



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 248 OF 2011

ISAAK SHILABU

MARENDE:..... APPELLANT

=VERSUS=

REPUBLIC:.....

RESPONDENT

JUDGEMENT

The Appellant, **ISAAC MARENDE**, was convicted for the offence of stealing stock contrary to Section 278 of the Penal Code. Thereafter, he was sentenced to five (5) years imprisonment.

In his appeal, the appellant submitted that the evidence which the prosecution adduced was not sufficient to warrant his conviction. He pointed out that the persons who testified were all from one family, save for the Investigating Officer.

Considering that the appellant was a son to the complainant, and also that two (2) of the other three(3) witnesses were his step-brothers, the appellant submitted that those witnesses had simply framed him. His view was that the said witnesses wanted to ensure that he did not inherit any portion of his father's land. For that reason, the witnesses were alleged to be intent on ensuring that the appellant was put behind prison cells.

According to the appellant, the prosecution ought to have called some independent witnesses, to back-up the evidence of his father and his step-brothers.

Such independent witnesses are said to include the neighbours of the complainant and the chief to whom the complainant reported the loss of his two (2) oxen.

A further independent piece of evidence which the appellant says should have been produced is the O.B., in which the complainant is recorded as having lodged his complaint of theft of his two oxen.

Another issue that was urged by the appellant was that the learned trial magistrate was wrong to have rejected his alibi, when there was no reason for that position taken by the court.

As regards investigations, the appellant submitted that the investigating officer failed to conduct any meaningful investigations. As far as the appellant was concerned, the investigating officer only recorded the statements of witnesses.

The Investigating Officer is said to have not even known the date when the appellant was arrested.

The appellant also said that there was inconsistency in the evidence tendered by the prosecution. For example, when PW1 said that he was first informed about the theft of his two oxen on 28th February, 2010, his son (PW2) testified that he gave the information to his father on 27th February, 2010.

Finally, because his arrest were completely divorced from the case at hand the appellant submitted that the said arrest did not shed any light on this case.

But the Respondent put up a spirited opposition to the appeal. Mr. Mulati, learned state counsel, submitted that although the complainant was the father of the appellant; and event though two (2) of the other witnesses were the step-brothers of the appellant, they tendered sufficient evidence to prove that the appellant committed the offence.

The Respondent pointed out that during the trial, the appellant never raised any contentions about the alleged grudges between him and either his step-brothers or with his father.

The incident happened in February, 2010, but it was not until May, 2011 that the appellant was arrested. The said arrest was in relation to an offence that had been allegedly committed at Moi's Bridge. Meanwhile, the offence herein was committed in Kongoni Location, Lukuyani District, Western Province.

As the appellant confirmed that he was arrested in relation to a different offence, the Respondent submitted that that piece of evidence corroborated the testimony of the Investigating Officer.

The trial court was said to have been entitled to reject the appellant's alibi defence, as it had been displaced by the evidence of the prosecution.

Finally, it was the Respondent's submission that there was no need to call any more witnesses, because the evidence produced had already proved the case beyond any reasonable doubt.

I have re-evaluated all the evidence on record.

PW1 is the appellant's father. On the night of 28th February, 2010, his two sons and their mother, informed him that the appellant had taken off with two of PW1's cows.

PW1 rushed home and verified that his 2 cows were indeed missing.

PW1 alerted the chief and also the police about the loss. However, the cows were never recovered.

Meanwhile, the appellant had disappeared from Sango, where the offence was committed.

PW1 next saw his son at the police station in Moi's Bridge, where the appellant was in custody.

During cross-examination, PW1 stated that on the material day, when his 2 cows were stolen, he had left the appellant at his home.

PW2 is a son of the complainant. He said that on the material date, PW1 had four (4) cows. PW2 and the appellant were herding those 4 cows. However, the appellant requested PW2 to look after the 2 "female cows", whilst the appellant would herd the 2 oxen.

At the end of the day, PW2 took the 2 cows back home. However, the appellant never returned home with the 2 bulls which he had gone to herd. In fact, the appellant did not return home at all. During cross-examination, PW2 said that the family land had not been subdivided. He also denied any suggestion that the family members had ganged up against the appellant.

PW3 is another son of the complainant. He said that the appellant encouraged him to go and bathe at the river, saying that the water at home was dirty.

After having a bath at the river, PW3 met PW2, who was herding 2 cows. PW2 informed PW3 that the appellant was herding the 2 bulls.

Later that evening, neither the bulls nor the appellant returned home.

During cross-examination, PW3 said that their neighbours became aware of the theft on the following day. He said that the neighbours could not have suspected that the appellant was upto anything, since the appellant was a member of the complainant's family.

PW4 is a police officer. He was attached to the Kogo Patrol Base at the material time.

PW4 testified that PW1 went to the Patrol Base on 28th February, 2010, and reported that his 2 cows had been stolen. The report by PW1 was that the appellant made-off with the animals which had been under his care.

PW4 booked the report and then he began investigations. During the said investigations, he learnt that the appellant was in police custody at Moi's Bridge. The appellant had been arrested in another case of stealing stock.

PW4 also said that his investigations established that it was the appellant who stole the complainant's 2 bulls.

The Investigating Officer did not say that the witness statements were recorded by him. Therefore, I find no basis for the appellant's assertion that the Investigating Officer only recorded witnesses statements.

When the appellant was put to his defence, he said that on the date he is alleged to have stolen his father's bulls, he was away in Kapenguria. He said that he rarely lived in the Sango area, where the animals were stolen from.

That piece of evidence corroborates the testimony of his father and his two brothers. The piece of evidence I am referring to is that which relates to appellant hardly living at Sango.

The learned trial magistrate observed the appellant's step-brother were witnesses of truth, who were not shaken during cross-examination.

From my analysis of the evidence on record, I find no reason to disagree with that assessment by the learned trial magistrate.

I note that the appellant never suggested to PW1, PW2 or PW3 that he, (the appellant) was not at Sango on the night of 27th February, 2010.

That therefore implies that when he later testified that he had been in Kapenguria at the material time, his said alibi was nothing more than an afterthought.

In any event, the evidence tendered by PW1, PW2 and PW3 placed the appellant at the complainant's home in Sango. Thus, apart from the alibi being an afterthought, the evidence tendered by the prosecution completely displaced the alibi.

The appellant testified that his father had been visiting whilst he was in custody. He nonetheless blamed his father for not having allocated any land to him.

That piece of evidence was intended to show that PW1 was prejudiced against the appellant. However, I do note that PW1 had not yet distributed any portion of his land to any of his children. That was

confirmed by PW2.

Therefore, the fact that PW1 had not yet given any piece of land to the appellant, was not an indication of any prejudice against him.

The appellant also said that his father had been consumed by hatred against him because he had been born out of wedlock. That contention is completely out of sync with the rest of the available evidence. I so find because PW1 clearly stated that the appellant had fled from school, and was thereafter only making technical appearances at home, before disappearing again. Notwithstanding that, PW1 told the appellant;

“Yes you are my son and you are entitled to remain in my home”

That is not the evidence of a father who hated his son, or who wanted to disinherit him.

Furthermore, the appellant's father was visiting him in prison, even after the appellant was charged with the offence of stealing his cows. That fact was confirmed by the Appellant.

On 10th August, 2011, the record of the proceedings shows that the appellant said;

“My father had visited me and requested an early date so that he can organize for the money for hospital expenses.”

That is not the conduct of a father who had disowned his son or who so hated the son that he preferred to have him suffer in jail.

In the result, I find that the defence was incapable of belief. It was therefore rejected rightly by the learned trial magistrate. The evidence against the appellant was overwhelming. The conviction is thus solid.

The appeal has no merits and is dismissed. I uphold both the conviction and the sentence.

DATED, SIGNED and DELIVERED AT ELDORET

THIS 18TH DAY OF NOVEMBER, 2013

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FRED A. OCHIENG

JUDGE