



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 109 of 2007

**ERICK CHEBON MALEKEN .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant **ERICK CHEBON MALEKEM** was charged with the offence of **stealing stock** contrary to **section 278 of the penal code**. The particulars of the charge as stated in the charge sheet were that on diverse dates between 4<sup>th</sup> and 5<sup>th</sup> days of September 2004 at Ngata Area in Nakuru District of the Rift Valley Province he stole one Freshian cow valued at Kshs.30,000/-, the property of William Kipchumba.

After a full trial before the Honourable Mr. B. Atiang RM wherein the prosecution called two witnesses and the appellant alone testified in his defence, the appellant was convicted of the charge and was sentenced to 5 years imprisonment. Aggrieved by both the conviction and the sentence the appellant filed this appeal on the grounds, inter alia,

1. That the learned trial magistrate erred both in law and fact in believing that the appellant committed the offence when, according to the appellant, the same was not proved beyond doubt.
2. That the allegation that the appellant sold the subject cow to PW2 was not proved and that the evidence of PW2 to that effect was not corroborated.
3. That the appellant's defence was not considered yet he had indicated that there existed a grudge between him and PW2.
4. That the sentence of 5 years imprisonment was harsh given the fact the appellant was a first offender.

While arguing his appeal the appellant submitted before this court that indeed the animals said to have been found with PW2 had been bought by the appellant and then sold to PW2. He submitted therefore that the learned trial magistrate ought to have addressed his mind to the fact that the appellant had bought the cows from Methubhai farm as was apparent from the sale agreement produced in evidence by PW2. He asked this court peruse the said agreement and find that the same clearly explained how the appellant had come into the possession of the cows allegedly stolen by him. The appellant asked this court to interfere with the sentence and reduce the same on the basis that he was unwell and that he had three young children and sibling who depended on him for their livelihood. He also raised an issue of having been kept in custody for nineteen days without being arraigned in court or being informed of the charges

facing him.

Opposing the appeal the learned state counsel, Mr. Mugambi, submitted that the appellant was convicted on sound evidence to the effect that he is the one who sold the cow found with Pw2 and which was proved to have been stolen from PW1's farm. Mr. Mugambi submitted further that when he was arrested, the appellant did not explain to the police where and from whom he had bought the cow. According to the State there was ample circumstantial evidence to support the charge of theft. Regarding the prolonged incarceration Mr. Mugambi submitted that same had not been raised in the petition and that the same was justified by the fact the appellant faced several other criminal cases on similar charges all of which were under investigation. He asked this court to dismiss the appeal.

I have carefully considered the proceedings of the trial court and the judgment delivered therein. I have analysed and re-evaluated the evidence adduced and arrived my own conclusions. The complainant William Kipchumba testified as PW1. He stated that he was a farmer at Ngata. On 4<sup>th</sup> September, 2004 he was informed by one of his workers that one, out of his 20 cows, was missing. He discovered that some fencing wire near a foot path had been cut. He reported the incident to the police and a police officer visited to the scene. Later PW1 recorded a statement at Menengai police station in which he described the missing cow by appearance, stating that it was valued at kshs.20,000/-. After about 2 months PW1 was called to Menengai police station to identify certain cows numbering nine (9). He was able to identify his cow which was photographed. The cow fitted the description that PW1 had given to the police. He was requested to report at the police station after 3 days. When he did so he was informed that a certain man had told the police that the subject cow had been sold to him. PW1 was later that the accused had been arrested in connection with the theft. PW1 identified his cow in the photograph produced in court as an exhibit.

PW2 one Benson Bore testified that he worked with a Non-Governmental Organization and had bought PW1's cow from the appellant who had previously sold him 3 other cows. He stated that he and the appellant had entered an agreement for the sale for the subject cow on 9<sup>th</sup> October, 2004, after the appellant had shown him an agreement under which he claimed to have bought the cows from a certain farm. After purchasing the cow for Kshs.22,000/- PW2 was later to be informed that the police had taken his four (4) cows. He went to Menengai Police station and explained to the police that the appellant had sold to him the cows that were found with him. With the assistance of PW2 the appellant was traced at the London Area of Nakuru and was arrested. PW2 identified PW1's cow in the pictures exhibited before court and confirmed that it was one of the four (4) that he had bought from the appellant. Under cross examination by the appellant PW2 denied that he held a grudge towards the appellant and also denied the appellant's suggestion that PW2 was out to frame him. The investigating officer CPL Lawrence Njue testified that he conducted the investigations into this case and also carried out other investigations relating to some other similar cases involving the appellant. He too denied that he held any grudge towards the appellant.

The appellant's defence was that he was arrested in connection with a title document relating to a plot that he had allegedly bought from PW2. He testified that he knew nothing about the stock theft charge and did not tender any evidence to challenge the evidence adduced against him in relation to the charge he faced before court.

Considering that the appellant pleaded not guilty to the charge which, according to lower court's record was read and explained to him in both English and Kiswahili Languages, and in the presence of his advocate Mr. Olonyi, this court cannot accept the appellant's contention that he was unaware of the charge in respect of which he was tried convicted and sentenced. In his submissions before this court, the appellant admitted that he sold the subject cow to PW2, only alleging that he had bought the same from some other person whom he does not name. Having not raised that defence at the trial and also having failed to challenge the allegations of theft or giving a proper account of how he came to be in possession of PW1's cow, I am of the view that the learned trial magistrate was right in finding that the charge of stock theft was proved by evidence. The appellant's contention that his defence was ignored is not correct. The learned trial magistrate did consider the defence tendered leading him to record the following in his judgment:

***“I have also considered the accused person’s defence and find that he does not have merit”.***

The learned trial magistrate also considered the appellant’s statement in mitigation and accordingly sentenced him to five (5) years imprisonment despite the fact that the charge that the appellant faced carries a maximum sentence of fourteen (14) years. That the appellant was under investigations for other similar offences adequately explains the reason for his incarceration of nineteen (19) days

Considering the above I see no reason to interfere with the learned trial magistrate’s findings. Accordingly the appeal herein is hereby dismissed. The conviction and sentence are upheld.

**Dated, signed and delivered at Nakuru this 5<sup>th</sup> day of August, 2009**

**M. G. MUGO**

**JUDGE**