



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 52 OF 2016

(Being an appeal arising from Kitale Chief Magistrate's Court Criminal Case No. 2163 of 2013 delivered by J.O. Owiti Principal Magistrate on 23/12/2014)

ROBINSON WANYONYI MAKOKHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

1. **Robinson Wanyonyi Makokha** “ the appellant “ was charged with the offence of **Stealing Stock** contrary to section 278 of the Penal Code. Particulars were that the appellant on the 30th day of August 2013 at Wamuini area in Trans Nzoia County jointly with others not before court stole one cow breed Freshian valued at Kshs 45,000/- the property of Paul Kimani.

He faced an alternative count of **handling stolen goods** contrary to section 322(1) and (2) of the Penal code. Particulars were that the appellant on 30th day of August 2013 at Wamuini area in Trans -Nzoia County jointly with others not before court otherwise than in the course of Stealing dishonestly received or retained one cow breed Freshian valued at Kshs 45,000/=- knowing or having reason to believe it to be stolen.

2. The appellant denied the charges and the matter proceeded to full hearing, as a result of which he was convicted and sentenced to five (5) years imprisonment.

He has filed this appeal citing the following grounds:

i) That the trial magistrate erred in law and in facts to convict the appellant on the main charge of Stealing stock yet the evidence adduced in court is variant and disputes the main charge as set out on the charge sheet.

ii) That the trial magistrate erred in law and facts to convict the appellant basing on the fatally defective charge sheet under Section 214 (1) (2) (3) of Criminal Procedure Code.

iii) That the trial magistrate erred in law and fact to rely on the evidence of PW2 and Pw3 yet they strongly contradicted each other on the arrest of the appellant.

iv) That the trial magistrate erred in law and facts to convict the appellant yet the photograph produced in court of the alleged cow did not include the appellant meaning the cow was photographed elsewhere and merely produced in court. Photograph did not

included the appellant nor the alleged slaughter house indicating the photograph was foreign to the alleged offence.

3. During the hearing of the appeal the appellant relied on his written submissions. He faulted the trial court for convicting him on the main count when there was no evidence to support it. That PW2 did not see the person who had the cow, but only saw it tied. Secondly PW3 failed to identify the cow he had recovered while PW1 gave a different description from what was before the court.

4. He further submitted that the charge sheet was defective because it was at variance with the evidence that was adduced. He wanted to appear in the photo if indeed he stole the cow.

5. The State through Mr. Kakoi opposed the appeal. He submitted that PW1 woke up to find his cow missing. PW2 later informed HIM that he had seen his cow at a slaughter house in Kiungani. He rushed there and found the appellant with it trying to sell it. He further submitted that ownership was proved, and the sentence of 5 years was reasonable.

6. A summary of the evidence that was adduced was that **PW1 Paul Kimani Ngige** who is a farmer had a cow and a calf in his cattle boma. On 30th August 2013 9 pm he went outside the house and noticed that his Freshian cow was missing, though the calf was there. He alerted neighbours and they searched for the cow the whole night in vain. He reported the matter at Kiungani police post.

7. The next day he was called by a police Reservist who informed him that a cow had been intercepted at Kiungani slaughter house. He proceeded there immediately and found his Freshian cow which was white, in colour.

The cow had horns and it had a rope. The cow was photographed and released to him. He identified the cow in the photos in court Exhibit 1 a & b.

PW2 John Stephen Ndungu owns a butchery at Kiungani Centre and he is the chairman of the slaughter house. On 31st August 2013 6.30 am a boda boda rider informed him of a cow that was being sold at the slaughter house.

8. He went there and found two men and the Freshian cow was tied in a bush nearby. The appellant was one of the two men and they told him the cow was theirs and they were selling it. He was suspicious about the cow. So he told them to wait for him as he contacted his partner. He proceeded to Kiungani AP Camp and reported to the AP Waweru. Two officers and himself walked towards the slaughter house. The appellant's accomplice spotted them and took off.

9. The appellant was arrested and the cow intercepted. He was escorted to the police post. Munene of Wamuini farm had reported about his missing cow. Later PW1 told him the cow belonged to him. **PW3 APC Zachary Waweru** confirmed the evidence of PW2. In cross-examination he said he had been escorted to the slaughter house by APC Hassan. He confirmed arresting the appellant at the slaughter house.

10. The recovered cow was brought to court and was identified by PW1. It was produced as Exhibit 2 by the investigating officer (PW4).

11. The appellant gave a sworn statement in his defence. He stated that he left home for his place of work in Lugari on 29th July 2013 6.30 am. He was going to cut trees using a power saw. At 3 pm the power saw broke down. He took it for repair on 30/7/13 and it was repaired. On 31st July 2013 he left for work with his power saw. He saw police officers on a bike approaching him, and he he was stopped and asked where he was going. He told them and they asked him for a permit which he did not have.

He was arrested and charged in court. He admitted that the offence in court occurred on 30th August 2013 and not 31st July 2013.

12. This is a first appeal and I have a duty to re evaluate the evidence and come to my own independent conclusion. I must bear in mind that I did not hear nor see the witnesses.

See Mwangi V Republic [2004] 2 KLR 28: Okeno V Republic 1972 EA 32.

13. Having considered the evidence on record, the grounds of appeal and submissions I find the following to be falling for determination.

(i) Whether ownership was proved.

(ii) Whether the cow was recently stolen.

(iii) Whether the appellant was found in possession of the stolen cow.

Issue No. 1 Whether ownership was proved and (ii) Whether the cow was recently stolen.

14. PW1 explained how he went to the cattle shade and found his white Freshian cow missing and left behind was the calf. Together with neighbours they searched for this cow in vain.

A report was made to Kiungani police post. He received information and went to a slaughter house in Kiungani and identified his cow, which was released to him.

He brought it to court when it was required.

15. To date no one has laid claim to it including the appellant.

In fact when the court wanted to release the cow the appellant was asked if he had any claim to it and he said he had no claim to it. This was on 22nd October 2014 at page 44 where he said;

“ The cow does not belong to me hence can be released to PW1.”

16. I therefore find that the cow (Exhibit 2) belonged to PW1.

PW1 lived in Wamuini Farm where he kept the cow. The cow went missing on 20th August 2013 and he found it at a slaughter house in Kiungani. This was the next day after the theft.

I do find that the cow had been recently stolen.

Issue No. (iii) - Whether the appellant was found in possession of the stolen cow.

17. PW2 owns a butchery at Kiungani Centre and is the chairman of the slaughter house. A boda boda rider informed him of a cow waiting to be sold at the slaughter house. Being suspicious, as it was too early in the morning he went there and confirmed. He then informed the police. He later arrived with two officers but the appellant's accomplice took off when he spotted them.

18. The appellant was arrested and the cow intercepted and recovered. He was arrested at the scene of recovery as he attempted to sell the cow.

PW2 and PW3 did not know the appellant and they had no reason to frame him. They were not the reason for the escape of the appellant's accomplice.

19. The appellant having been found in possession of recently stolen property did not offer any explanation for the said possession. In his defence he explained where he had been on 30th July 2013 upto when he was arrested on 31st July 2013. The incident relating to PW1's stolen cow took place on 30th August 2013 and it was recovered on 31st August 2013. His explanation was therefore not plausible.

20. Having been found in possession of stolen property within a day of the theft and without offering any explanation, it is taken that he was the thief or one of the thieves. The learned trial magistrate did not therefore err in convicting him on the main count and there was nothing defective in the said charge sheet.

21. The appellant was sentenced to five (5) years imprisonment after consideration of probation officer's report which was found to be unfavourable. Considering that the stolen Freshian cow was recovered almost immediately I find the sentence of 5 years to have been a bit too harsh.

22. The appellant has been in prison since December 2014 and has already served 2 years 8 months which is sufficient punishment.

I allow the appeal on sentence only.

The conviction is upheld while the sentence is set aside.

I substitute the sentence with the period already served.

The appellant to be released forth with unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed and dated on 29th August 2017 at Kitale.

H. ONG'UDI

JUDGE

In the presence of;

Ms Kagai for Mr Kakoi fro the State

Appellant – present

Kirong – Court Assistant

Court: Judgment delivered in open court.

Right of Appeal explained.

H. ONG'UDI

JUDGE

29/8/2017