



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 79 OF 2012

DANIEL ONYANGO OGULA alias JOHN.....APPELLANT

VERSUS

**REPUBLIC.....
.....RESPONDENT**

[From original conviction and sentence in Senior Resident Magistrate's Court at Bondo Criminal Case No. 955 of 2011 Before Hon. D. Wangeci]

J U D G M E N T

Introduction

1). The appellant herein was charged with the offence of Stock Theft contrary to section 278 of the Penal Code. The particulars are that on the night of 13th/14th December 2011 at Uriri village, Usenge sub location in Bondo district within Nyanza county jointly with another not before court stole one bull valued at Kshs. 12,000/= the property of George Ondoro Obego.

The appellant was convicted and sentenced to serve 3 years imprisonment, hence this appeal.

Facts

2). The complainant herein on the 13th December 2011 safely locked his cattle in the cowshed in the evening. The following day on 14-11-2011 he woke up only to realize that one of his bulls was missing. Together with **PW2 Nicodemus Otieno** and **PW3 Jack Odhiambo Omondi**, they mounted a search. PW2 later found the cow among the herd of cattle belonging to the 4th witness Michael Agola. The same were being herded by a young boy.

3). PW4 told the court that the cow had been given to him by the appellant so that he could train it on ploughing. Later the appellant was arrested by the villagers as well as the village elder and taken to the police station. He apparently implicated his co-accused whom he alleged to have sold him the cow in his defence.

In his unsworn defence the appellant implicated his co-accused who was later acquitted by the court.

Issues for Determination

3). The applicant has filed 8 grounds of appeal. The same can be summarized as follows:

1. **Whether the trial court correctly applied the doctrine of recent possession.**
2. **Whether the production of photographs pursuant to section 77 (a) of the Evidence Act Chapter 80 Laws of Kenya prejudiced the appellant.**
3. **Whether there was sufficient evidence to convict the appellant.**

4). Both Mr. Odongo for the appellant and Mr. Sang for the state submitted strongly in this appeal. This being the first appeal the court is enjoined to re-evaluate the evidence afresh with a view to arriving at a new independent finding.

5). There is no dispute that the complaint's cow was lost and the same was found. The photographic evidence as well as other oral evidence were clearly presented by the prosecution. But who was in the custody of the said animal?

PW2 told the court that the same was in the custody of a herds boy who was herding PW4's cows. PW4 Michael Agola told the court that the appellant brought the bull to him so that he could train it on how to plough. He infact took them to the appellant where he admitted that the bull was his.

6). From the proceedings it appears that the appellant did not contradict PW4. Infact when he was given opportunity to cross examine he had nothing to say. One can conclusively therefore trace the roots of the cow to the appellant.

Equally, he did admit that he bought the cow from his co-accused. Unfortunately he failed to cross examine his co-accused when the latter testified.

On the score of possession therefore, I do find that indeed the appellant though not in physical contact of the cow, he did not rebutt PW4's evidence.

7). Nonetheless, was the appellant's explanation satisfactory? The appellant's counsel argued that the court failed to apply the doctrine of recent possession appropriately in this matter and that had it done so the court would have arrived at perhaps a different finding.

This doctrine was well articulated by Bosire J in Malingi -VS Republic [1989] KLR 225 where the judge as he was then said:

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complaint about. He can only be asked to explain his possession after the prosecution have proved certain basic facts.

Firstly, that the item he had in his possession had been stolen, it had been stolen a short period prior to the possession, that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item the circumstances of the case, verdict, that there are non co-existing circumstances which points to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable assumption that is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver”.

8). The appellant explained how he came into possession of the cow, namely that it was sold to him by the co-accused. It is not disputed that the appellant does the business of selling and buying cows.

This line of evidence run through the entire prosecution and defence evidence. What the prosecution failed to establish is whether the 2nd accused person indeed sold the cow to the appellant.

9). From the evidence the appellant gave an explanation on how he came into possession of the the cow. After buying it from his co-accused he took it to the 4th prosecution witness to train it on how to plough. Infact when the cow was found it had a new rope on the neck.

10). My finding is that the appellant gave a proper explanation of how he came into contact with the cow. Although he failed to cross examine his co-accused on the allegations, the co-accused's defence was shaky and not convincing. In a situation where there was no eye witness to the theft, the circumstantial evidence as presented by the prosecution is rebutted by the explanation by the appellant.

11). In essence had the appellant stolen the cow one wonders whether he would have taken the cow for training in a nearby place where it could easily be found.

This court finds that the case was not proved beyond reasonable doubt and that the explanation given by the appellant rebutted the doctrine of recent possession.

12). On the production of the photographic evidence, I respectfully disagree that the appellant suffered any prejudice. The prosecution clearly explained to the court why it was necessary to have the same produced at that moment. From the proceedings there is nothing to indicate that the appellant did not understand and thus required the court to have explained to him.

13). Consequently, and for the reasons adduced above I do find this appeal meritorious. I shall allow the same, set aside the conviction and sentence and order the appellant to be released unless lawfully held.

Dated, signed and delivered at Kisumu this 28th day of November, 2013.

**H.K.
JUDGE**

CHEMITEI