



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 213 OF 2010
APPELLATE SIDE

(From the Original Conviction and Sentence in Criminal Case no. 366 Of 2008 of the Senior Resident Magistrate’s Court at Voi - I. M. Nyakundi – R.M.)

ALI SALATAPPELLANT
- VERSUS -
REPUBLICRESPONDENT

JUDGEMENT

Ali Salat Ahmed and Salim Kosgei Ndende, hereinafter referred to as “**appellants**” were charged with an offence of stealing stock Contrary to Section 278 of the Penal Code. Upon conviction by the Resident Magistrate, Hon. Nyakundi L.M. they were each sentenced to serve 7 (Seven) years imprisonment, they have appealed against both the conviction and sentence.

The brief circumstances of the case are that on the 16th day of May 2008, **Pamanus Mwakireti Mwambeta**, herein after referred to as the Complainant or “**PW1**” woke up in the morning and went to check on the cattle boma. He found a lot of hooves steps and noticed two bulls missing. He further received a report from the herders Abdi and Hassan that there were other cattle missing. In total, 5 cattles were found to be missing. A head count revealed 99 cattle present instead of 104. He commenced a search into several slaughter houses. As the search proceeded, on he received information that the cattles were sold at Kalalani Market. He went there the following day. He found a “**Masai**” man in the company of the appellants. Upon inquiry from the “**Masai**” man, he learnt that, he, the Masai had bought 2 cattles from the appellants. At that point the appellants ran away. The cows of the complainant (PW1) had an identification mark (“**No. 29**”). The Masai allegedly told the complainant he bought the two cattle from the appellants. Shouts of “**thief thief**” followed as the appellants ran away. As a result the members of the public joined in the chase and the appellants were arrested. That, later another Masai brought an additional three cattles. According to PW1 – the value of his stolen cows was Kshs. 90,000. After investigation the appellants were charged, tried, convicted and sentenced as aforesaid.

In their respective defence, given in an unsworn statement of defence, the 1st appellant told the trial court that, he met a group of 20 people as he was going to visit his brother. That, he was interviewed over someone he did not know and when he inquired as to why they wanted that person, he was beaten until he bled. That, at that point, the co-appellant inquired as to why he was being beaten, a scuffle ensued and they were badly beaten by the mob. That, he was treated and later charged with an offence he knows nothing about. In his defence, the 2nd appellant told the court that on 9th May 2008 that while in a hotel he heard people shouting kill “**waria**” and he went to find out what was going on. He demanded to know

why a Somali was being beaten. He too was attacked. He sustained a deep cut on the head. After treatment he was charged with an offence he denied today.

In the amended grounds of appeal, (amended) the appellants raised the following issues.

- 1. THAT the provisions of Article 50 (2) (g), (h) of the Constitution, were violated (see ground 1 of grounds of appeal of both appellants).**
- 2. THAT the case was not proved beyond reasonable doubt (see ground 2,3, of 1st appellants grounds of appeal and ground 2, and 4 of the 2nd appellants grounds of appeal)**
- 3. THAT, their defence(s) was not considered (see ground 4 of each appellant's grounds of appeal).**

At the hearing of the appeal, each appellant filed written submissions on which they relied entirely. The state was represented by Mr. Tanui the learned State Counsel.

I shall deal with the 1st ground that; each appellant alleges that they proceeded on with the hearing of the case in the trial court without being given the witnesses written statements that, that is contrary to Article 50 (2) (g) (h) of the Constitution of Kenya, and therefore, they did not receive a fair trial. The state did not reply to this ground. However, I have perused the lower court records. I find no evidence on the record that the appellants ever applied for witness statements and/or were denied the same. Instead they fully participated in the trial and even cross-examined the witnesses. I, therefore, dismiss that ground as lacking merit.

I shall consider the other grounds as consolidated. I find the appellants submission are that, they were not found in possession of the stolen cows. That they were not even photographed with the cows. That, there was no proof they sold the cows as alleged. That there were witnesses not called and that includes the “**chairman**” where the two recovered cattle were. The appellants further submits that, the charge sheet's particulars differs from the evidence adduced in that, the value of the cows in the charge sheet is stated as Kshs. 70,000 and the evidence indicated Kshs.90,000. Similarly that the recovered cows seems to have been more than the stolen cows. Thus, the evidence adduced was contradictory and unreliable. In addition, the appellants submitted the photographs were produced by an officer of a rank of a Corporal, and it's not indicated who appointed him. That, that contravenes, the provisions of Sect 78 (i) of the Evidence Act.

In reply, the State opposed that ground of the appeal and submitted that the evidence adduced at the trial was sufficient to sustain a conviction. The State submitted that the Complainant (PW1) found the appellants selling the cows to PW2 – Lazaro Zaki and ran away on seeing the owner approach to enquire about them. That indeed PW2 testified the two appellants had gone to sell the cows to them. That, the witnesses gave corroborative evidence. The State submitted that, the photos produced showed, the cows had a mark of no. 29, which was consistent with the evidence of PW1.

In the judgment delivered by the trial magistrate, it was observed and I quote

“I have analysed the evidence adduced before this court and I have come to the conclusion that there is no way PW1, PW2 and PW3 would have made up a strong case view with clear flow of events”

The Magistrate observed further that:-

“the accused's in their unsworn statement did not respond to the allegation leveled against them by the prosecution witnesses”.

In my own analysis of the evidence I find that PW1 was able to identify the stolen and recovered cows as his. He identified them by the mark No. 29. His evidence was corroborated by that of PW2 and PW3, that the two appellants approached them (PW2 and PW3) independently to sell to them the stolen and recovered cows. Indeed PW2 and PW3 corroborated the evidence of PW1 that the recovered cows bore a mark of No. 29. That in fact when both appellants saw the complainant (PW1) approach and inquire about the cows, the two appellants bolted off. That they were chased arrested and taken to the hospital and to the police station, where they were charged. As they offered the cows for sale, the appellants went to the

buyers twice on the date of the offer and on the following day when they were negotiating on drafting an agreement of sale. Thus, the evidence was sufficient to sustain a conviction. The defence offered by the appellants was not tested on cross-examination, as it was unsworn statement. Again, the defences did not address the issue of the date of commission of the offence. It just offered evidence on events of arrest, therefore not helpful. The alleged discrepancies in evidence, as it relates, to the value of the subject matter is not only minimal but of no prejudice at all. I find the conviction of the appellants was sound and safe and I confirm and uphold the same.

As regards sentence I find that under the provisions of Section 278 of the Penal Code, the sentence provided for an offence of stealing stock is an imprisonment term not exceeding 14 years. In this case, the appellants were sentenced to serve 7 years imprisonment. I note, however, that before the sentence was pronounced, the court called for a probation officers report in respect of each appellant, and the same were found unfavourable. I have however, looked at the Probation Officers reports, and the reasons given for the “**unfavourable recommendations**” are not quite clear. Be it as it may I realize the court does not seem to have taken into account the appellant’s individual mitigation. (at least as per the record) and neither were the records considered. Indeed the prosecution treated each one of them as first offenders. I equally note that, the stolen cows were recovered. I also consider the fact that, they were on trial from the 13.05.08 to the 10.2.10 a period of about two years. They have been serving the sentence since 10th February 2012 for two years. I believe the sentence of seven years for first offenders was a little harsh and the case is suitable for consideration. The 2nd appellant is aged. Salim Kosgey is aged about 42 years.

In this regard I reduce sentence of each appellant to three and a half years (3 ½ years) imprisonment with effect from the date of conviction and sentence by the trial court.

Orders accordingly.

Right of appeal explained.

G.L. NZIOKA

JUDGE

13th February 2012

DATED this 13th February 2012 and delivered at Mombasa in the open court.

G.L. NZIOKA

JUDGE

13th February 2012

In the presence of:

Tanui for the state

1st appellant in person

2nd appellant in person

Musa – interpreter into Somali language

Matano – the court clerk

G.NZIOKA

JUDGE

13th February, 2012

