REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 215 of 2005

GUANTAI KATHURIMA MUNGANIA…………………………APPELLANT

V E R S U S

REPUBLIC………………………………………...………..RESPONDENT

J U D G E M E N T

The Appellant herein was charged and convicted of theft of stock contrary to sections 278 of the Penal Code (Cap 63 Laws of Kenya). He was sentenced to serve 3 years imprisonment by the Senior Resident Magistrate, Meru Central Law Courts. He has appealed against the conviction on five grounds.

Whereas the accused was represented at the lower court during his trial, he made his appeal in person. His argument was that the learned Senior Resident Magistrate failed to give weight to his contention that all the prosecution witnesses came from the complainant's family and were therefore biased against him, that the said Magistrate failed to give weight to his evidence that P.W.2 was of the same family with the complainant who had a grudge against him having had a quarrel with the Applicant's brother.

For those reasons the Appellant contests the conviction and sentence.

On its part, the Republic represented by Mr.Oluoch Senior Deputy Chief State Counsel supported both the conviction and the sentence. Learned Counsel submitted on all the five grounds of appeal. I set out these grounds and arguments seriatim.

Ground1 - that the learned Magistrate erred in law by relying on circumstantial evidence. Learned State Counsel submitted that contrary to what the appellant contends, the evidence of P.W.2 was direct and not circumstantial. P.W.2 was one John Mutwiri Githinji. In his evidence in – chief he said –

"**I do not know the complainant (not complaint!) I also do not know the accused herein. I got to know them after 8.12.2003 at about 1.00 p.m. On that day I was in the forest at Naari, I was herding cattle. I saw a young man with two cows one was a black heifer and a red bull. I told him to be careful so that the herds would not mix as they could fight. He said he was taking his to the watershed I gave him a cigarette on his request. We were together for about 30 minutes. We were about a metre apart".**

In cross-examination by Mr. Ogoti, the learned Counsel for the Appellant in the lower court P.W.1 said - "**we talked but we did not tell each other our names. We shared a cigarette. We discussed the fact the policemen were chasing people from the forest. Accused left with the cattle heading for the water shed…..he had shown nervousness, being in a hurry to go to the water shed……"**

P.W.3 David Mungatia was a Std 7 pupil at a local school Muruguma Primary School. He said – "**I know the complainant. We are neighbours……"**

P.W. 4's evidence was to the same vein. He also was herding cattle at Naari forest. "**I was on my way to the watering shed when I met a young man with 2 cattle, one cow which was black in colour and a bull. I did not know the young man. He is before court the accused duly identified….."**

The evidence of the said witnesses and that of P.W. 1 was not shaken in cross-examination by Mr. Ogoti. The Appellant was properly identified as the person who was seen with the two head of cattle, a cow and a bull. The evidence of P.W.2 and P.W.3 as well as P.W.4 was

direct evidence as to both the Appellant, and the two head of cattle stolen by the Appellant. It was neither circumstantial nor hearsay. The witnesses were persons intimately concerned with the loss of those animals on the material day.

Ground 1 and 4 (that the evidence was circumstantial, and not direct) must therefore fail, and I so hold. For the same reasons Ground 2 (that the prosecution's case was based on hearsay evidence) must also fail, and I so find and hold.

The evidence of P.W.1 clearly showed that there was no grudge between him and the Appellant. This is what P.W.1 said after describing his fruitless efforts to find his lost cows.

"**…….On 24.12.2003, I and John Mutwiri Githinji (P.W. 2) (also described in the evidence as John Mutwiri Githinji "Mutaita") were sitting when John saw the young man who he indicated was the one he had seen with the cows. I rushed to the Police and accused was arrested. Accused is my neighbour. His home is about ½ kilometer from my home. He was arrested and taken to the Chief's Camp. By the next day he had named all his accomplices who have not yet been arrested. He was later charged with this offence. My cows have not been recovered. I have no grudge against accused (accused identified**)"

Here was a person, who, the complainant who had lost his valuable cattle had identified. His desire and not grudge would be to **firstly** recover his cattle and **secondly** have the person who occasioned the loss subjected to due process of law. The word "**grudge**" has no legal or technical meaning. In its ordinary use, the word has several meanings. The old Chambers Twentieth Century Dictionary 1976 gives the following definition of the word "**grudge" "to murmur at (now obsolete) to look upon with envy to give or allow unwillingly (something to a person) to be loth to do v.i, to murmur to show discontent (obsolete) – n;- secret enmity or envy, an old cause of quarrel"**

In the context of the Appellant's Ground 3 (that the learned trial magistrate erred in law and fact by failing to note that I had an existing grudge with the brother of the complainant P.W.1 Henry Mureithe Mburugu) the Appellant by pleading a "**grudge**" probably refers to "**enemity or envy**" or "**an old cause of quarrel**". If this is what he meant, this did not come out either in his evidence or that of his uncle, Paul Gikunda who was D.W. 2 and who was the Appellant's employer as a herds - boy. As D.W. 1 this was the Appellants evidence-

"**These charges are trumped up against me. We have a grudge against P.W.1 I and his family and our family. He has quarreled with my brother".**

This evidence was in my opinion, inadequate to establish a grudge, within the common meaning of "**an old cause of quarrel.**" His brother never preferred any evidence as to the existence of such grudge. But even if there was such pestering grudge among the appellant's family and the complainant's, the Appellant had unwittingly given the complainant a perfect excuse for pressing charges against the Appellant. He was positively identified by persons (P.W.2, P.W.3, and P.W…) who were not concerned with such grudge, as the young man who was seen with the complainant's cattle driving them towards the watershed, and being nervous in the process. Ground 3 of the appeal has therefore no basis in law and I so find and hold.

Ground 5 of the Appeal was to the effect that the learned trial magistrate erred in law and fact by rejecting the Appellant's sworn defence without giving cogent reasons for the same.

Firstly the contention that the learned trial magistrate rejected the Appellant's sworn testimony is not correct **Secondly** it is also not correct for the Appellant to contend that the learned trial magistrate did not give cogent reasons for rejecting the Appellant's sworn testimony.

The learned trial magistrate did in fact look at the Appellant's evidence. This is want the trial magistrate said at p.2 of her judgment.

"**In his defence, the accused admitted that he had been in the forest on the material day, grazing his uncle's cattle. He admitted that the forest guards harassed him, and warned P.W.3 about the presence of the forest guards. He rushed away and left P.W.3 sitted. Accused admitted he met many people but denied having talked to them. He then claimed the charges had been trumped up by P.W.1 because of some quarrel he had with the accused's brother. In cross examination the accused denied having stolen P.W.1's cattle in revenge."**

The learned Magistrate did not merely consider the Appellant's evidence, the Magistrate also took into account the evidence of D.W.2 the Appellant's uncle Paul Gikunda who in cross – examination confirmed that the Appellant had a run in with the forest guards.

Again, the English word "**cogent**" is neither a legal nor technical term. In its ordinary meaning it means "**convincingly persuasively or persuasively convincing.**" Similarly the expression or word "**reasons**" is neither legal nor technical. In its ordinary usage the word "**reasons**" has a variety of meanings, and Chambers 20th Century Dictionary (supra) gives a variety of contextual meanings of the word, "**ground, support or justification of an act or belief**"….Put together therefore "**cogent reason**" means, convincing or powerfully "**convincing or persuasive ground, support or justification of an act or belief**".

The justification, ground or support of the learned trial Magistrate's judgment must come from the evidence, not merely of the prosecution, but also of the accused, or the evidence of the Defence. The learned trial magistrate concluded at p. 2 of her judgment and said.

"**Looked at in the whole, I do not make a finding that the accused's testimony has shaken the prosecution case. The prosecution witnesses P.W.2, P.W.3 and P.W.4 were very consistent on the description of the accused and the stolen cattle. Accused has not specifically denied or faulted the evidence that P.W.2 and P.W.4 met him on the road. No doubts have been raised in this matter".**

The justification, ground or support (cogent reasons) for finding the accused guilty as charged of the offence of having stolen stock contrary to Section 278 of the Penal Code, is all there, in very clear terms in the learned trial Magistrate's judgment of 17th November 2005 and the accused was properly convicted as charged and sentenced to three 3 years imprisonment.

Section 278 of the Penal Code (Cap. 63, Laws of Kenya), had prior to 1987 provided for punishment of not less than seven and not more than fourteen years together with corporal punishment if one was found guilty of the offence of stock theft. The new provision was enacted in 1987, and eliminated the minimum period of seven years (over which the court had no discretion) but retained the punishment for fourteen years together with corporal punishment. The section was further amended in 2003 and the provision about corporal punishment was removed. As of the time the appellant was convicted and sentenced to three years imprisonment, the Section read-

S.278. If the thing stolen is any of the following things that is to say a horse, mare, gelding, mule, camel, ostrich, bull, cow, ox, ram, wether, goat or pig, or the young thereof, the offender is liable to imprisonment for a period not exceeding fourteen years"

During the hearing of the Appeal the subject of this Judgment, the Appellant perhaps as a sign of remorse, or perhaps as a challenge to society to understand him did plead-

"**It is my desire that my appeal should be allowed. I wish to add that I am alone that is why everyone is against me. My mother even does not stay with me. I used to stay with my grand parents".**

In this case the Appellant was convicted of stock – theft, namely a cow and a bull, and was sentenced to three years imprisonment. I think the court, having observed the condition and demenour of the Appellant, was extremely considerate to the Appellant taking into account the fact that the complainant never recovered any of his stolen animals, convicted and sentenced the Appellant to only three years and nowhere near the maximum 14 years.

The Appellant was I think well advised not to appeal against the sentence for this court would as well have enhanced that sentence taking into account the loss, and liability to a longer term under Section 278, and this notwithstanding the Appellant is out on bail.

Thus, in the learned trial Magistrates keen language, "**looked at in the whole**" from the perspective of the offence, the sentence meted to the Appellant, the Appellant's insistence that "**I did not steal the cows,"** contrary to the direct evidence of his identification as scare-monger of other cattle herders and in particular the young boy P.W.3 (David Mungatia) of the presence of forest guards when none of the grazers of cattle in Naari forest on that date met with any forest guard I find absolutely no merit in this Appeal at all. It is dismissed, with a direction that the bond/bail granted to the Appellant on 6th April 2006 is cancelled forthwith and the Appellant be committed to imprisonment forthwith, for the term of three years as imposed by the trial Magistrate.

These are the orders of this court.

Dated and delivered at Meru this 23rd day of May 2008

M.J. Anyara Emukule

Judge.