



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 18 OF 2017

ELIPHAS SIMWA WASONGA.....APPELLANT

-versus-

REPUBLIC RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. P. K. Rugut, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 203 of 2016 delivered on 02/09/2016)

JUDGMENT

1. The Appellant herein was charged with the offence of **Stock Theft** contrary to **Section 278** of the **Penal Code**, Cap. 63 of the Laws of Kenya. The particulars were that the appellant stole one cow valued at Kshs. 25,000/= the property of Tobias Enock Ouma on the night of 24th and 25th March 2016 at Central Sakwa Location, Komolo Ruma village in Migori County. He faced an alternative charge of **handling stolen property** contrary to **Section 322(1)(2)** of the **Penal Code**. The Appellant denied the offences and a trial was held.
2. The prosecution availed four witnesses who were the complainant (**PW1**), an Administration Police Officer attached to Rodi Police Post **No. 221053 Corp. Geoffrey Lopat** who testified as **PW2**, a County Revenue Officer one **John Ouma Odum** who testified as **PW3** and the investigating officer one **No. 55472 PC Reuben Guya** attached at Awendo Police Station who testified as **PW4**. The appellant was found with a case to answer and was placed on his defence.
3. In his defence, the appellant admitted having been found with the cow in question at the Rodi Kopany market during a market day but stated that the cow had been given to him by one **Victor Ouma** together with another unidentified man. That, the appellant had worked at the homestead of Victor Ouma sometimes in 2014 and did not find it difficult to assist when Victor wanted to look for some change within the market. That, he explained to **PW3** and **PW1** but in vain.
4. The trial court considered the evidence *in toto* and arrived at a finding that the defence was not holding; the defence was dismissed, the appellant found guilty as charged on the principal offence, convicted and sentenced to three years imprisonment.
5. Being dissatisfied with the said conviction and sentence the appellant preferred an appeal with the leave of this Court against the entire judgment, conviction and sentence. He also filed written submissions in support of his appeal. The appeal was opposed.
6. As this is the appellant's first appeal, the role of the court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
7. In discharging the said duty, this Court is to satisfy itself that the ingredients of the offence of stock theft were proved and as so required in law; beyond any reasonable doubt or alternatively, the ingredients of the offence of handling stolen property were satisfied.
8. **PW1** testified on his ownership of the cow in question. There was no challenge as such save the contention that the cow was given to the appellant by one Victor Ouma and another unidentified man. **PW1** explained that he was a trained Veterinary Consultant and kept four heifers at his home at Komolo Ruma and that one of them was stolen the night before the market day at Rodi Kopany. **PW1's** wife woke up their son one Victor Ouma and they tried to find the cow in vain. **PW1** believed that his cow was likely to be sold at the market on that day and personally went to find out if he will find it. He dispatched his other members of his family to two other market places to continue with the search.
9. **PW1** saw and identified his cow at the said Rodi Kopany market. He found the appellant holding its rope and bargaining the selling price with several interested business men. **PW1** had described the cow to **PW3** and on reporting to **PW3** that he had found his cow, the appellant was arrested. The description given by **PW1** fitted the cow that was found with the appellant. **PW1** also identified some photographs of his cow in court.

10. **Could Victor Ouma have been the owner of the cow?** On arrest, the appellant did not disclose the name of the owner of the cow. He only told PW3 that he had been given the cow by the owner at Kanyawanga as the appellant was on his way to the market. On interrogation, the appellant could not identify the owner either by name or the home where the owner came from. When PW1 and PW3 reported the matter to PW2 and upon further interrogation by PW2 still the appellant did not reveal the ownership of the cow. But the appellant told the trial court that he had been given the cow by one Victor Ouma within the market. Further, in his submissions on this appeal the appellant brings forth a completely different aspect of the ownership of the cow. Could the said Victor Ouma be the same son of PW1? Could he be another person with a similar name?

11. A careful analysis of the issue reveals that the appellant failed to dislodge the fact that the cow belonged to PW1. I hence find and hold that the prosecution proved that PW1 was the owner of the cow in question.

12. On how the appellant came into possession of the PW1's cow, the foregone evidence still does not support the position taken by the appellant. There is evidence that the appellant worked for PW1's daughter for a month as a herder. He therefore knew the homestead well and the fact that there was a market day at Rodi on some days. The theft of the cow was hence planned in such a manner that the cow would be immediately disposed by way of sale at the market the very following day. Indeed, that is where the cow was recovered and in the company of the appellant.

13. The appellant was also not forthright on his identity. He told PW2, PW3 and PW4 that he did not have an identity card. He further told the trial court that he was minor aged 17 years old. An age assessment revealed that he was aged between 18 and 20 years old. PW4 took the trouble of ascertaining whether the appellant was registered with the National Registration Bureau and it was revealed that he had been issued with an identity card number 2395347062. The appellant had also given a different set of names when he worked for PW1's daughter. It is apparent therefore that the appellant was not a straight forward person and knew at all stages that he was being untruthful.

14. The appellant's defence was therefore rightly disregarded by the trial court. I find and hold that the evidence on record supports a conviction on the offence of stock theft and that the appellant was rightly convicted.

15. On sentence, the appellant contends that the 3-year imprisonment is excessive, harsh and very punitive. The state prayed that the sentence be enhanced. I do not think that the state is merited in that submission. I say so because there was no appeal on sentence neither was the appellant notified of the intention to apply for enhancement of the sentence in time. I therefore decline that request. As a by the way, I would have found this case to be an appropriate one for such enhancement.

16. The offence of stock theft attracts a sentence of imprisonment of up to 14 years. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

17. Revisiting the circumstances surrounding the commission of the offence herein and the mitigations tendered I do not see how the sentencing court can be faulted. The appeal on the sentence is unmerited as well.

18. The upshot is that the appeal is not merited. It is hereby dismissed, and the decision of the trial court is hereby affirmed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of February 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Eliphas Simwa Wasonga, the Appellant in person.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Miss Nyauke – Court Assistant