



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CRIMINAL CASE APPEAL NO.284 OF 2011

COLLINS ISICHE.....APPELLANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

(From the original conviction and sentence of P. O. OOKO, SRM at Kakamega, criminal case no 2161 of 2010)

JUDGEMENT

The appellant, Collins Isiche was charged with offence of stock theft contrary to section 278 of the Penal Code Cap 63 of the Laws of Kenya. Particulars were that on the night of 27th and 28th November 2010 in Murumba sub-location in Kakamega Central District within Western Province stole one cow black in colour valued at Kshs 15000, the property of Sabina Wawire. Alternatively the appellant was charged with the offence of handling stolen property contrary to section 322(2) of the Penal Code Cap 63 Laws of Kenya. Particulars were that, on the 8th day of November 2010 in Maraba village, Kakamega Central District, within Western Province, otherwise than in the cause of stealing, dishonestly retained one black cow knowing or having reason to believe it to be stolen property.

The prosecution called three witnesses who gave evidence in the lower court. The first witness was the complainant who narrated how she retired to bed on the night of 26th Nov 2010. She had securely locked up her five herds of cattle. When she woke up the following day, she found one missing. She later learned from Mulembe FM radio that a stolen cow had been recovered. She proceeded to the Kakamega police station where she found her stolen cow with the accused person arrested. The second witness was the village elder of Scheme village. She told court that she received a call that a suspected stolen cow had been recovered at Masingo area. She proceeded to the said area where she found the accused person tied up with ropes surrounded by members of public who were ready to lynch him. The stolen cow was also at the sight. She inquired from the accused where he got the cow and he said a certain boy whom he didn't disclose gave it to him. She rescued the accused from the mob and arrested him. The third witness was the investigating officer. He also produced before court the picture of the stolen cow which had been identified by the complainant as the one that had been stolen from her.

After hearing of this case, the learned trial magistrate found the accused person guilty on the alternative count of handling stolen property and sentenced him to serve seven years in jail. The appellant has now appealed before this court on both his conviction and sentence. Has raised three grounds of appeal as follows:-

1. **That he was wrongfully convicted because he is a lay man and was unrepresented.**
2. **That the sentence imposed on him was harsh and excessive given that he is a student and in**

- school and he stands to lose a lot being in prison for seven years.**
- 3. That the sentence be reduced so he can go back to school.**

The appellant also presented before court written submissions in which he stated that he was framed up and was convicted on a defective charge sheet. He further submitted that the trial magistrate erred by relying on the evidence of P.W 3 which he had dismissed as not being accompanied by a certificate while at the same time convicting him based on the same evidence.

On the first ground, there is no evidence that the appellant was merely charged before court because he is a lay person. His contention remains a mere imagination which has not been established.

On the second ground, the appellant has asserted that the sentence imposed on him was excessive. The appellant was charged under section 322(1) as read with section 322(2) of the Penal Code. Under section 322(2) a person who handles stolen goods is guilty of a felony and liable to imprisonment to a term not exceeding fourteen years. The learned trial magistrate sentenced the appellant for seven years which is within what is stipulated in law. However the appellant contends that this sentence was excessive. He submitted that he is a student and stands to lose greatly if he serves the seven years. However from the court record, he never told the court that he was a student and only mentioned that he an orphan which fact was taken into consideration by the trail magistrate. The issue of being a student is therefore an afterthought.

The appellant has also raised the issue of the evidence of P.W 3 which the trial magistrate had dismissed as being of no value because it was not supported by a certificate. The certificate in question relates to the exhibits P1 (a) and (b) photographs of the stolen cow. These photos were produced by the investigating officer as opposed to the scene of crime officer who took the photographs of the stolen cow. Under section 78(1) of the Evidence Act, such a certificate is prepared by the person who took the photograph and such certificate is proof of the facts thereof. The court may however sermon the person who prepared such a certificate and examine him if the court thinks it fit to do so. There is however no mandatory requirement that the person who prepared the certificate should be the one to produce it. What is in issue here however is whether exhibits such as photographs can be produced without an accompanying certificate and what is the resulting effect. Under section 78(1) of the Evidence Act Cap 80 Laws of Kenya,

“...a certificate in the form in the schedule to this Act, given under the hand of an officer appointed by the Attorney General for the purpose who shall have prepared a photographic print or photographic enlargement from an exposed film submitted to him shall be admissible, together with the photographic prints, photographic enlargements and any other annex referred to therein and shall be evidence of all facts stated therein”

The wordings of this section seems couched in mandatory terms that such photographs should be accompanied by a certificate as proof of the facts stated therein. In this case, no such certificate was ever produced. This matter was even raised by the trial magistrate in his evidence who however went ahead to rely on the photographs produced without such a certificate. The effect of not producing a certificate was to render the photographs produced a nullity and therefore conceding that there was actually no exhibits produced and hence no proof that there was any recovery made of the stolen cow.

The end result is that there was actually no evidence that there was any stolen cow that was ever produced before court. With such an omission, it was not safe to convict the accused. I make a finding that the appeal of the appellant succeeds on the ground that he was convicted without sufficient evidence. I therefore proceed to allow his appeal and order him set free henceforth unless otherwise lawfully held.

DATED THIS 11th DAY OF December 2013.

HELLEN WASILWA

JUDGE

S. J. CHITEMBWE

JUDGE