



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 115 OF 2013

KEVIN ODHIAMBO OMONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in the Senior Principal Magistrate's Court at Siaya Criminal Case No. 447 of 2012]

J U D G M E N T

1). The appellant was charged with the offence of Stealing Stock contrary to section 278 of the Penal Code.

The particulars were that on the 30th day of May 2012 at Kodiero sub location in Siaya District within Nyanza Province, stole one brown female cow valued at Kshs. 22,000/= the property of George Ouma Japala. The appellant denied the charge and the prosecution called a total number of 7 witnesses to establish their case. The appellant was convicted and sentenced to serve 10 years imprisonment hence this appeal.

2). The facts briefly are that PW1 on the night of 30th May 2013 tethered his cow outside. Later when his wife went out for a short call she discovered that the cow was missing. Efforts to trace it became fruitless till he reported the matter to the chief as well as the Administration Police. On 2-6-2012 he received information on 2-6-2012 that his cow had been seen at Nyajuok area. They went with the police and recovered the same. They also arrested the appellant who had shown them where the cow was.

3). **PW2 Paul Ochieng**, is the village elder. He assisted in searching for the cow whereby on 1-2-2012 at 11 p.m he was told where the cow was. He arrested the appellant and one George Owino who later committed suicide. The appellant led them to Nyajuok the home of one Arek PW3 where they found the cow.

4). PW3 on the other hand testified of how on the 31-5-2012 at Randego market the appellant and the late George sold the cow to him at a cost of Kshs. 18,000/=. After receiving the money they both disappeared even before receiving an official receipt. Apparently, the said Mr. Arek knew the appellant. He was advised not to sell the cow. Later on 2-6-2012 the accused took the police to Mr. Arek's home where the cow was recovered.

5). PW5, 6, and PW7 are police officers who assisted in tracing the animal and apprehending the appellant. The cow's photograph was equally produced.

6). The appellant gave unsworn testimony. He denied the charge. He was arrested with the late George on 2-6-2012 at the latter's compound. He was taken to the cells and later charged.

7). The court has carefully perused the proceedings herein as well as the parties submissions. The state did support the conviction and sentence on the grounds that the evidence against the appellant was watertight.

8). The appellant has filed 5 grounds arguing basically that the evidence by the prosecution was unsatisfactory and could not sustain the charge and conviction; that one George Owino ought to have been called and that the burden of proof was shifted to him.

9). This court is enjoined to reevaluate the evidence afresh and ought to arrive at an independent finding. See Okeno -VS- Republic [1972] EA 32. What is not in dispute is the fact that the complainant's cow was stolen on the fateful night. Nobody saw the thieves.

10). However, PW3 who says that he deals in the business of buying and selling cattle confirmed to the court that he purchased a cow from the appellant. This was daytime. The said witness equally confirmed that the appellant had the cow and he knew him. Is it possible therefore that there was any case of mistaken identity? I do not think so. Neither do I find any evidence to suggest that Mr. Arek plotted to "fix" the appellant.

12). The cow was in any event traced to the said Mr. Arek's home. He wisely refused to sell the cow after suspecting that the same might have been stolen as the two vendors disappeared. The prosecution evidence was not displaced by the defence in any way. It is the appellant who led the police officers and witnesses to where the cow was.

13). In the premises I do not agree with the motion that the burden of proof was shifted to the appellant. His co-accused George Owino had already died and it was not therefore possible to charge him. Both of them had been locked up in the police cells.

14). Consequently, and in the light of the above findings I do not find this appeal meritorious. The appellant's scheme was thwarted and furthermore Mr. Arek todate I suppose has never been refunded. The appeal it hereby dismissed.

Dated, signed and delivered at Kisumu this 16th day of December, 2014.

H.K. CHEMITEI

JUDGE