



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 125 of 2007

MASHAKA TERO KIZIWI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 1628 of 2006 of

The Senior Resident Magistrate's Court at Kwale – A. M. Obura, – RM)

JUDGMENT

The appellant **Mashaka Tero Kiziwi**, with one Mtende **Mwatiga** (hereinafter “the 1st accused”) were charged in Kwale Senior Resident Magistrate’s Court Criminal Case No. 1623 of 2006 with the offence of Stock theft contrary to Section 278 of the Penal Code. The particulars of the offence were that on the 2nd October, 2006 at Magojoni Village, Kilimangodo Sub-Location, Mwereni Location, Kwale District within the Coast Province, the appellant and the 1st accused jointly with another not before the court stole 20 head of cattle valued at Kshs. 202,000/- the property of Ngoma Lemomo (hereinafter “the complainant”). The appellant faced a second count of handling stolen goods contrary to Section 322 (2) of the Penal Code particulars of which were as follows:- that the appellant on the 4.10.2006, at Kinyungu area, Mwereni Location, Kwale District within the Coast Province, otherwise than in the course of stealing, dishonestly received or retained five (5) head of cattle knowing or having reason to believe them to be stolen goods.

The appellant and the 1st accused appeared before Daniel Ochenja (SRM) and initially pleaded not guilty. On 4.1.2007 however the 1st accused changed his plea to one of guilty to the charge and was convicted and sentenced to five (5) years imprisonment. After a full trial the appellant was also found guilty of the principle charge of stock theft and sentenced to five (5) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant has appealed to this court on five (5) grounds which raise two issues: that he was convicted on unsatisfactory evidence; that the evidence of his arrest and that of the Investigation Officer was not adduced and that the sentence of five (5) years imprisonment is manifestly excessive in the circumstances.

In his written submissions, the appellant elaborated those grounds and in addition stated that there was conflict in the evidence which was adduced by the prosecution and further that crucial witnesses did not testify before the Learned Senior Resident Magistrate.

The appeal was opposed by Mr. Onserio, Learned State Counsel who represented the State. He submitted that whereas there were discrepancies in the evidence the same were not material and that the stolen cattle were found with the appellant who offered no explanation at all.

This is a first appeal. That being the case, this court has a duty to reconsider and re-evaluate the evidence which was adduced before the trial court and arrive at its own independent determination on whether or not to uphold the conviction bearing in mind that the court did not see or hear the witnesses testify (**See Njoroge –Vs- Republic (1987), KLR 19**).

In a nutshell, the facts of the case were that the complainant (PW 1) and his brother Rumba Lemomo (PW 2) on 4th October, 2006 returned home from the market at about 5.00pm and found 20 of their calves missing. A report was made

to Mandodo Police station and a search resulted in the recovery of 13 of the calves. The complainant then reported to the police station where he was shown the recovered calves and the appellant together with the other suspect. The complainant and his brother identified the calves as theirs. Later two other calves returned to the complainant's home on their own. The recovered calves were then photographed and returned to the complainant.

The complainant and his brother were the only witnesses who testified before the trial court. After their evidence, the learned trial Magistrate put the appellant on his defence but the appellant opted to keep quiet.

After analyzing the evidence, the Learned Resident Magistrate found that the appellant and the 1st accused had led the complainant and his brother to the appellant's house where two of the cattle were recovered and that the testimony in that regard had not been denied by the appellant. The Learned Magistrate further found that the appellant had not explained how he had come into possession of the said cattle. In the Learned Magistrate's view, the doctrine of recent possession applied and held that the appellant had stolen the cattle.

Having independently evaluated the evidence which was adduced before the Learned Resident Magistrate, I have noted the following flaws in the case put forward by the prosecution. The 13 calves were said to have been recovered by the complainant's Chairman at the home of the appellant and the 1st accused. The Chairman was not called as a witness to confirm that allegation. Further when the complainant went to the police station after the recovery of the 13 calves had been made, the purpose of the visit must have been to identify the calves. They testified that they did so and the calves were then photographed. It is significant that at the trial neither the recovered calves nor their photographs were produced. Furthermore the police officers who arrested the appellant and received and released the recovered calves did not testify. There was therefore no credible testimony regarding the possession of the 13 calves by the appellant.

With regard to the two head of cattle recovered later, there is serious conflict in the testimonies of the complainant and his brother (PW 2). The complainant testified that the two head of cattle returned home on their own whereas his brother testified that the two were recovered in the appellant's home. That conflict in my view was significant and was not resolved by the Learned Resident Magistrate.

In the premises I have come to the conclusion that the prosecution did not present credible evidence which supported the main charge and the alternative one. It is immaterial that the appellant chose to keep quiet. His silence did not lessen the onus the prosecution had to prove the charge beyond reasonable doubt. I must therefore allow this appeal. I quash the appellant's conviction and set aside the sentence imposed upon him. The appellant should be released forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF AUGUST 2009.

F. AZANGALALA

JUDGE

Read in the presence of: the Appellant in person and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

27.8.2009