



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 36 of 2009

JOSEPH NDALE OMULI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G E M E N T

The appellant was convicted of the two counts of stealing stock contrary to *section 278* of the Penal Code. He was sentenced to serve 4 years for each count. The appellant filed this appeal with sixteen (16) grounds.

Mr. Chegenye for the appellant argued all the grounds together. Counsel submitted that the prosecution did not prove its case as required. No investigations were done on the case. The investigating officer did not know the colour of the stolen cows. The complainants knew their cows by colour. Counsel further submitted that the burden of proof was shifted to the appellant. The appellant called witnesses and established that the recovered cows were his. The charge was defective and the defence evidence was disregarded. The animals purportedly stolen were not photographed to enable the court verify the animals vis- a- vis the evidence.

Mr. Karuri, learned state counsel did not oppose the appeal. He submitted that the case was not proved as required by law and the evidence was not credible.

Before the trial court, the appellant face four counts of stealing stock and four alternative counts. He was convicted on count II and count IV of the main counts.

In Count II the complainant was Jonathan Manyori Majan. His evidence is that on the night of 22nd and 23rd December, 2008 he was awoken in the morning and told that his two cows had been stolen. He phoned the Assistant Chief. These were freshian cows. They looked for the cows but in vain. On 1st January 2009 he was informed that some cows had been recovered at Bunyore. He went there at the Chief of Isava South and identified one cow as his. His further evidence is that all freshian cows are black and white.

The complainant in count IV was Gilbert Osango Amukuzi, PW6. His evidence is that on 1st January, 2009 he discovered that his cows had been stolen. This was about 2.00 a.m. as he was watching T.V. as people were ushering in the new year. His two sons, Simon and Adrian assisted him with the search and at about 9.00 p.m. he was informed that the cows had been recovered. He went to the Liaduywa Chief's camp and identified his two cows by their colour. One was brown and white and they had the names of Mark and Kalengo. They could respond to their names.

PW7, Simon Muganda Ogongo is the son of PW6. After he discovered that their cows had been stolen he assisted in the search and went to the appellant's home on 3rd January 2009 where the cows were recovered.

PW10 P.C. Joseph Mwangi was the investigating officer. His evidence is that the accused/appellant was taken to the Mbale

Police Station by two Administration Police officers claiming he had stolen six cows. The appellant claimed the cows were his. After the investigations he decided to charge the accused.

In his defence, the accused testified that the cows recovered from his homestead were his. He produced receipts and documents as proof of ownership. The appellant's further evidence is that he keeps dairy cattle and his six cows were two Ayshire, one Ganze, two Freshian, and one Gersy. He gave an elaborate analysis as to when, where and how he got his cattle.

The appellant called three witnesses DW2 James Munadi is his neighbour who also rears dairy cattle. DW2's evidence is that the appellant engages in dairy farming. He also does artificial insemination. He had seen the appellant with his cows. DW3, Ezekiel Onoka Mukuna is the appellant's herdsboy. He is the one who used to take care of the cattle and stated that the appellant had a bull for artificial insemination. On 1st January 2009 when people went to his employer's home looking for stolen cows he was there. He saw the assistant chief of Ebukunze sub-location, APs and other people numbering about thirty. There were eight cows in the shed.

DW4, May Omukeya Okwemba is the appellant's wife and was at home on the night of 1st January, 2009. Her evidence is that the cows belonged to them and she gave a full description of their colours and how they acquired them.

From the prosecution evidence, it clearly comes out that the same was displaced by that of the defence. It is true the complainants lost their cows but the evidence does not establish beyond reasonable doubt that indeed the stolen cows were those found with the appellant. The complainants did not know who stole their cows and yet the appellant was convicted of the main counts of stock theft. There was no evidence that he is the one who had stolen the complainant's cows.

The cows were not photographed to enable the court analyze the complainant's evidence properly. Had this been done, it would have enabled the court compare the evidence of the prosecution and that of the defence. The appellant had a cattle shed at his home meaning that he keeps cattle. According to D3, all their cows except two calves were taken. That means all the appellant's cows had been obtained through theft. How does one maintain a cattle shed for purposes of keeping stolen cows.

I do agree with the learned state counsel that the case was not proved beyond reasonable doubt. The prosecution evidence still raises doubt as to whether the cows found with the appellant belonged to the complainants. The only mode of identification of the cows was their colour. It is not established that all cows have different colours and that the appellant never used to keep cattle at all. For these reasons I do find that this appeal has merit and the same is allowed. The appellant shall be set free unless otherwise lawfully held.

SAID J. CHITEMBWE

J U D G E

Delivered, dated and counter signed at Kakamega this 11th day of March, 2010

ISAAC LENAOLA

J U D G E