



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 21 of 2008

JARED NZOBERI ISAAC ::::::::::::::::::::::::::::::::::: APPELLANT

V E R S U S

REPUBLIC ::::::::::::::::::::::::::::::::::: RESPONDENT

J U D G E M E N T

The appellant was convicted for the offence of stock theft contrary to **section 278** of the Penal Code.

During the trial, he was the 1st accused, amongst the 3 persons who were tried together. The said 3 persons were said to have jointly with others who were not before the court, stolen 2 cattle valued at KShs.36,000/= . The 2 cattle were the property of **PW2, CHARLES NYERERE**.

At the time the offence was committed, on the night of 7th/8th March 2007, PW2 was at his place of work, in Mombasa. By the time PW2 traveled to his home in Butere, the appellant and his 2 co-accused were already in police custody. PW2's role at the trial was simply to confirm ownership of the 2 cattle which had been stolen.

PW1, MARGARET AYAKO, is the mother to PW2. She was woken up on 8th March 2007, only to find that 2 cattle belonging to her son had been stolen on the preceding night. PW1 raised an alarm and people gathered. The people then started tracking down the cattle, following their hoof marks.

The said marks led the people, including PW1, to the home of the appellant, where they found that cattle had been slaughtered.

According to PW1, when the appellant was questioned about the meat which was found in gunny bags at his home, the appellant said that the cow was his.

However, PW1 was able to identify the head of one of the cattle, as that of her son's cow.

PW3, ELIUD JOSHUA NZALA, is a brother to the complainant, PW2. He woke up at 5.00 a.m. on 18th March 2007. As he was getting ready to go to the farm, he noticed that the enclosure in which their cattle were usually locked in, was open. The said enclosure had been broken into, and 2 cows were missing.

As PW3 is the one who had tethered the cows inside the enclosure, and padlocked it on the night before, he woke up PW1, who raised an alarm.

PW3 went to make a report at Khwisero . Later, PW3 got a report that a cow had been slaughtered at the

home of the appellant. PW3 went to that home, where he found meat in sacks. PW3 was able to identify the cow which had been slaughtered from its head and neck. He identified it as belonging to PW2.

PW4, PC PHILIP LOMAR, was attached to the Khwisero Police Post at the material time. He testified that PW3 and his father reported at the Khwisero Police post, that their cattle had been stolen on the night of 7th March 2007.

According to PW4, the persons who reported the incident told him that they suspected the appellant to have slaughtered the cow.

The police therefore went to the appellant's home, where they found the head and skin of a cow. Upon interviewing the appellant, PW4 was not satisfied with the appellant's contention that the slaughtered cow was his.

The appellant is reported to have told PW4 that it was the 2nd accused who had brought the cow to him. Therefore, the police went to the home of the said 2nd accused, where they recovered a basin full of meat. PW4 also recovered "matumbo" and other meat in a banana plantation.

PW5, SAMSON OTUKU OCHENGA, was the Assistant Chief of Wambulushu sub-location.

He accompanied PW4 and other police officers in tracing the 2 cattle belonging to PW2. PW5 said that the police recovered the skin and head of a cow, from the appellant's home. Upon recovery, PW1 identified the head and the skin as those of PW2's cow.

According to PW5, when the appellant was asked about the meat which was being cooked in his house, he said that the same was given to him by his son called Solo.

The said Solo was, however, never arrested, although PW5 said that the police were looking for him.

Thereafter, when the appellant was put on his defence, he confirmed that when the police went to his home on 8th March 2007, they found him eating.

The police then escorted him to a thicket within his farm, where they found meat.

According to the appellant, the thicket was on an area of the farm which he had given to his son, Solo. The said son had, however, disappeared from home.

Having re-evaluated the evidence on record, I find that there is no doubt at all that PW2's two cows were stolen. There is also no doubt at all that on the morning after the theft, the hoof-marks of cattle were traced to the home of the appellant, where the head and skin of one of the stolen animals were recovered.

The said head and skin of the said cow were identified by PW1 and PW3.

Clearly, that evidence placed the appellant in a tight spot, as the cow which was stolen only on the night before, was traced to his home.

According to the prosecution witnesses, when the appellant was asked about the meat, part of which was cooked in his house, he said that it was from his cow. However, when PW1 and PW3 had identified the head and skin of the cow as those of the complainant's cow, the appellant opted to explain that the cow had been brought by his son Solo.

In my considered opinion, the appellant's defence was untenable. I say so because if it were true that the appellant's son Solo had brought the cow home, the appellant would not have, at first, laid claim to the ownership of the cow. He would then have said, right from the word go, that the son, Solo, had brought the animal home.

Instead, the cow was slaughtered, and some of the meat was already cooked, in the appellant's house!

567\=-0--most significantly, when the appellant was giving his defence, he said that his son had-

“left his house unaccompanied. He died. We found meat there. We transferred the belongings to my house. I locked the house.”

Considering that the said son is alleged to have brought the cow on the previous night, I find it wholly unconceivable that the appellant should then also have concluded that the son had died, leaving his house unaccompanied!

Later still, in his defence, the appellant again said that his son, Solo;

“is not seen anymore.”

That begs the question whether Solo was alive or dead. I say so because if one was dead and buried, it is obvious that he would not be seen anymore. It would therefore be totally unnecessary to say that that son was not in, as he was not seen anymore.

I find that the learned trial magistrate was right to have rejected the appellant's defence, as the same was simply incredible and unbelievable. I too, do hereby reject the said defence.

I find that the appellant was properly convicted on the basis of the doctrine of recent possession. I therefore uphold the sentence, as the same is lawful.

Accordingly, the appeal is dismissed.

Dated, Signed and Delivered at Kakamega, this 29th day of January 2009

FRED A. OCHIENG

J U D G E