



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 165 OF 2007

JOHN KAMAU NANCY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant John Kamau Nancy was charged of the offence of stealing stock contrary to section 278 of the Penal Code (Cap 63 Laws of Kenya). The prosecution called 3 witnesses and the appellant gave an unsworn statement. He was subsequently convicted and sentenced to seven (7) out of the maximum of 14 years as provided for in section 278 of the Penal Code.

The appellant has appealed in this court on four grounds, the most important of which was that the court did not consider his mitigation as well as his age when convicting him. In his submissions to this court the appellant sought leniency and he said that he was sorry for what he did and prayed that his sentence be reduced, that he is an orphan and he is the eldest of the three boys and six sisters. Mr. Gumo the learned Assistant Deputy Public Prosecutor submitted that he left the entire matter of the appeal to the discretion of the court.

It is the duty of this court as the first appellate court to examine the evidence before the lower court and draw its own conclusions and findings. The evidence before the lower court was brief and clear. PW1 testified that he is a farmer and he had taken his 14 sheep and 2 goats to graze near his home at Manyani Estate and left them at the grazing place and expected them to come back for a drink of water at about 10.00 a.m. The sheep and the 2 goats did not return home and he was later called by a neighbor (PW2) Francis Muchiri that he had seen the appellant driving away some 14 sheep and 2 goats. On this information he went to the place where the appellant had the goats and found him surrounded by a group of angry people who wanted to lynch the appellant.

In cross-examination by the appellant who had contended that he was on a mission to bury his relative PW1 countered that the appellant would be lying if he said he had gone to bury someone, near where the goats and the sheep were grazing.

PW2 testified that he was from a slaughter at Roda when he met an appellant driving away the sheep and goats belonging to PW1. His testimony was clear that he knew that the goats belonged to PW1 from whom he buys goats and sheep to slaughter at his butchery

at Shauri Moyo Shopping Centre.

PW2 testified that he followed the appellant at some distance of about 1km when the appellant increased the pace of driving away the sheep and goats. He stopped him and asked where he was taking the animals. The appellant informed him that he was grazing them and taking them to Lakeview to the owner called Wambogo. PW2 informed the appellant that he (PW2) was interested in purchasing the goats for slaughter and that the appellant should drive the goats slowly to the owner called Wambogo while he (PW2) went to fetch money with which to buy the goats. PW2 in fact went and informed PW1 the owner of the sheep and goats whether he had lost any of his animals and that he had seen the appellant driving them away. PW1 and PW2 followed the appellant and found him surrounded by a group of people. The appellant was arrested and taken to the Police Station.

In cross-examination the appellant did not inform PW2 that he was going to attend any burial ceremony. PW3 was PC Andrew Kimutai who was attached to Bondeni Police Station on Crime Branch. His testimony was that the appellant was brought to the station by members of the public together with PW1 who told him that the appellant had stolen his 14 sheep and 2 goats and had taken them from Manyani to Kivumbini. He carried out investigations and found that it was true and charged the appellant accordingly.

In the course of the trial the goats were identified by both PW1 and PW2. PW1 in identifying the sheep and the goats which were grazing outside said

“The 14 sheep are these ones here grazing I know they are mine. When I call they actually come to me.”

PW2 in identifying the goats said-

“These are the 2 goats and 14 sheep I found the appellant leading away.”

In his unsworn statement the appellant informed the Court that he was a student at Utalii at Mau Narok in Form II. On the material day he was from home to a place called Mbogororo to bury a cousin of his and on reaching the place he found the body had not arrived. Instead he went to Pangani to demand money from one Wambogo. On the road he found goats and a vehicle and that one boy he met asked him to return the goats and he refused since he did not know the owner of the goats. He informed the court that he was merely a passerby and he did not steal any goats at all. That was the evidence. On hearing the appeal today the 25th day of January 2010 the appellant told the court

“I am sorry for what I did I wish my sentence to be reduced I am an orphan I am the oldest of the three boys.”

The evidence is very clear that the appellant was on no mission to bury any cousin whose name he did not even mention. It is also clear that he was on no mission to see Mr. Wambogo who I think did not exist. There was clear and adequate evidence to convict the appellant and sentence him accordingly.

In view however of the appellant's expressed regret for what he did, and in view also of the fact that all the stock (*the 14 sheep and 2 goats*) were recovered, I would in the exercise of the powers conferred upon the court by section 364(3)(ii) of the Criminal Procedure Code reduce the appellant's sentence to five (5) years from seven (7) years imposed by the lower court. The appeal otherwise fails.

Dated, delivered and signed at Nakuru this 26th day of February, 2010

M. J. ANYARA EMUKULE

JUDGE