



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL 92 OF 2011
ELIJAH TATU JAMESAPPELLANT

-VERSUS-
REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case no. 358 of 2010 of the Senior Principal Magistrate's Court Taveta – C.N. Ndegwa – SRM)

JUDGMENT

ELIJAH TATU JAMES, hereinafter referred to as “the appellant” was charged with the offence of **STEALING STOCK** contrary to Section 278 of the Penal Code, in the Senior Resident Magistrate’s Court at Taveta.

The particulars of the charge are that:

On the 6th day of September 2010, at about 11.00 p.m. at Mshekesheni Village in Taveta District at the Coast Province, jointly stole one cow valued at Kshs. 35,000 the property of DISMAS KIVUNJA DECEMBER.

The Appellant pleaded not guilty to the charges and the case proceeded to a full hearing. He was subsequently found guilty and convicted. He was sentenced to serve seven (7) years imprisonment.

Being dissatisfied with the Conviction and sentence he has appealed against both.

The brief circumstances of the case are that on the 6th September 2010, PW2 Dismas Kivunja who was taking care of the subject cow, milked it at 5.00 p.m. The cow belonged to one Regina Ledemi (PW4). After milking the cow, he securely tethered it. At 3.00 a.m. he woke up to attend to a call of nature and found the cow missing. He reported the matter to the village elder, who in turn gave him a whistle. The village elder advised him to blow the whistle so that, he could attract the attention of other villagers to assist in the hunt of the cow. He obliged. As a result several villagers responded and mounted a hunt for the cow. They followed the human footprints and the cow hoof marks. It led them to Russia area. They found the cow tethered outside a house. They knocked on the door of the house. The door was

not opened.

The villagers forced open the door. The Appellant and another, (his co-accused in the trial court) were found inside that house. Allegedly, the Appellant ran away to the bedroom from the sitting room. That, he was asked to come out but he refused and hid under the bed and was removed therefrom. That stolen cow was recovered, the suspects were taken to the police station and charged after the investigations.

In his defence, the Appellant told the court that he stays at Malkloriti area whereas his parents stay at Mshekesheni village. That on the 6th day of September 2010 he was asleep at home, when the door was broken into and people stormed into his house. That they beat them up accusing them of stealing cows. That, they were shown a cow tethered on a tree. He denied knowledge of the cow but he was arrested and charged accordingly. He attributed his calamities to a debt of Kshs. 900 he owed PW2 – Dismas Kivunja. That, the debt arose out of the charcoal which Dismas sold to him.

At the close of the entire case, the Learned trial Magistrate observed in the judgment;

“Going by the foregoing definitions of possession; (under section 2 of the Penal Code) it is my finding that the accused persons were jointly found in possession of the stolen cow after it went missing from the complainants compound on 6th September 2010. I therefore find them guilty as charged and convict them accordingly”

As already stated, the Appellant has appealed against both conviction and sentence. As a first appellate court, my duty is to re-evaluate the evidence afresh and draw my own conclusion, taking into account that I did not benefit from the demeanor of the witnesses. I shall now consider the grounds raised by the Appellant, the submissions in support and the submissions by the State. In this appeal the Appellant appeared in person. The State was represented by the Learned State Counsel Mr. Gioche. He conceded to the appeal.

In a nutshell, the appellant raised the following grounds, that, the Learned trial Magistrate erred in law and fact by:-

1. Sentencing him by relying on evidence of recovery not fully proved.
2. Failing to find there was an existing grudge between him and the complainant.
3. Failing to find the evidence adduced did not support the charge.
4. Failing to consider some prosecution witness did not come to testify.
5. Giving him a harsh and extensive sentence yet he was a first offender.
6. Failing to consider the sworn defence he gave casting doubt on the prosecution case.

In my own analysis, all the six grounds of appeal, consolidated, can be summarized into one ground, whether, the prosecution evidence proved the case beyond reasonable doubt, and whether, the defence evidence cast doubt, which would be given to the appellant.

In conceding to the appeal, the Learned State Counsel told the court that the prosecution failed to prove the footprints found were similar to those of the Appellant's shoes. Secondly that the distance between the house where the Appellant was and the tree on which the cow was tethered was not established.

In my own analysis I find that, there is no dispute the cow was stolen. Similarly it is not in dispute that it was subsequently found tethered on a tree **“near”** the house where the Appellant was. The parties have submitted on the several issues, however, one major issue seems to have eluded them. That issue is: **who is the complainant herein.** The charge sheet shows the cow belonged to one **DISMUS KIVUNJA**

DECEMBER. However, in the evidence of the said Dismus (PW2) he testified.

“I went to milk the cow which belongs to Regina who is my step mother. I was the one taking care of the cow”

In corroboration, Regina PW4 testified

“I left my house to attend the burial of my father at Rekeke. While at Rekeke, I received a call from Dismus Kivunja that my cow had been stolen”.

So whereas the charge sheet states the cow was the property of **DISMUS KIVUNJA DECEMBER**, the evidence states otherwise. That supports the first ground of appeal that indeed the evidence was at variance with the particulars of the charge. The State did not respond to this ground of appeal and on that ground alone, the charge sheet having been left unamended, the appeal herein would succeed on conviction.

I now turn to the evidence adduced. I do agree with the State submissions that the critical evidence that would convict the Appellant to the offence would be his knowledge of the stolen cow. But the entire evidence has to be considered. The trial Magistrate quickly concluded that the Appellant was guilty because of **possession** as defined under Section 2 of the Penal Code. With outmost respect, the Learned trial Magistrate should have tied that definition to the facts and arrived at his own conclusion.

In my re-evaluation of the evidence, I find that, the footprints and hoof prints led to the final resting position of the cow and the recovery thereof. Thus, these foot and hoof prints were very guideful and useful. Secondly, the villagers responded to the distress call immediately. No time was wasted. Thirdly, the conduct of the Appellant ought to be considered PW2 Dismus Kivunja testified in relation to the same as follows:-

“We knocked at the door. The owner of the house refused to open the door. The villagers forcefully opened the door. Inside the house we found the 2 accused . . .

Both of them were sitting in the sitting room. The 2nd accused (the appellant herein) ran into the bedroom ... the 2nd accused had a panga when he was in the bedroom. He was asked to come out but he refused”.

In corroboration, PW3 – Msafari Lekulo Kidundo testified:-

“We knocked on the door but there was no response. We forced our way into the house. . . . the 2nd accused was hiding in the bedroom”.

In Cross-examination by the Appellant the witness stated:-

“was present when you were arrested from the house. I did not meet you driving the cow to Makloriti. There were hoove marks and human foot steps which we followed leading us to the house from which we recovered the cow”.

All this evidence, on the conduct of the Appellant does not negate knowledge of the presence of the cow and/or theft of the same. Be it as it were, what rendered the prosecution case hopeless was lack of concrete evidence of the investigating officer. David Mureithi Mutugi PW1 PC testified as an Investigating Officer and produced the recovered cow. In his evidence he told the court that he received a call from Corporal Mbugua to the effect that thieves had been arrested by members of the public. He went to the scene with Corporal Mwau. He testified he visited the scene, but does not give any evidence of who Corporal Mbugua was, and how he learnt of the matter neither does he tell the court what investigations he carried out upon the arrest of the suspects. The issues raised herein of comparison of the footprints, and the distance of the cow to the house, was business of the Investigating Officer. I realised from the evidence that, once he produced the cow for the purposes of the same being released to the owner, he was

never recalled to conclude his evidence. That issue seems to have escaped the knowledge of the prosecution and rendered a major blow to the prosecution case. That was fatal. As a result therefore, it may or may not have been the Appellant who stole and tethered the cow at the place it was recovered from. The Appellant receives the benefit of doubt although no thief would steal a cow to tether it outside the house of another. I, therefore find the conviction herein was not safe on the grounds and/or reasons stated herein. Be it as it were again, I find that even, if the conviction was safe, a sentence of 7 years for a first offender over theft of a cow valued at Kshs. 35,000 and recovered was excessive and harsh.

In view of my finding on the conviction, I shall leave the issue of the sentence to rest. I, therefore, quash the conviction of the Appellant and set aside the sentence herein. I order that he be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated, signed and delivered on this 25th day of June, 2012 at Mombasa.

G.L. NZIOKA

JUDGE
25.6.2012

Delivered in open court in the presence of:

Appellant in person

Mr. Gioche for the State

Mr. Matano Court clerk

G.L. NZIOKA
JUDGE
25.6.2012