



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.163 OF 2012

MILTI OLE NKIPAI..... APPELLANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT

(Being an appeal from original conviction and sentence in Naivasha C.M.CR.C.NO.770 of 2012 by Hon. S. Githinji, Chief Magistrate, dated 9th August, 2012)

JUDGMENT

INTRODUCTION

1. The appellant was charged with the offence of **stealing stock** contrary to **Section 278** of the **Penal Code**.
2. The appellant was also charged with an alternative charge of **Handling Stolen Property** contrary to **Section 322(2)** of the **Penal Code**.
3. The particulars of the charge in brief are that on the 5th March, 2012 at Ewaso Kedong in Kajiado District together with others stole seven (7) heads of cattle, which cattle belonged to **KASALE OLE LESHINKA KOILEL**.
4. The appellant took the stolen cattle to a slaughter house in Mai Mahiu.
5. The Appellant was arrested at the slaughter house and subsequently charged with the offence. He was convicted on the charge of stealing stock and sentenced to seven (7) years imprisonment.
6. The Appellant being aggrieved with the decision of Hon. S. Githinji, Chief Magistrate, Naivasha delivered on the 9th August, 2012 preferred this appeal and listed eight (8) grounds of Appeal in his Petition of Appeal.
7. The grounds of Appeal are *inter alia*:
 - i) That the proceedings were conducted in a language not understood by the appellant. On the 8th June, 2012, a Maasai language interpreter was provided when three (3) witnesses testified and not availed in proceedings thereafter prejudicing the appellant's case.
 - ii) That the appellant was convicted on an offence not proven against him

iii) That the learned magistrate failed to appreciate the fact that the appellant had a claim over the livestock he slaughtered.

iv) The learned Magistrate failed to apply the benefit of doubt in favour of the appellant

v) That the charge in the alternative count was not amended pursuant to Section 214 of the Criminal Procedure Code on 8th June, 2012 to read 8th March, 2012 from 5th March, 2012 as drawn prejudicing the Appellant's case.

vi) That the trial magistrate in convicting the Appellant on the main count did not evaluate the principle of recent possession *vis a vis* the defence of the accused.

vii) That the principles of a fair trial were not applied by the Trial Magistrate by facilitating that the appellant understood the proceedings

viii) That the sentence was excessive.

8. At the hearing of the appeal Learned Counsel for the Appellant, Mr. Mburu and Prosecuting Counsel for the State, Mr. Marete, both made oral submissions.
9. Counsel for the Appellant submitted that the prosecution failed to prove that the appellant stole the seven (7) heads of cattle.
10. It was Counsel's contention that no evidence was adduced by any of the prosecution witnesses connecting the Appellant with the actual stealing of the cattle.
11. That the trial court failed to make a finding on how the appellant came into possession of the cattle and also failed to put into play the Doctrine of Recent Possession.
12. Counsel submitted that it was the prosecution's duty to prove its case on either the main count or the alternative count and it was upon the court to make a determination as to whether the appellant was the thief or he was a handler of stolen property.
13. Counsel further submitted that the dates on the charge sheet, particularly for the alternative count were deleted to read 8th March, 2012 instead of 5th March, 2012 and the Appellant was not called upon to plead to the amended charge sheet.
14. Lastly, Counsel submitted that the sentence meted out was excessive as the trial court failed to take into consideration, the appellant's mitigation and that the appellant was sentenced to serve a prison term and was not given an option of a fine.
15. Counsel prayed for the court's leniency and prayed that the sentence be reduced to a non-custodial one with an option of a fine.
16. The Appeal was opposed on both issues of conviction and sentence..
17. Prosecuting Counsel for the State submitted that the witness (P.W.3) who was the owner of the slaughter House testified that it was the Appellant who brought the cattle to the slaughter house and that the Appellant also produced records for the livestock brought to the slaughter House.
18. Counsel submitted that the trial court applied the Doctrine of Recent Possession, when it made reference to the records.
19. Counsel urged the court to uphold the conviction and sentence. Alternatively, counsel called upon the court to substitute the conviction and sentence as provided under the provisions of **Section 354** of the Criminal Procedure Code.

ISSUES FOR DETERMINATION

20. After due consideration of the submissions of both parties this court finds the following issues for determination.

i) whether the prosecution proved its case beyond reasonable doubt on the charge of stealing;

ii) recent possession

ANALYSIS

21. This court being the first appellate court, it is incumbent upon it to re-assess and re-evaluate the evidence on record and arrive at its own independent conclusion. Refer to **Okeno V. Republic**, [1972] E.A. 32.
22. On the first issue, it was incumbent upon the prosecution to prove beyond reasonable doubt that the Appellant committed the offence of stealing the seven (7) cattle.
23. This court will analyse this issue from the aspect of identification.
24. The evidence of the complainant was that the animals had distinct markings and the complainant was able to identify the carcasses from these markings.
25. From the evidence on record, this court is satisfied that the complainant was able to identify the stolen property and was able to prove that the cattle belonged to him.
26. The other aspect of identification relates to the Appellant. After perusing the court record, this court notes that there was no eye-witness to the Appellant's stealing of the cattle.
27. None of the prosecution witnesses in particular the complainant adduced evidence that pointed to the Appellant and identified him as the thief who stole the heads of cattle.
28. This court finds that this ground of appeal has merit as the prosecution failed to prove that the Appellant was the actual thief, who stole the seven (7) heads of cattle from the complainant.
29. The second issue relates to recent possession and it also touches on the alternative count of handling stolen property.
30. On the amended dates on the charge sheet, alluded to by counsel for the appellant in his submission, this court opines that this issue is immaterial as it does not alter the charge. Reference is made to the provisions of **Section 214** of the **Criminal Procedure Code** which touches on the issue of dates.
31. The complainant stated in evidence that the animals went missing on the 5th March, 2012 and on the 8th March, 2012, acting on information received, he was able to recover the hides, heads and carcasses of the animals at the Mai Mahiu slaughter House.
32. The carcasses were recovered within two (2) days after the cattle had been stolen and the carcasses were traceable to the appellant.
33. The evidence of VIRGINIA NJERI (P.W.3) and STEPHEN GITHURA MWANGI (P.W.6) was that they were both employees at the Slaughter House.
34. P.W.6 testified that he received the animals for slaughter from the appellant and he took down his particulars and recorded them in a book.
35. P.W.6 was able to identify the Appellant as the person who brought the animals to the Slaughter House
36. P.W.3 availed the livestock record to court and it was marked as "PMF1 -1".
37. From the court record, this court finds that the evidence of P.W.6 is corroborated by that of P.W.3.
38. The Appellant was duty bound to offer a reasonable explanation as to how he came into possession of the stolen animals. In his unsworn statement, he stated that he bought the animals.
39. This court finds that the explanation is not reasonable as the evidence shows that he was a neighbour of the complainant and knew the complainant's cattle distinct markings and it is clear from the complainant's evidence that he did not sell the cattle to the appellant.
40. After re-assessing and re-evaluating the evidence on record, this court finds the facts are supportive of the alternative charge of **handling stolen property** contrary to **Section 322(2)** of the **Penal Code**.
41. This court invokes the provisions of **Section 354(ii)** and hereby alters the findings of the trial court but will maintain the sentence as it is not harsh or excessive and is the same as that prescribed for handling stolen property.

FINDINGS:

42. This court finds that the prosecution failed to prove to the required standard of proof that the appellant stole the cattle.
43. This court finds that the evidence conclusively supports the alternative count of **handling stolen property** contrary to **Section 322(2)** of the **Penal code**.

CONCLUSION:

44. This court hereby quashes the conviction for the offence of **stealing** and substitutes it with a conviction for the offence of **handling stolen property**.
45. The sentence imposed by the trial court to be maintained and to run effective from the date of judgment, that is 9th August, 2012.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 22nd day of January, 2014.

A. MSHILA

JUDGE