



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 44 OF 2010

(From the Original Conviction and Sentence in Criminal Case No. 2271 of 2007 of the Principal Magistrate's Court at KWALE - A.M. Obura (Mrs)– R.M)

TAJIRI KISIRI NDUKAYAAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

TAJIRI KISIRI NDUKAYA was charged with the offence of stealing stock Contrary to Section 278 of the Penal Code.

The particulars of the charge are that:

“On the 8th December, 2007 at unknown time in Gangani village, Vigurungani location within Kinango District of Coast Province, stole three bulls valued at Ksh. 50,000/= the property of RODAH KILUU MAINGI”.

He was tried, convicted and sentenced to serve **FIVE (5) years**, imprisonment. He is aggrieved with both the Conviction and Sentence, and has appealed accordingly.

The brief facts of the case are that, on the 8th December, 2007, **PW1 Rodah Kiluu Maingi** left her home to go and seek for medical attention. She returned and found her three bulls missing. She described them as white, black and white and brown and white in colour. She learnt from her children that the bulls had gone missing. She searched for them all over in vain. She then learnt from a member of the public that there were cows at Mlima area. She went to the area and met the Chief and the Chief told her, that the cows were at Voi. She learnt that, the appellant herein, who is her neighbour had loaded the cows on a motor vehicle as there was no Complainant. She reported the matter to Mlima police Station. She then called the Village Chairman and the appellant was arrested and charged.

In his defence, the appellant denied the Commission of the offence. He testified that he was arrested while at his house. He was beaten without being given the reason why. He became unconscious. He was taken to the police station and later to the hospital. He was then released on bond. He was later charged although he was not found in possession of the stolen bulls.

In her Judgment, the Magistrate found that:

“ The prosecution relied on both circumstantial and direct evidence. There was evidence (direct) that the accused was seen in the forest with the 3 cows the following day after they disappeared from the complainant’s home. PW 2 also said he looked suspicious and retreated to the forest when he was seen. There was no evidence of bad blood between the accused and PW 2. PW 2 was a livestock keeper and he was able to describe the cows he had seen. The description he gave matched that of the complainant who was an illiterate woman”.

She further observed

“There was consistency in the description of the cows that they saw, and although the witnesses saw the accused at different times, they were not mistaken that he was one of the people with the cows”.

and finally the trial Magistrate observed

“While applying the doctrine of recent possession. I find that he must have been involved in the theft”.

The appellant filed amended grounds of appeal. In the said grounds he has raised several issues namely:-

1. The charge sheet was defective.

2. His Constitutional rights under Article 49(1) (i) (ii) of the new Constitution were violated.

3. Inconsistent, insufficient and in accurate prosecution evidence

4. Lack of proper investigations.

5. The stolen bulls were not recovered in possession of the appellant.

6. Rejection of the defence evidence.

In arguing his application, the appellant relied on the submissions he has filled. In reply, the State represented by the Learned State

Counsel Ms Macharia conceded to the appeal on the grounds that:

(1) That the witnesses contradicted themselves on the colour of the stolen cows.

(2) That, although, (PW2) said he saw the cows in the forest, he did not see the motor vehicle used to remove the cows away.

I have re-evaluated the evidence and I find that in deed the witnesses contradicted themselves on the colours of the cows.

PW 1 – described them as

(a) White

(b) Black and white

(c) Brown and White

PW2 stated they were

- (a) White in colour

- (b) White and Black on the heed are

- (c) Black and White spots.

PW 3 – did testify to the colour of the cows as follows

- (a) One was black on the head and white on the
other parts.

- (b) Another was red on the head with spots and

Whitish on other parts.

- (c) White all over.

Obviously these witnesses were not describing the same bulls. Even if they were, no one saw the appellant steal the bulls, hence the direct evidence of theft is missing. Again with due respect, the doctrine of recent possession applied herein is applicable where there is recovery of the stolen goods and, more so in physical possession of the suspect. There being no recovery I believe the appellant should have been given the benefit of doubt especially when he denied commission of the offence. It may be that, he was in deed in possession of cows or bulls but the same were not properly and corroborative identified by the witnesses. It needed to be proved that those cows described were the same ones stolen.

I therefore give him the benefit of doubt. I quash the conviction, and set aside the sentence and order that he be set free forthwith unless he is otherwise lawfully held.

Orders accordingly.

G.L. NZIOKA

JUDGE

19TH MARCH, 2012

Dated, signed and delivered at Mombasa.

G.L. NZIOKA

JUDGE

19TH MARCH, 2012

In the presence of:-

Appellant in person

Mr. Gioche for the state

Cc Maroro