



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 71 OF 2012

APPEAL FROM THE ORIGINAL CONVICTION AND SENTENCE BY SENIOR

RESIDENT MAGISTRATE AT HOLA (M.O OBIERO, SRM) IN CRIMINAL CASE
NO. 44 OF 2012

BAKARI JILLO HAMISI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Bakari Jillo Hamisi, the appellant, was tried, convicted and sentenced to seven years imprisonment by the Senior Resident Magistrate at Hola for the offence of stealing stock contrary to section 278 of the Penal Code. The particulars state that on diverse dates between 15th January 2012 and 17th February 2012 at Kona Village in Tana River District within Tana River County stole 3 cows and 1 bull all valued at Kshs 120,000 the property of Ahadho Alkano Jarso.

The facts of this case are that Ahadho Alkano Jarso, PW1, gave her four cows to the appellant to look after at his home at a monthly pay of Kshs 500. On 17th February 2012 PW1 sent Hassan Salit, PW3, to go to the appellant's home to mark the cows but PW3 found the cows missing. When after three days the cows were not found, PW1 reported the matter to the police. Inspector of Police Julius Langat received the report and visited appellant's home. He did not find the appellant at home. He left word that the appellant should report at the police station the following day. The appellant reported to the police. He told the police after interrogation that he did not know the whereabouts of PW1's cows. The police detained him and preferred these charges against him.

In his defence the appellant categorically denied ever receiving any cows from PW1 and that there is no evidence that he ever received the cows or that he had been paid money for looking after the cows.

The trial court considered this evidence and found it well corroborated and overwhelming against the appellant. The trial magistrate considered the appellant's defence and rejected it. He found the case proved beyond reasonable doubt and convicted the appellant and sentenced him to seven years.

The appellant was dissatisfied with the conviction and sentence and filed this appeal. The initial petition of appeal was filed on 25th June 2012. It had four grounds of appeal. With leave of this court, the appellant amended his petition of appeal and submissions. These were filed on 20th September 2013. On 26th September 2013 the appellant informed the court that he would use the amended petition of appeal. He has listed four grounds of appeal, namely:

- i. **The learned trial magistrate erred both in law and fact in relying on incredible and contradictory evidence.**
- ii. **The learned trial magistrate erred in law and fact in failing to find that the prosecution had not proved its case beyond reasonable doubt.**
- iii. **The learned trial magistrate erred in law and fact to dismiss my defence without considering that the same was firm to create doubts on the prosecution's case (sic).**
- iv. **The sentence is harsh and excessive.**

In support of the grounds of appeal the appellant has submitted that the prosecution did not prove its case beyond reasonable doubt; that the evidence of the complainant is not clear when the cows were stolen; that the evidence of PW1 and PW2 contradict each other and it is not clear who gave the appellant the cows; that the number of cows in the charge sheet is different from that in the evidence; that there was no formal agreement between the appellant and PW1 and that the benefit of doubt should have been resolved in the appellant's favour.

The appellant further submitted that his defence was not considered and that the sentence imposed is harsh and excessive.

The appeal was opposed by the prosecution. The learned state counsel addressed two issues only. Firstly he asked the court to invoke its discretionary power and rectify the section of the law cited by the trial magistrate in sentencing the appellant. Secondly, he submitted that the prosecution case was corroborated and the appellant's defence was considered by the court. He urged the court to dismiss the appeal.

I have reminded myself of the duty of this court while sitting on first appeal to examine and evaluate the evidence afresh to reach an independent finding. I will have this in mind as I determine the issues raised by the appellant.

The appellant contends that the evidence is contradictory. The trial magistrate found the evidence corroborated and overwhelming. The evidence of Ahadho Alkano Jarso PW1, Adhan Ahmed PW2, and Hassan Salit, PW3 is crucial.

PW1 told the court that she gave her four cows but specified that one was a bull and the other three were calves. She was not sure when she gave these cows to the appellant. She told the court that before the month of March and April 2011 she gave her cows to the appellant and was paying her Kshs 500 a month. Her evidence is that she sent her son PW3 on 17th February 2011 to go and mark the cows but was told they had been taken to the grazing fields and that after PW3 going back to the appellant's home for three consecutive days he was told the cows had gone missing. On cross examination she said there was no written agreement but they had agreed mutually.

PW2 told the court that he is the one who was sent to take the cows to the appellant. He said he took the cows in April 2011. His evidence is that there was one bull, one pregnant cow and two calves. He said two of the cows belonged to him and the other two belonged to PW1 who is his step mother. This witness told the court further that in July 2011 the appellant told him one of his cows had died and he decided to sell the other cow leaving the two that belonged to PW1.

PW3 confirmed the evidence of PW1 that on 17th February 2011 he was sent to the appellant's home to put a mark on the cows but did not find the cows and on the third day he was told by the appellant that the cows had gone missing.

According to Satima Salat, PW4, her mother PW1 told her that the cows in the appellant's custody had gone missing and he accompanied her mother to report to the police.

PW5 told the court that PW1 reported that her cows had gone missing while in the custody of the appellant.

I have considered this evidence and my evaluation of the same leads me to believe that it is true the

evidence is contradictory. The trial magistrate was wrong to find the evidence corroborated and overwhelming. Firstly, it comes out clearly in evidence that all the four cows did not belong to PW1. Two belonged to PW2 and actually out of the two belonging to PW2, one cow had died and the other had been sold. This left the two cows belonging to PW1. It seems PW1 was not aware of this.

Secondly, I believe the evidence that the appellant was given the cows to look after. I am not sure about the payment per month but I find that I have no reason to doubt the evidence of PW1, PW2 and PW3 that the appellant was looking after the cows. What these witnesses, especially PW1, did not specify is the number of the cows belonging to PW1 and to PW2.

Thirdly, the identification of the cows does not agree. PW1 said one was a bull and three were calves while PW2 said there was one bull, one pregnant cow and two calves.

On the contention that the trial magistrate failed to consider the appellant's defence, this is not true. The trial magistrate considered it and rejected it. I too have considered it and found it baseless. I have no doubt in my mind that the appellant was looking after the cows belonging to PW1 and perhaps PW2. I do not believe the family of PW1 could fabricate a case like this one against the appellant.

I have noted that all through no witness claimed that the appellant stole the cows. They all said that the appellant told them that the cows had gone missing. This is a very good defence but the appellant in his wisdom decided to deny anything to do with the cows. I think the appellant lied to court. I want to take the view that the appellant was actually looking after the cows and that they may have gone missing as he claimed. To the police, PW1 reported missing cows not stolen cows.

On the contention that the prosecution did not prove its case beyond reasonable doubt, I agree with the appellant. This is true given the anomalies in this case and given the evidence that the appellant explained the loss of the cows and also given that not all the four cows went missing as one was alleged to have died and another sold by PW2. That is a possibility this court cannot ignore.

The trial magistrate was in error in finding the case proved beyond reasonable doubt and in ignoring the possibility that the cows had gone missing and the appellant decided to lie to court to save his skin. The trial magistrate appreciated that the cows in issue were two and not four but then went astray in finding the evidence corroborated and overwhelming.

The trial magistrate did not misdirect himself by sentencing the appellant under section 275 of the Penal Code as submitted by the learned state counsel. I have counterchecked the handwritten judgement against the typed and I have realized that it is typographical error. The handwritten judgement reads section 278 of the Penal Code. That being the case then the sentence cannot be harsh since the seven years handed to the appellant is half of the sentence under that section. The penalty is a sentence term not exceeding fourteen years. The trial magistrate is in error in stating that the minimum sentence under section 278 Penal Code is seven years. The section does not have a minimum sentence.

At the conclusion of this determination, I find the appeal has merit. The offence of stealing stock has not been proved beyond reasonable doubt for the reasons given in this judgement. For this reason, I hereby allow the appeal, quash the conviction, set aside the sentence and order immediate release from custody of the appellant forthwith unless for any other lawful reason he is held in custody. I make orders accordingly.

Dated, signed and delivered this 16th day of December 2013.

S.N.MUTUKU

JUDGE