

REPUBLIC OF KENYA

High Court at Bungoma

Criminal Appeal 122 of 2011

ISAAC NALIKA KALENDA.....APPELLANT

~VERSUS~

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence of Principal Hon. E. C. Cherono at Webuye in Criminal Case No.1504 of 2009)

JUDGMENT

The Appellant was convicted of stock theft contrary to section 278 of the Penal Code whose particulars were that on the night of 14th and 15th September 2009 at Mukuyuni village in Naitiri location in Bungoma he stole a cow valued at Ksh.30,000/= the property of Andrew Simiyu Muruya (PW1). He was ordered to serve 15 years in jail. He was aggrieved by the conviction and sentence and preferred this appeal. Mrs Leting for the State conceded the appeal.

The prosecution evidence was that PW1 was woken up by the noise of his dogs which were barking. He took a panga and a lamp and came out and found a person driving away his cow. He asked “*who are you?*” The man took off running. PW1 chased him while screaming and ordered him to stop or he cuts him the panga. He chased the man for 100 -150 metres. The man fell down and did not want his face to be seen. PW1’s screams had attracted his brother and neighbor Maurice Wafula (PW2) who came with a torch which he flashed and they recognized the man to be the Appellant who comes from the area. Other people came and beat and injured the Appellant before he was taken to Mukuyuni AP Camp. He was taken for treatment and subsequently charged. The cow was brought to the AP Camp and photographed (exhibits 1A, B, C)

The Appellant’s unsworn defence was that he went to drink with friends at a bar at Mukuyuni until after 1.00 a.m when he left to go home. He passed near the home of PW1 on his way home. He was attacked by people, who included PW1 and PW2, who also robbed him of his money. He was cut and became unconscious. When he woke up he was at Mukuyuni dispensary being treated. Police collected him and took him to Mukuyuni AP Camp where a cow was brought and it was alleged he had stolen it. He called Solomon Wasuge Wanyonyi (DW2) who works at the bar to say he served him with drinks until about 1.00 a.m when he left while quite drunk. He, however, had a lot money. The Appellant told court he had been paid Ksh.20,000/= the previous day.

The trial court accepted the prosecution evidence and discounted the defence. On that evidence he was found guilty. It is the duty of this court to re-evaluate and re-consider afresh the entire case before the trial court and reach its independent conclusion on whether the conviction was safe (**Okeno v. R. [1952] EA 32**)

In the grounds of appeal the Appellant complained that he had been convicted on insufficient and uncorroborated evidence and that he had not been accorded a fair trial by the prosecution not disclosing to him relevant evidence before and during the trial. He prepared written submissions to support the complaint. In it there was no allegation that any evidence, relevant or otherwise, was withheld from him. He was present when the three prosecution witnesses testified. He cross-examined each of them. He was then allowed to make his defence and call a witness. The record shows that when he asked to be supplied with copies of witness statements he was granted the order. I find that he was accorded a fair trial and therefore his complaint has no merit.

On the insufficiency of the prosecution evidence, it is not in dispute that both PW1 and PW2 knew the Appellant and he knew them. PW1's evidence was that he found the Appellant in his home that night driving away his cow. He chased him as he screamed. The Appellant fell down and at that point PW2 came and using the torch they recognized him. Other people came. He was subjected to "*mob justice*" before being taken to police. PW2 testified that he was attracted by PW1's screams. He came out of his house and found PW1 chasing the Appellant saying he had stolen his cow from the shed. At that point PW2 did not see the cow. It is in the morning that the cow was taken to the police. The Appellant said he came from drinking and was passing near the home of PW1 when he was attacked and robbed. PW1 and PW2 denied the allegation of robbery against the Appellant. The trial court which saw and heard other witnesses accepted the prosecution version. There is no reason to depart from the finding. The result is that the Appellant was convicted on sufficient and cogent evidence. The appeal against conviction is dismissed.

On sentence, the trial court did not consider that the Appellant was a first offender and that the stolen animal was one and was recovered. Further, the Appellant was beaten and injured during the recovery of the cow and his arrest. The sentence meted out was in the circumstances manifestly harsh and excessive. He has been in jail for over one year. I consider that he has been given sufficient punishment. The sentence is consequently reduced to the period served. This means that he shall be immediately released from custody unless he is otherwise lawfully held.

Dated, signed and delivered at Bungoma this 17th day of October, 2012.

A. O. MUCHELULE

JUDGE