2018. Both the appellant and Mr. Ng'etich, Senior Prosecution Counsel, made oral submissions. The appellant said that he had a family where the children were going to school. He invited me to consider that fact. Mr. Ng'etich submitted that the sentence was lenient given that the law provided for a maximum of fourteen years' imprisonment.

10. I note that this is an appeal on sentence only. I note that the heifer was recovered. The appellant was said to be a repeat offender. The state did not place any material before the trial court of the offence he had been previously convicted of and sentenced for, but the appellant admitted the fact. He was remorseful before the trial court, even though he did not express the same remorse before me. I shall exercise

lenience in view of his mitigation. I shall accordingly reduce the sentence imposed on the appellant by the trial court of five years imprisonment to the period served. He shall be freed from prison custody unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS10th DAY OFApril... 2019

W MUSYOKA

JUDGE