



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT HOMA BAY**  
**CRIMINAL APPEAL NO.13 OF 2016**

**BETWEEN**

**JOHNSTONE OUMA GOR.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from original conviction and sentence in original*

*Ndhiwa Criminal Case No.437 of 2014 – Hon. Mr. B.R. KIPYEGON, RM*

*dated 14<sup>th</sup> April, 2016)*

**JUDGMENT**

1. **JOHNSTONE OUMA GOR** (the appellant) was convicted on a charge of stealing two bulls worth Kshs.34,000/= contrary to **Section 278 Penal Code** and also interfering with investigations contrary to **Section 37** of the **Sexual Offences Act**. He denied the charges, and after trial in which prosecution called witnesses he was convicted and sentenced to pay a fine of Kshs.10,000/= and in default serve 6 months on each count.
2. At the trial, the appellant had been jointly charged with **WALTER ODHIAMBO OBONYO**. The prosecution case was that they jointly stole the two bulls and also interfered with investigations into a sexual offence by releasing a potential suspect and victim who were in their custody.
3. It was the evidence of **HELLEN AKETCH OKEYO** (PW1) that on 9<sup>th</sup> December, 2014, the appellant who was the chief of East Kanyamwa Location arrested her together with **SAMSON OMIGO** on the pretext that they had subjected her daughter **QA** to sexual abuse by having her married to **SAMSON**.
4. PW1 denied that her animals were stolen, saying they belonged to **JOHN OMIGO AROT** but the appellant had sent dealers to collect the bull from her home.
5. **JAMES OMIGO AROT** (PW2) said he had given his son **SAMSON** the bulls to use in ploughing, and eventually one bull was returned to him (PW2) but he was informed by PW1 that one other bull had been taken by the area chief.

6. **SAMSON ODERO OMIGO** (PW3) confirmed that he had used his father's bulls to plough one **ABODI's** land, and also **HELLEN'S** (PW1's) land. The animals remained at PW1's home for some time. One day, the chief arrived with boda boda riders at PW1's home and arrested him together with PW1 on allegations that the latter had given him her daughter **Q**. PW3 was to be taken to Ndhiwa for prosecution. However on the way at **OGENG**, the appellant led them deep into a cane plantation and said he could assist them, but he required that a bull be sold and the proceeds be given to him to take to the OCS Ndhiwa.

7. The appellant then called some cattle dealers to go and collect the animals which were at PW1's homestead and he quickly organized for the sale of the animals and received the money Kshs.15,500/= claiming it was for onward transmission to the OCS Ndhiwa.

8. They never got to the police station and were released once the money was handed over to the Chief.

9. **WILLIAM OTIENO AMOLO** (PW4) who deals in livestock within Kanyamwa North received a call from the appellant requesting him to go and buy a bull at Atieno Ogwany's home – he obeyed. He did not find anyone there, but shortly three people arrived on a motor cycle among them was PW1 and one **ELIAS OBONYO**. PW1 pointed out one bull to them but they could not agree as “**she is a woman.**”

10. PW1 led them to the owner of the bull who was at Ogeng and on arrival the appellant authorised them to buy the bull, saying they were all aware he paid Kshs.15000/= to the owner and PW1 accompanied them back to her home and handed over the bull to them.

11. **ELIAS MANYONI ABONYO** (PW5) a livestock trader stated that he was approached by PW1 who said she had a cow for sale. She led him to her home where they found **OTIENO JACOB**, a fellow livestock trader. There were two bulls in the compound and she pointed to one for them to buy but they were reluctant to negotiate with a woman. He corroborated PW5's evidence that PW1 went with them to Ogeng where they found the appellant and the owner of the cow referred to as **JAPOLO** (a title ordinarily used among the Luo in reference to one who is involved in religious activities – it means heavenly person). They paid the owner money and left with PW1 to take the bull.

12. **JUNIOR ODONGO OGUTU** (PW6) a farmer in **KANYAMWA KOCHIENG** and son to PW1 had made a report at **BURA ATEGO** School regarding abuse of a minor who was living with **OMIGO AROT**. The head teacher gave him a letter to take to the appellant in his capacity as the area's chief. The appellant arrested **OMIGO** and led him to Ndhiwa but on the way and when they got to **KODIERA** the appellant said he would write to confirm that the minor was **OMIGO's** wife and he saw the appellant writing. He was then instructed to bring the minor from school.

13. Later PW6 learnt that the arrested person never got to the police station, and when he tried to inquire from the appellant what had happened, the later became rude. PW6 reported the incident to police and a few days later he learnt from **OMIGO** that the appellant had taken his cow. PW6 explained on cross examination that he had questioned PW1 about the relationship between the minor **Q** and **OMIGO** but she had said that was her child and she could deal with her as she pleased.

14. **PW7 QAO** (aged 17 years) denied that she had any relationship with **SAMSON OMIGO AROT** but confirmed that PW6 collected her from school and took her to **KODIERA's** chief camp where she found **SAMSON** hand cupped and in the company of the appellant.

15. The appellant instructed that PW1, PW3 and PW7 be taken to Ndhiwa, but when they got to Ogeng the appellant said they should sell PW3's bull as the OCS needed some money. She witnessed appellant calling the livestock traders, the sale of the animal and eventual receipt of the proceeds by the appellant and the subsequent release of PW3.

16. The appellant denied taking part in any sale of a bull or receiving money involving PW1 and PW3. In his defence he explained that a report had been made that PW3's son was sexually abusing minors a minor and infact some youth from the area wanted to kill him and the appellant went to his rescue.

17. He questioned the minor, her mother and PW3, and after establishing that an offence had been committed he directed them to accompany him to the police station so that an arrest could be effected.
18. It was his evidence that PW1 and PW3 were eventually charged in court in Case No.432 of 2014.
19. In his judgment the trial magistrate took note of the fact that PW3 (**SAMSON ODERO OMIGO**) was charged in Criminal case No.431 of 2014 and convicted for defiling a minor **QAO** and PW1 (**HELLEN AKETCH OKEYO**) was charged in Criminal case No.432 of 2014 and convicted for forcing to save **QAO** from sexual exploitation.
20. The trial magistrate also noted that PW1 distanced herself from allegations relating to giving away her child to PW3 but confirmed that the girl was pregnant at the time. He noted that she also admitted that she is the one who showed the dealers the bull although she absolved the chief from any wrong doing.
21. The trial magistrate noted that appellant was not the one who went to drive away the bull from Hellen's home nor did the bull strictly belong to Hellen, but it lived in possession of both Hellen and Omigo.
22. The trial magistrate held that a report had indeed been made to the appellant concerning PW1 and PW3 and they had been duly apprehended by the area chief, then the appellant eventually released them after entering into a deal where he received money.
23. It was the trial magistrate's finding that the appellant's conduct and actions led "to fraudulent commission without claim of right to the complainant's bull and resulted in the termination of the delivery of the suspects to the police station." The trial magistrate described this release of the suspects as a collusion with the suspects to circumvent justice.
24. The appeal was canvassed by way of written submissions and counsel faulted the sentences which the trial magistrate said should run consecutively because the charges were based on some facts which arose during the same transaction.
25. It is counsel's contention that in general concurrent sentence should be awarded for offences committed on the same transactions and he has referred to a Handbook on sentencing by Brian Slattery at page 7-8. Also that under **Section 278 Penal Code** there is no option of a fine.
26. Counsel also faulted the manner in which the charge was drafted saying the evidence presented was at variance with the particulars in charge sheet. The question was whether the animals belonged to Hellen as stated in the charge sheet. He supported this argument by referring to the case of **STATE –VS- EREMENJINTO WARAGA (1964) EA 366 page 368** where Cido Udoma, CJ stated that: **"... the prosecution is bound by the particulars of the charge ..."**
27. Counsel also argued that the offence is stealing as defined under **Section 268 Penal Code** was not proved as the evidence showed that the owner of the cow sold it and is the one who received the money. It was submitted that there was no evidence that appellant took the bull and that PW1, PW3 and PW7 were in some way accomplices to the offence.
28. It was counsel's contention that at best the evidence disclosed an offence of soliciting a bribe but not stealing.
29. It was further submitted that the charge was defective because **Section 37 (1)** merely states what constitutes the offence of interfering with a scene of crime whilst **37 (2)** sets out what constitutes interference so the court should not have convicted appellant for an offence under **Section 37 (1) (2)** of the **Sexual Offences Act**. Further that it was unsafe to convict on uncorroborative evidence.
30. It is argued that since the **Sexual Offences Act** provide for a minimum sentence then the sentence of a fine is void and it should rectify this by ordering for his release.

31. In opposing the appeal Mr. Oluoch submits that the sentence meted in respect to the offence under the **Sexual Offences Act** was lawful as **Section 37 (1)** of the **Act** provides imprisonment of a term not less than 3 years or to a fine of Kshs.100,000/= or both, so the fine of Kshs.10,000/= was lawful.

32. Mr. Oluoch also submitted that the offence of stealing within the meaning of the Penal Code was proved and the appellant's actions were intended to subvert justice.

33. The trial magistrate correctly took cognisance of the fact that a report had been made to the appellant in his company as the area chief that PW1 had given out her minor daughter in marriage to PW3. In fact PW1 and PW3 were arrested by the appellant in exercise of his legal authority.

34. It is also true that the appellant did not go to forcefully drive the bull from PW1's compound, but the evidence indicates he coerced them to part with the animal by way of sell and then appropriated the proceeds saying the same would be transmitted to the OCS Ndhiwa police – probably so as to act favourably towards the suspect's what is of greater significance, and which all the prosecution witnesses attested to as that after the appellant received the money, he immediately released the suspects.

35. Would this amount to stealing? **Section 268 (1)** of the **Penal Code** defines stealing as:-

**“A person who fraudulently, and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.”**

**(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say –**

- a. an intent permanently to deprive the general or special owner of the thing of it;**
- b. an intent to use the thing as a pledge or security;**
- c. an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;**
- d. an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of conversion.**

36. Although the charge sheet states that the bull belonged to Hellen Aketch, it was evident that it actually belonged to **JAMES OMIGO** who had given it to his son **SAMSON OMIGO** (PW3) who claimed to have kept the bulls at Hellen's homestead as he was using them to plough her land. Hellen was not the owner – but could she be considered a special owner? **Section 268 (2) (e)** states that:-

**“special owner” includes any person who has any charge or ..... upon the thing in question, or any right arising from or dependent upon involving possession of, the thing in question.”**

37. I think this is the definition the trial magistrate relied on in making a finding that Hellen was a special owner as at the time the bull was under her charge within her compound. To that extent then the argument that the evidence is at variance with the particulars of the charge does not stand.

38. This then now leads to the next issue – did the appellant fraudulently convert the animal to his benefit. Fraud is defined in Collins Oxford English Dictionary Twelfth Edition (Stevenson A and Waite M: 2011:564) as wrongful or criminal description intended to result in financial personal gain. The appellant did not physically get the bull from Hellen's compound, but he coerced Samson and Hellen to sell the animal against their will –this was intended to be some hand of inducement so that he could release them, although he mentioned the OCS as a benefactor – probably to give it some appearance of credibility.

39. I think there is an attempt to extrapolate the meaning of stealing – the official owners that is Hellen and Samson parted with the animal so as to buy their freedom and yes an offence was committed by the appellant, but it would have made more sense to charge him under the Anti-Corruption and Economic Crimes Act for a variety of offences – from soliciting for a bribe, abuse of office, receiving a bribe – surely way go for something that remains a wife net to be cast to prove the offence? What evidence was there that the OCS did not benefit from the proceeds for fraud to stand?

40. To my mind the evidence did not prove a charge of stealing as defined under the Penal Code BUT it did disclose an offence for which the appellant ought to have been charged as already pointed out. The conviction is thus quashed and sentence set aside.

41. As regards the second count under **Section 37 (1)** of the **Sexual Offences Act**; the prosecution case was that the appellant interfered with investigations by releasing a suspect of defilement namely **SAMSON ODERO** and the victim **QAO** after arresting them. The persons arrested confined as much. **Section 37(1)** provides:-

**“Any person who intentionally interferes with a scene of crime or any evidence relating to the commission of an offence under this Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than three years or to a fine of one hundred thousand or both...”**

42. That is the provision which creates the offence – **Section 37 (2)** defines interference to include inter alia any other act or omission that would hinder or obstruct investigations...

43. This as adequately demonstrated by the evidence presented at the trial. I am not sure which argument appellant’s counsel was advancing because the charge sheet clearly refers to **Section 37 (1)** and not **37 (1) (2)** as he suggests in his written submissions.

44. Consequently this second limb of the appeal has no merit. The conviction on the second charge was based on sound evidence and is upheld. The sentence was legal as provided under the Act and I confirm it.

45. The appeal thus succeeds only partially that is on count 1 but count 2 is upheld.

Delivered and dated this **23<sup>rd</sup>** day of **September, 2016** at Homa Bay.

H.A. OMONDI

JUDGE.