



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

Criminal Appeal 174 of 2007

FREDRICK KIMNGETICH TANUI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant, Fred Kipngetich Tanui, was charged jointly with Zablon Inyumba with the offence of stealing stock contrary to section 278 of the Penal Code and an alternative charge of handling stolen property contrary to section 322(2) of the Penal Code. After a full trial before the Hon. E. Tanui Resident Magistrate, Nakuru, where the prosecution called 4 witnesses, with the appellant and his co-accused testifying in their own defences, the appellant alone was convicted on the main count while his co-accused was acquitted under section 215 of the Penal Code. The appellant was sentenced to 4 years imprisonment.

Aggrieved by the sentence which he considered excessive, the appellant filed this appeal, which is in the nature of mitigation. He has asked this court to consider that he was a first offender and that he has a family that depends solely on him. He prays that the court either pardons him or reduces the sentence. He also says he is remorseful.

The particulars of the charge as stated in the charge sheet were that on the night of 1st May, 2007 at Simiyon area within Stapol Subukia in Nakuru District, the appellant, jointly with the said Zablon Inyumba together others not before court, stole 2 heads of cattle valued at Kshs 40,000/= the property of Rose Nakhumcha Jibendi. The particulars of the 2nd count were that on the same night and at the same place the appellant and his co-accused, otherwise then in the course of stealing, dishonestly received the said two heads of cattle, knowing or having reason to believe the same to have been stolen property.

At the hearing of the appeal, the appellant elected to have the State (*represented by the learned state counsel Mr. Njogu*) respond to the grounds of petition as filed but did not make any reply to the state counsel's submission. Opposing the appeal, the learned state counsel submitted that the charge against the appellant was proved by sound evidence of two eye witnesses PW2 and 3 who recognized the appellant as he drove the complainant's cattle away and that the two fled on seeing PW2 and 3. He submitted further that the sentence of 4 years was lenient, given that the offence of stock theft attracts a maximum sentence of 14 years.

The complainant, Rose Jibendi (PW1) testified that on 1st May, 2007 at about 11.00 p.m. she found two of her cows missing from the shed where she had earlier locked them at about 6.00 p.m. She screamed, attracting the attention of neighbours, among them PW3 and PW2 (*whom she referred to as Rasta*). The two followed leads to trace the cows and in the morning PW3 telephoned to tell her that the

cows had been recovered. They were restored to her in the evening of 2nd May, 2007. PW1 had made a report of the theft at a nearby police station. She testified however that she did not know whether the appellant had stolen the two cows.

PW2, Samuel Kimei testified that PW1 was his neighbour on the material night he heard screams from her home and went to the rescue. He learnt from her that her two cows had been stolen. In the company of one Patrick Ngeno (PW3), PW2 followed the cows hoof-prints which led them towards Banita. On the way they caught up with people going to a cattle auction. After explaining their mission, PW2 and 3 were given a bicycle by a good Samaritan which they used to continue with their pursuit. They caught up with the appellant, whom they knew as a neighbour, and another man (*whom they did not recognise*) as the two were driving the complainant's cows, which PW2 knew well. On seeing PW2 and 3, the appellant and his companion fled into the bushes leaving the cows behind. PW2 and 3 reported the incident to the police and returned the cows to PW1 who positively identified them as hers. The appellant never returned to his home but hid himself on top of a hill where he was flushed out by local youth, including PW2, after two days. He was arrested and charged. PW3's testimony was identical to that of PW2. He too had been alerted to the scene by PW1's screams. He pursued the stolen cows and saw the appellant driving them in the company of another person and witnessed the two fleeing into the bushes. Although he did not witness the appellant's arrest, he was able to identify him as one of the people who were driving the complainant's cows away. The appellant was well known to him.

PW4, P.C. James Kamunyah testified that on 4th May, 2007, (*the day that PW1 stated the appellant was arrested*) while on patrol in Simbalay area, he met a group of people escorting two suspects arrested in connection with the theft of two cows. PW4 re-arrested the two suspects and after interrogating them he charged them with the offences for which they were tried and the appellant convicted.

In his defence, the appellant testified that he had been away visiting his brother between 29th April, 2007 and 3rd May, 2007 and that he came to learn of the alleged theft from his friends upon his return. He also stated that there existed a grudge between himself and PW1. I have noted, as did the learned trial magistrate, that he did not raise any such issue with the complainant when cross-examining her.

After evaluating the evidence placed before him the learned trial magistrate rejected the appellant's defence whilst finding that the evidence adduced against him was watertight. Based on the said evidence the trial magistrate found that the main charge against the appellant was proved beyond doubt. Upon re-evaluation of the entire evidence, I share the same view.

Before sentencing the appellant the learned trial magistrate took note of the fact that the appellant was a first offender and had, in mitigation, prayed for leniency. Considering those facts, the learned trial magistrate sentenced the appellant to 4 years as a deterrent, notwithstanding that the offence attracted a maximum sentence of 14 years. I see no error in the learned trial magistrate's decision to warrant interference by this court. The sentence is in no way excessive and was warranted. The appeal fails and I hereby dismiss the same.

Dated signed and delivered at Nakuru this 18th day of September 2009

M. G. MUGO

JUDGE

In the presence of:

N/A for State

N/A for Appellant

Appellant present- in person