REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 15 OF 2009

GODANA ABDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Criminal case No. 76 of 2008 at Marsabit PM'S ccourt: J.Kiarie (PM)

JUDGMENT

The appellant Godana Abdi was charged with two counts of robbery with violence contrary to section 296 (2) of the Penal Code in respect of the first count of robbery with violence. The appellant faced an alternative count of handling stolen goods contrary to section 322 (2) of the Penal Code. The learned Trial Magistrate found the appellant guilty of both counts of robbery with violence, convicted him and sentenced him to death.
The appellant was aggrieved by the conviction and therefore filed this appeal. The appellant raised four grounds of appeal to the effect that the charges of robbery were not proved to the required standard; that the evidence against him was full of irregularities and was therefore not credible; and that his defence was disregarded. The State opposed the appeal.

The prosecutor called eight witnesses. The facts of the prosecution case were that the complainants'' cows and those of others in Gudas village, Laisamis location were stolen by armed men, on 9th March 2008. PW 6 and PW7 were together grazing part of the stolen herds. PW6 had 110 head of cattle of his own while, PW 7 had 210 cattle belonging to his brother, PW5. On the 11th April 2008 at about 11.30 a.m., the appellant and another took one bull, photographed as Exh 1, to the home of PW2, and asked to be allowed to keep it there. The bull was eventually identified by PW5 as one of the cows stolen from his brother PW7 in the grazing field. Eventually the appellant was arrested and charged for the offence.

The appellant gave a sworn statement. He denied the charge. He stated that he was not in possession of the bull when it was recovered and that he did not ask PW2 for permission to tether the bull in his home.

We have carefully analyzed and evaluated afresh the entire evidence adduced before the learned trial Magistrate while bearing in mind that we neither saw nor heard the witnesses and giving due

allowance. We were guided by the court of appeal decision **OKENO V. REPUBLIC [1972] EA 32**. Where the role of a first appellate Court is given as follows:

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

The appellants' main ground of appeal in his written submissions is that the learned trial Magistrate erred in finding that the doctrine of recent possession applied to this case. The appellant contended that since he was not found in actual possession of the bull in question, he ought not to have been convicted of the charge.

Mr. Musau opposed this appeal. The learned state counsel urged that since bulls are not fast moving, the doctrine of recent possession applied.

The prosecution relied on the doctrine of recent possession. The prosecutions case was that the appellant delivered one bull to the home of PW2. The cattle had been stolen on 9th March 2008. The bull was taken to PW2's home on 11th April, 2008 one month after the theft. The question is whether one month is recent possession of a bull.

We have not been able to get a case on this part however whether or not the doctrine of recent possession applies will depend on the nature or kind of the item stolen, whether it can easily be sold or disposed off, the lapse of time between the theft of the item and its recovery. Each case must however be determined based on its peculiar circumstances.

In this case we are told that there were over 300 head of cattle which were stolen at Gudas location of Laisamis District. The bull in question surfaced one month later in Marsabit District, Mata-Alba sub location. The difference in distance between the two locations are not discussed anywhere in the evidence, however it is clear that the place where the cattle was stolen was a different district from the place where the bull was recovered.

We have considered that the item involved in this case was a bull. We think that even though bulls may not be fast moving items as compared to furniture or other inanimate item, one month since the same was stolen is far too long for the doctrine of recent possession to be applied. This is more so considering the incident happened in Northern Kenya where such items are easily disposable. We think that it would not have taken one month to dispose off a bull. The doctrine of recent possession does not therefore apply to the circumstances of this case.

Having come to this conclusion we find that the prosecution had not proved that the appellant was one of those who stole the complainants' bull and other animals from others in Laisamis, as charged in both count 1 and 2.

Turning now to the alternative charge of handling stolen property the prosecution adduced sufficient evidence in our view to establish that it was the appellant and another who took the bull to PW 2 and 1 to

keep for them.

In order to prove the charge, the prosecution has to prove that the bull was stolen; that the appellant had knowledge or reason to be have that it was stolen; that he honestly undertook or assisted in its retention, removal, disposal as realization by or for the benefit of another person .See Ondogo –vs- Rep 1983KIR 301.

The prosecution called the evidence of the owner of the bull PW6 and those of his village mates with whom he had joined hands to herd each of their heads together that is PW5 and 7. Each of these witnesses identified the bull in a photograph taken by the police and produced in evidence as an exhibit. In addition PW6 was shown the bull after it was recovered and had identified it to police. It was photographed before being released to him.

We are satisfied from the evidence adduced that the bull was sufficiently identified as the property of the complainant, PW6. The appellant did not lay any claims on it.

The prosecution has shown that the appellant had knowledge or reason to believe that the bull was stolen. We find this proved from the evidence of PW1 where he stated that as soon as the appellant who was guarding the bull in PW2's home after tethering it saw the police approaching in a vehicle, he abandoned the bull and ran away. PW1 traced him later having traveled a distance and in the process of crossing into Galkasa sub location. We find the appellants' conduct of fleeing from the home of PW1 proof that the appellant had knowledge or reason to believe that the bull had been stolen or dishonestly received.

We have considered the appellant's defence to see of he gave a reasonable or plausible explanation of how he came by the bull. The appellant denied ever taking it to PW1 & 2 had no grudge against the appellant. They had no reason to fabricate such a serious charge against him. Indeed no such claim was made by the appellant.

We have confirmed that as required, the learned trial magistrate made no finding in respect of the alternative charge of handling stolen goods.

We do find that the evidence adduced in this case supports a conviction for the single alternative count of handling stolen goods contrary to section 322 (2) of the Penal Code.

We do set aside the finding of guilty to count 1 for the main count of robbery with violence contrary to section 296 (2) of Penal Code and the sentence therein. We substitute this with the alternative count of handling stolen goods contrary to section 322 (2) of the Penal Code.

In regard to the second count of robbery with violence contrary to section 296 (2) of the Penal Code, we allow the appellants appeal, quash the conviction and set aside the order holding in obeyance the sentence on this count.

We have considered that the appellant was a first offender. We also saw him in court. He is a young

person. The offence of handing stolen goods contrary to section 322 (2) of Penal Code calls for a maximum sentence of 14 years imprisonment with hard labour.

We find a sentence of four years with hard labour from the date of sentence in the lower court sufficient penalty for the offence. We so order.

DATED SIGNED AND DELIVERED AT MERU THIS 31ST DAY OF MARCH 2011.

LESIIT, J

JUDGE

KASANGO,J

JUDGE