



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Criminal Appeal 325 of 2008

**HELLEN NYOKABI THEURIAPPELLANT
VERSUS
REPUBLICRESPONDENT
JUDGMENT**

Hellen Nyokabi Theuri, the appellant herein was tried on a charge of stealing stock contrary to section 278 of the Penal Code. The particulars of the offence are that on the 10th day of August 2008 at Meere Forest, Nyeri North District within Central Province, jointly with others not before court stole ten (10) cows and one bull all valued at Kshs. 250,000/= the property of John Nderitu Kanyiri. At the end of the trial, the appellant was convicted and sentenced to serve 7 years imprisonment. Being aggrieved, the appellant preferred this appeal.

On appeal, the appellant put forward the following grounds in her amended petition of appeal:

1. *The learned trial magistrate erred in law and fact in convicting the appellant on a charge of stock theft whereas the same was not proved.*
2. *The learned trial magistrate erred in law and fact in failing to consider the appellant's defence of alibi whereas the same was unchallenged and shifting the burden of proving the same to the appellant.*
3. *The learned trial magistrate erred in law and fact in preemptorily dismissing the appellant's defence whereas the same was credible and unchallenged.*
4. *The learned trial magistrate erred in law and fact in failing to appreciate that there was a grudge between the complainant and the appellant which made the complaint and the evidence in support thereof less credible.*
5. *The learned trial magistrate erred in law and fact in convicting the appellant on hearsay evidence which was not corroborated.*

Before considering the grounds argued on appeal let me state in brief the case that was before the trial court. The prosecution's case was supported by the evidence of six witnesses. John Nderitu Kanyiri (P.W.1), the complainant herein, told the trial magistrate that on 10th August 2008 he set his cows numbering 11 to the forest adjacent to his farm for grazing. It has been his practice for many years to drive the cows into the forest, leave them to graze. The cows would normally come back for milking at 3.00 p.m. On that date the animals did not come back. P.W.1 claimed he saw the appellant leave the homestead and never returned too. The appellant is said to be the wife of P.W.1's son. The complainant went searching for his cows in vain. He was prompted to seek for police assistance. Susan Nyambura Gikuhi (P.W.2) told the trial court that on the same date i.e. on 10th August 2008 at about 11.00 a.m. she saw the appellant in company of a man driving some cows from the direction of Kimahuri. By that time P.W.2 was manning a road barrier where she was collecting cess on farm produce and livestock. The appellant and her companion were stopped by an administration police officer who was also assisting her (P.W.2) in manning the road barrier. The appellant told P.W.2 and the administration police officer upon being interrogated that she was taking the animals for grazing at Karatina. She was then allowed to pass. Edward Njoroge Mwangi (P.W.6) claimed he was approached by the appellant to buy 11 cows but he declined to purchase them because the animals were emaciated. Later P.W.6 said P.W.1 came inquiring him about his lost cows and that is when he told him he had seen some cows at the slaughter house. The appellant was arrested by police officers from Munyo Patrol based and taken to Kiganjo police station for interrogation.

When placed on her defence, the appellant denied committing the offence. She also summoned the evidence of her mother. The appellant stated that between 6th and 10th August 2008, she spent at her mother's home. Basically the appellant raised the defence of alibi. Margaret Wangari Gaturuku (D.W.2) told the trial court that she could only remember that her daughter (appellant) was arrested on 10th August 2008 while she was with her child. The learned trial chief magistrate observed the demeanor of D.W.2 and formed the opinion that she was rude and not a reliable witness.

Having set out in brief the case that was before the trial court, let me now turn my attention to the arguments presented on appeal.

It is the submission of Mr. King'ori, learned advocate for the appellant that the charge was not proved to the required standards in criminal cases since there was no direct evidence connecting the appellant with the offence. The appellant's counsel further argued that the circumstantial evidence tendered was not watertight hence it could not be used to sustain a conviction. Mr. Makura learned Senior State Counsel was of the view that there was overwhelming circumstantial evidence to sustain a conviction. I have considered the divergent arguments. It is not in dispute that the prosecution's case heavily depended on circumstantial evidence. The complainant told the trial court that on the fateful day, the appellant was at home. He saw her dress up as if she was to go to church. The cows were taken to the nearby forest for grazing but they did not return to the homestead as they usually do. The appellant did not also come back that day. The appellant and a male companion were seen by Susan Nyambura (P.W.2) on the same day driving away some cows from the direction of Kimahuri. The duo were stopped by P.W.2 and A.P.C. Samuel Maina (P.W.4) at Biriri county council barrier. She was allowed to proceed ahead when she told P.W.2 and P.W.4 that she was taking the cows for grazing at Karatina. Edward Njoroge Mwangi (P.W.6) said he was approached by the appellant to buy the cows but he declined to do so because some of the animals were thin and the others were milk cows. After a careful reconsideration of the evidence I am convinced that the circumstantial evidence points to the guilt of the appellant and no one else. She was at complainant's home on that day. She left but never came back. She had the opportunity to commit the offence. She was seen by P.W.2 and P.W.4 driving away the cows towards the Karatina direction. P.W.6 was able to show that the appellant had taken the cows to a slaughterhouse at Karatina. I am convinced the circumstantial evidence was enough to sustain a conviction against the appellant.

The other ground argued on appeal is to the effect that the appellant's defence of alibi was never considered by the trial magistrate. Mr. Makura was of the view that the defence was considered and properly dismissed. I have carefully examined the evidence tendered by the appellant and her witness. It is clear that the appellant set up the defence of alibi. She said she left for her parents to attend a get together party at Nanyuki at 8.30 a.m. on 10th August 2008. She claimed she stayed at her parent's home until 19th August 2008 when she was arrested at the school gate of her child's school while she was taking the child to school for tuition. I am unable to accept the appellant's defence of alibi. The same is displaced by the evidence of P.W.1 & P.W.3. In fact the appellant confirms that she was at P.W.1's home in the morning of 10th August 2008. I have carefully perused the trial magistrate's judgment and I am unable to find that the learned chief magistrate shifted the burden of proof to the appellant.

The other issue which was argued on appeal is the existence of a grudge between the complainant and the appellant. It is the appellant's submission that since there was a grudge between her and the complainant there was no credible evidence which could sustain a conviction. The learned Senior State Counsel did not address this court over this issue. I have re-evaluated the evidence and it is clear that from the evidence that the appellant and the complainant may not have had a good relationship. In his evidence on cross-examination the complainant stated that he fought with his son over the appellant. He claimed he told his son that he had brought a thief to his home. In her unsworn defence, the appellant told the trial court that she had no cordial relationship with the complainant. She said she was unable to obey the complainant's instructions to take care of the cows alone in the forest because it was dangerous since the forest is dense and is infested with wild animals. I have critically examined the aforesaid evidence and I do not think the differences between the duo could lead to the complainant setting up the appellant. There is no evidence that the complainant had fought nor quarreled with the appellant. Even if there was a grudge between them, it is not possible for the complainant to orchestrate a case of such a magnitude against the appellant. The chain of events are so co-ordinated and so real that there is no chance for the complainant to invent as suggested by the appellant.

In the end, I find the appeal to be without merit, it is dismissed in its entirety.

Dated and delivered this 17th day of September 2010.

J.K. SERGON
JUDGE

In open court in the presence of Mr. Kingori for the Appellant and Mr. Makura for the State.

J.K. SERGON
JUDGE