



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NOS. 485 & 488 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 698 of 2009 of the Senior Resident Magistrate's Court at Kwale: A.M. Obura – S.R.M.)

KAULI NGALA 1ST APPELLANT

TSUNGU KESI 2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The two Appellants **KAULI NGALA** (hereinafter referred to as the 1st Appellant) and **TSUNGU KESI** (hereinafter referred to as the 2nd Appellant) have both filed this appeal to challenge their conviction and sentence by the learned Resident Magistrate sitting at Kwale Law Courts. Both Appellants were arraigned before the trial court on 14th May 2009 on a charge of **STEALING STOCK CONTRARY TO SECTION 278 OF THE PENAL CODE**. The particulars of the charge were given as follows:

“On the 29th day of April 2009 at Nzola Mawe Village mwereni Location in Msambweni Location within Coast Province jointly stole two (2) bulls valued at Kshs.42,000/- the property of Umazi Wamnyika”

Both Appellants entered a plea of **‘not guilty’** to the charge and their trial commenced on 8th September 2009. The prosecution led by **INSPECTOR SIBUDA** called a total of four (4) witnesses in support of their case.

The brief facts were that on 29th April 2009 at about 6.00 p.m. the complainant took out her two ploughing bulls to graze. She went back later at 8.00 p.m. only to find both bulls missing. The next day the complainant saw and followed the trail of the two bulls to the home of one **NDORO NYAMAWI PW3** and beyond. **PW3** told her that he had seen the two accused leading the two bulls away. The matter was reported to police and both accused were later arrested. The two bulls in question were never recovered.

At the close of the prosecution case both appellants were found to have a case to answer and were placed

on their defence. They each opted not to make any statement in defence. On 9th November 2010 the learned trial magistrate convicted each Appellant and thereafter sentenced them to serve four (4) years imprisonment each. Being aggrieved by both their conviction and sentence the Appellants filed this appeal.

The Appellants both opted to rely entirely upon their written submissions which with the leave of court had been duly filed. **MS. MACHARIA** who appeared for the Respondent State opposed the appeal.

I have carefully considered the evidence adduced before the trial court. **PW1** told the court that the two bulls one white and one black were stolen from the field where she had tethered them to graze. **PW2 MBATI MUNYIKA** a son to **PW1** confirms that they had two ploughing bulls one white and one black. He confirms that on the 29th April 2009 his mother took the two bulls out to graze. When they later went to collect the bulls they were missing. **PW3** told the court that on that same night he met the two Appellants leading two bulls one white and one black through his shamba. This could not have been a mere coincidence. **PW3** told the court that there was sufficient moonlight which enabled him to see and identify both Appellants. Furthermore **PW3** spoke to the two men enquiring where they were taking the bulls. The 1st Appellant replied that they had been sent by **PW2** to seek ploughing contracts. Lastly on this point **PW3** knew both Appellants very well. The 2nd Appellant was a brother to **PW3** whilst the 1st Appellant was a neighbor. There was therefore no possibility of a mistaken identity as he was able to recognize both men. The fact that the two accused were seen leading away the stolen bulls barely hours after they had been stolen leads to the irresistible conclusion that it was the two who had stolen the 2 bulls from where they had been tethered. The learned trial magistrate did address her mind to the fact that there was only one identifying witness being **PW3**. In her judgement at page 18 line 21 she states:

“I must warn myself and I hereby do of the dangers of relying on the evidence of a single identifying witness in arriving at a conviction”

The trial magistrate goes on to observe at page 19 line 19:

“PW’s evidence was not shaken even on cross-examination. He maintained that he moved close to the accused persons and spoke to them. He was emphatic that he saw the accused persons that night with a white bull and a black bull.

There was no evidence of bad-blood or rivalry between the accused persons and PW3. I observed the demeanour of PW3 and I found that he seemed honest. I doubt whether he made false claims as against the accused persons”

These are the observations of the magistrate who saw and heard the witness testify. I have no reason to doubt her belief that **PW3** was an honest witness. I am satisfied that the two Appellants were positively identified by **PW3**. They have not effectively challenged nor controverted his evidence. The two were seen in possession of the stolen bulls barely hours after they had been stolen. The doctrine of **‘recent possession’** will squarely apply. The only logical conclusion is that it was the two Appellants who stole the bulls. Their conviction was therefore sound and I do confirm the same.

Both Appellants were allowed an opportunity to mitigate after which the trial court sentenced each to serve four (4) years imprisonment. This sentence was both lawful and appropriate and I am not inclined to interfere with it. In a nutshell this appeal is found to be without any merit and is hereby dismissed in its entirety.

Dated and Delivered in Mombasa this 23rd day of April 2012.

M. ODERO

JUDGE

In the presence of:

Both Appellants in person

Mr. Tanui for State