



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 222 OF 2015

PATRICK WANDURUA MBARIA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Appeal from the Judgment of the Chief Magistrate's Court at

Molo Hon. J Mwaniki–Principal Magistrate delivered on the

6th December, 2012 in CMCR Case No. 2299 of 2010)

JUDGMENT

The appellant **PATRICK WANDURUA MBARIA** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at the Nakuru Law Courts.

The appellant had been arraigned before the trial court on 28/4/2010 on a charge of **STEALING STOCK CONTRARY TO SECTION 287 OF THE PENAL CODE**. The particulars of the charge were that

“On the 15th day of August, 2009 at Njoro Ngongongeri Farm in Nakuru District within the Rift Valley Province jointly with others not before court, stole 4 Freshian milking cows, 3 Ayeshire steers and one Ayeshire in calf heifer all valued at Ksh 385,000/= the property of Egerton – Ngongongeri Farm by a motor vehicle Registration KAN 564X Mistubishi Canter”.

The appellant pleaded ‘**Not Guilty**’ to the charge and his trial commenced on 11/10/2010. The prosecution led by **CHIEF INSPECTOR IKUNYWA** called nine (9) witnesses in support of their case.

The brief facts of the prosecution case were that on 15/8/2009 a lorry Reg. No. KAN 564X on its way to Sobeia was intercepted by police whilst ferrying cattle suspected to have been stolen. The driver and the turn boy of the lorry were arrested. **PW1 DAVID CHERUIYOT** the manager of Ngongongeri Farm told the court that he was called to the police station to assist in identifying the cattle. **PW1** went to Njoro Police Station and saw the cattle.

He was able to identify them as belonging to Ngongongeri Farm due to the exclusive marks being the ear notching that had been done on the cows. Additionally **PW1** had a register of these cattle which registration details he produced as an exhibit **P. exb 1**.

PW9 PC JOHN CHACHA told the court that on 15/8/2009 at 4.30am he received a report that some people had loaded cattle onto a canter Reg. No KAN 564X and they were headed to Elburgon. **PW9** and other officers pursued the canter. They intercepted the vehicle and arrested the driver and his two turn boys. Later on some of the cattle were identified as belonging to Ngongongereri Farm. The driver and turn boys were charged. It was not until later that the appellant who was said to be the broker for the cattle was arrested and charged.

PW6 JOHN MAINA was the driver of the Mitsubishi Canter Reg. No. 564X while **PW5 PAUL WAINAINA** was a turn boy on the same vehicle. They both told the court that on 14/8/2009 at about 12.00 noon the appellant came to the stage where their vehicle was parked and requested to hire the vehicle to transport cows from Njoro to Naivasha the next morning. The parties negotiated and agreed on a price of Ksh 16,000/= **PW6** told the court that the appellant paid him a cash deposit of Ksh 4,000/=

The next day **PW6** drove to Njoro to pick the cattle. The appellant and others loaded ten cows onto the canter and they set off. The appellant had assured **PW6** that he had a valid permit for the transportation of the cattle. As they drove the appellant alighted from the canter saying that he was going to check if there were police men ahead. He vanished with the permit. The police intercepted the vehicle and detained the driver and turn boy. The appellant was not arrested until 26/4/2010.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant gave a sworn defence in which he denied having in any way been involved in the transportation of the stolen cattle.

On 6/12/2012 the learned trial magistrate delivered his judgment in which he convicted the appellant for the offence of theft and sentenced him to serve (9) years imprisonment. Being aggrieved the appellant filed this appeal.

Being a first appeal this court is obliged to re-examine and re-evaluate the prosecution case and to draw its own conclusion on the same (see **AJODE Vs REUBLIC [2004] KLR 82**).

The question of the ownership of the recovered cattle is not in any doubt. **PW1** told the court that he found the cows at the Njoro police station. He was able to identify them as the properties of Ngongongereri Farm by the notching done on their ears. **PW2 JACKSON WANYONYI** told the court that he was the technician at Ngongongereri Farm. He told the court that it was he who did the notching and registration of the cattle. The register of the cattle was produced as **P exb 1**.

PW8 PC DAVID IRUNGU was a gazetted scene of Crime Officer. He told the court that he took photographs of the recovered cattle which photographs were produced in court as exhibits **P exb 8**. The photographs clearly shown the canter motor vehicle Reg. No KAN 564X as well as a view of the notched ears of the cows. The appellant made no claim that the cattle belonged to him. I am satisfied that the 3 cows recovered by police on 15/8/2009 belonged to Ngongongereri Farm.

The appellant has been charged with having stolen these cattle. No witness saw the appellant lead the cows out of the Ngongongereri Farm. Neither was the appellant found in actual possession of the stolen cows. **PW8** one of the police officers who intercepted the vehicle ferrying the cattle told the court that he did not find the appellant anywhere near that canter. **PW8** told the court that he arrested the driver and the two turn boys. These persons were charged in court and dealt with.

The vehicle ferrying the cattle was intercepted on 15/8/2009. It was not until eight (8) months later on 28/4/2010 that the appellant was arrested. The appellant was linked to this offence by the evidence of **PW6** and **PW5** who were the driver and turn boy respectively of the canter. The two were in effect co-accused because they too had been arrested and charged with theft of the same cattle. The possibility that **PW6** and **PW5** were out to shift the blame to the appellant in an attempt to exonerate themselves, cannot be ruled out.

As stated earlier the appellant was not arrested on the date when the cattle were recovered. He was

arrested 8 months later. Given this time lapse it would have been prudent for the police to conduct an identification parade so that **PW5** and **PW6** could confirm their identification of the appellant as the man who had hired them to transport the cattle. No identification parade was conducted and no reason was advanced by the police for that omission.

In his evidence **PW6** referred to the appellant as '**woffer**'. There was no evidence to show that his was the appellant's alias name.

On the whole this court is not convinced that the prosecution proved its case beyond reasonable doubt. I award the benefit of doubt to the appellant. I allow this appeal and quash the appellant's conviction. The nine (9) year jail sentence is also set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 3rd day of August, 2017.

Appellant in person

Mr. Chigiti for DPP

Maureen A. Odera

Judge