REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 9 OF 2007

JEDIEL THIAINE …….. APPELLANT

VERSUS

REPUBLIC ……..……. RESPONDENT

(An appeal against the conviction and sentence by G. Oyugi, DM II Tigania CR. Case No. 1617 OF 2006 dated 11.1.2007)

JUDGMENT

The appellant was tried, convicted and sentenced to three years' imprisonment of the offence of stealing stock contrary to section 278 of the Penal Code. It was alleged in the charge sheet that on 26th August, 2006 at Nkomo Location, Ntuli Village in Meru North District the appellant stole one heifer valued at Kshs. 15,000/=, the property of Dr. John Kangiria M'Athiu.

After hearing six prosecution witnesses, the learned trial magistrate came to the conclusion that the prosecution had proved the case against the appellant beyond any reasonable doubt, found the appellant guilty, convicted him and sentenced him as indicated at the beginning of this judgment. The appellant aggrieved by both the conviction and sentence has preferred this appeal relying on six grounds. The grounds raise basically two broad issues, namely that there was no or no sufficient evidence to base conviction on and secondly that the sentence was manifestly excessive.

Arguing the appeal, counsel for the appellant submitted that the evidence of the main prosecution witness, PW2, was not corroborated. That no motive was shown why the appellant would steal from the complainant. That the appellant's *alibi* defence was not shaken. Finally, it was argued that the offence of stealing was not proved.

Being the first appellate court, I am duty-bound to re-evaluate the evidence on record in order to arrive at my own independent conclusion. It was the evidence of PW2, Jeremiah Rukunga that the appellant in the company of three others went to the home of his brother, who was PW2's employer, by the name Dr. John Kagwiria (the complainant) and took away the heifer in question explaining that he had been sent by the complainant's father, PWV Daudi M'Imuti (Daudi).

Evidence was also led by PW3, Julius Muchiri Tharimbi (Julius) and PW4 George Gikundi (George) to the effect that they separately saw three people driving away a heifer. Daudi on his part denied having sent the appellant to take the heifer from the complainant's home.

The appellant in his defence denied stealing the heifer and maintained that on the day in question he spent

the whole day splitting timber with the help of his two witnesses, DW2, Moses Mwiti and DW3 Gituyu Paul.

That briefly is the evidence adduced at the trial. There is no dispute that the complainant's heifer went missing. What fell for determination in the trial court as in this court is whether the heifer was stolen by the appellant. A heifer is simply a cow and therefore stock within the meaning of Section 278 of the Penal Code.

The first question is therefore identification. It was the evidence of PW2 – Jeremiah Rukunga that the appellant went to take the heifer at 3.00pm. The latter was in the company of two other people. They spoke when the appellant explained that he had been sent by Daudi to collect the heifer.

The appellant, on his part has raised an *alibi* defence, which has been confirmed by his two witnesses. Section 143 of the Evidence Act makes it absolutely clear that no particular number of witnesses, in the absence of any provision of law to the contrary, is required to prove any fact. However, in accordance with numerous case law, the court will receive evidence on identification with the greatest circumspection particularly where circumstances are shown to have been difficult and did not favour accurate identification.

Where evidence rests on a single witness and the circumstances of identification are known to be difficult, then other evidence either direct or circumstantial pointing to the guilt of the suspect must be sought.

See **Odhiambo V. R.** (2002) I KLR 241. The appellant was known to Jeremiah Rukunga (PW1) as the latter was employed by the former's brother as a caretaker for 2 ½ years. Jeremiah Rukunga was categorical that the appellant informed him that he (the appellant) had been sent to take the heifer by Daudi.

On account of the appellant being Jeremiah's employer's brother and the former having been sent by the father to the appellant and the complainant, Jeremiah allowed the appellant to take away the heifer. No grudge existed between Jeremiah and the appellant, although there was evidence that there was one between the complainant and the appellant.

The trial magistrate having seen the witnesses and having observed that Jeremiah gave a lucid, direct and credible evidence, I have no basis to interfere with that finding. That finding in effect displaces the appellant's *alibi* defence and places the appellant at the scene.

I find no contradiction in the prosecution evidence save to observe that the testimony of PW3 and PW4 did not add value to the prosecution case as they neither saw the appellant nor were they able to confirm that the heifer they saw belonged to the complainant.

I come to the same conclusion as the learned trial magistrate that the offence was proved beyond any reasonable doubt. There was taking of the heifer without claim of right with an intention of depriving the complainant permanently of the same and indeed it was not recovered.

The sentence of three years as opposed to seven years provided in Section 278 of the Penal Code cannot be described as excessive.

I find no merit in this appeal which is dismissed in its entirety.

Dated and delivered at Meru this 19th ….day of may….. 2008.

W. OUKO

JUDGE