



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL 248 OF 2010

SAMWEL KALINGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case no.1314 of 2009 of the

Senior Resident Magistrate's Court Kwale – A.M. Obura)

JUDGMENT

SAMUEL KALINGE (hereinafter referred to as the appellant) **was** charged with the offence of **STEALING STOCK** contrary to section 278 of the Penal Code and he was charged in the alternative count, with the offence of **HANDLING SUSPECTED STOLEN PROPERTY** contrary to section 322 of the Penal Code.

The particulars of the charges are as per the charge sheet. The prosecution case is that, on the **15th September 2009**, the complainant **Sabine Mwambu** securely locked her bulls in the boma. The following morning she found two bulls, one black and the other brown in missing. She raised an alarm. The neighbours responded and mounted a search. On the **17th September 2009**, she received information the two bulls had been recovered. Apparently, the neighbors who were looking for the bulls, received information from one Obed, that there was a suspect who knew where the bulls were. Obed identified the Appellant herein as the suspect. The suspect was picked up and he led the villagers to the forest where the bulls were recovered. He was arrested alongside two other suspects whom, he allegedly named and led to their arrest. After the investigations he was charged as herein.

At the close of the prosecution case the appellant was put on his defence. He denied the offence. He told the court that on the **16th September 2009** he was from work and alighted at Maili Kibwana. He missed a connecting motor vehicle home. He booked a room for the night. He went outside the bar at 5.45 a.m. and found four people who were neither policemen or sungu sungu questioned him. He did not understand their queries. He declined to bribe them as they demanded for money. He was taken to Mlima Police station, transferred to Samburu Police Station and then Kinango Police Station. He denied knowledge of the offence herein but was still charged.

At the conclusion of the case, the Learned trial Magistrate, wrote the judgment and observed that

“There was evidence that a day after he alleged disappearance, the 2nd accused (the appellant) was traced at the bar in Macknon. He admitted being at the said bar and that he was confronted by some people. There was also evidence that he led PW2 and PW3 into the forest where the two bulls were recovered.”

The Appellant has faulted this finding and the sentence imposed. He has cited several grounds of appeal, which includes the fact that, the charge sheet was defective, that his constitutional rights under Article 49(1) F (i) (ii) were violated, that the photographs of the two bulls were not produced, key witnesses were not called to give evidence and that his defence was not considered.

At the hearing he relied on the written submission he filed in court. The State was represented by the Learned State Counsel Mr. Jami. The appeal was opposed. He told the court the charge was properly drafted, as the property stolen was well described. He analysed the evidence that, the court found the Appellant led the villagers to the recovery of the stolen bulls. That although the Appellant raised an alibi, he did not support it. On the issue of sentence, the counsel submitted that, five years imprisonment was lenient, taking into account the offence carries fourteen years imprisonment term, which is the maximum sentence.

I have re-evaluated the evidence as expected being the 1st appellant court. The case of Njoroge -Vs- R 1987 KLR 91 refers, I find that, the charge sheet is well drafted in accordance with the provisions of Section 137 of the Criminal Procedure Code. The issue of the colours of the bulls and the value is matters of evidence, therefore that ground is neither here nor there. I move to the grounds of contravention of Article 49 of the Constitution, that, he was detained beyond 24 hours. That is baseless. He was charged before the new constitution was promulgated. As regards ground 3 - 7 relating to the evidence adduced by the prosecution and the defence, I find that his defence was considered in the judgment, the trial Magistrate observed;

“The second accused Samuel Kalinge gave unsworn evidence. He told the court that he was . . .”

So the defence was well considered.

However, I find that, the evidence of PW1, PW2 and PW3, clearly implicated the Appellant as the one who led them to the recovery of the bulls, thus, rendering the appellants defence useless, hopeless and a mere denial. However one major omission dealt a fatal blow to the prosecution case. The subject matter of the suit that is the bulls were **NEITHER MARKED AND/OR PRODUCED IN COURT PHYSICALLY OR PHOTOGRAPHS TAKEN AND PRODUCED.**

Thus the submissions by the Appellant, hold **total water**. Throughout, all the witness testified making reference to the recovered cows or bulls, but at no time were they produced in evidence. The Appellant denied the offence at plea stage. The burden of proof the case beyond reasonable doubt was on the prosecution. **If the prosecution could not prove the bulls existed in the first place, how could they prove they were stolen?** I find that the case was a total disaster to the prosecution case. I don't know how it, escaped the prosecution and the trial Court. On that basis alone, I find the case was not proved beyond reasonable doubt. I therefore give that doubt to the appellant.

I hereby quash the conviction of the Appellant and set aside the sentence of five years imposed upon the Appellant. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated, signed and delivered in open court on this 26th day of June 2012 at Mombasa.

G. NZIOKA

JUDGE
26.6.2012

In the presence of:
Mr.Jami for the State

Appellant – present in person

Philip – Court clerk.

G.NZIOKA
JUDGE
26.6.2012