

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 128 of 2006

KARISA KATANA MBITHAAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

Karisa Katana Mbitha, the appellant herein, was tried on a charge of two counts of stealing stock contrary to section 278 of the penal code. At the end of the trial, he was convicted on both counts and sentenced to serve 5 years imprisonment. The appellant was aggrieved hence the filing of this appeal. On appeal the appellant alleged that there was no evidence connecting him with the offence he was convicted for. He also alleged that his defence was not considered by the trial magistrate. On his part, Mr. Monda, learned Senior State Counsel was of the view that the prosecution had proved its case to the required standards of beyond reasonable doubt hence the appeal should be dismissed.

The case before the trial court appears to be short and straightforward. It is the evidence of Ramadhan Dadu Kivilo (P.W.1) that he lost his black calf which was left under the care of one Juma Kapola, a herdsman. P.W.1 went looking for his calf. P.w.1 gave the physical description of his calf to Majimbo Karisa Kadenge (P.W.2). P.W. 2 also told P.W.1 that he too had lost his calf. He (P.W.2) also gave the physical description of his calf to P.W. 1. P.W.1 later found his calf and another which fit the description given to him by P.W.2 in the home of Mathias Kazungu Masha (P.W.3). He gave that report to P.W.2. The duo (P.W. 1 and P.W.2) visited the home of P.W.3. P.W.4 said that the cows were given to him by Jefa Sinya Masha (P.W.7) in exchange with his bullock on 22.1.2005, but the transaction did not succeed. P.W. 4 never saw them until he met Jefa Sinya Masha (P.W.7) at Kaloleni Police Station on 6/2/2005. On 3/2/2003, P.W.1 visited the house of P.W.4 where he identified his cow and thereafter informed him that it had been stolen from him. He also identified the cow of P.W. 2 which had too been stolen. P.W. 7 told P.W.4 that the calves were taken to him by the appellant on 18/1/2005 to exchange with a bullock. The appellant had requested P.W. 4 to exchange the animals for him at a commission. P.W.4 took the animals to P.W.3, the area Councillor but returned the same to the appellant when the councillor demanded for more money to enable him release his bullock in exchange with the calves.

Before the conditions were met, the appellant was arrested. Rachael Sinya, a mother to P.W.4 recalls that on 18.1.2005 she saw the appellant bring two calves to P.W. 4. she overheard the appellant tell P.W.4 to exchange the calves with a bullock which the accused wanted to slaughter. The appellant refused to go and identify the cows despite claiming they were his.

In his defence the appellant made an unsworn statement. He denied the allegation that he took the animals to P.W.7. He claimed he had lent Kshs.10,000/- and in return P.W. 7 was to give him 3 calves. He said he refused to go and collect the animals at Mtsangamali because the place was far. As a result they quarreled. Later Jefa brought police to arrest him.

I have considered the appellant's written submissions and the oral submissions tendered by Mr. Monda. The learned Senior State Counsel. The evidence on record proved that both P.W.1 and P.W.2 lost their calves which were later recovered from P.W.3. Those animals were properly identified by P.W. 1 and P.W. 2. I am also convinced that the appellant took the animals to Jefa as witnessed by P.W. 6 and P.W.8. I am not satisfied that Jefa would have framed up the appellant because of the debt he had with him. In sum, I am convinced that the appellant was in possession of the stolen calves before parting

possession to Jefa. I am satisfied that the appellant took possession of the two calves with no intention of returning them to the rightful owner. The appellant did not explain how he came to the possession of the animals. The evidence of P.W.4, P.W.6 and P.W.8 squarely proves that the appellant was in possession of the calves despite his spirited denials.

In the end I am satisfied that the prosecution proved its case against the appellant to the required standard of beyond reasonable doubt. I also find that the trial magistrate ably considered the appellant's defence and was entitled to reject it as a make up story to cover up his participation in the offence.

The appellant was sentenced to serve 5 years imprisonment with hard labour. Under Section 278 of the penal code, the penalty is a maximum of 14 years. I am convinced that the sentence is not harsh nor excessive. In the end the appeal is hereby dismissed in its entirety.

Dated and delivered at Mombasa this 29th day of July 2008.

J. K. SERGON

J U D G E

In open court in the presence of the appellant in person and in the presence of Mr. Monda Learned Senior State Counsel.