



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 197 of 2006

ISAAC WAIHAKA NJIPI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court

at Nanyuki in Criminal Case No. 2058 of 2005 dated 3rd April 2006 by R. N. Muriuki – SRM)

J U D G M E N T

The appellant **Isaac Waithaka Njipi** was charged with the offence of injuring an animal contrary to section 338 of the Penal Code in the Senior Resident Magistrate's Court at Nanyuki.

The particulars of the charge as stated in the charge sheet are that on 22/9/2005 at Akorino Farm in Laikipia District in the Rift Valley Province, the appellant unlawfully maimed four cows, animals capable of being stolen by hitting them with sticks and inflicting them with bodily injuries the property of **Joseph Kagwi Kihara**. The appellant denied the charges and his trial ensued in earnest.

The prosecution called a total of 3 witnesses. Its case was that on 22/8/2005 PW1 **Joseph Kagwi Kihara**, Complainant herein took his herd of 16 cows to the river and thereafter went to get fodder for them. It was then that he met with the appellant, his wife (DW1) and his two children. The appellant poignantly asked him if he had ears and soon they began to hit his cows with sticks. They managed to drive away thirteen of his cows. After being hit with sticks four of the cows were seriously injured. He testified that the following day police arrested him on the allegation by the appellant that he had attempted to assault him. Later he was released and he reported to the police injuries inflicted to his cows by the appellant. He contacted a veterinary officer who examined the four cows and made a report, following which the appellant was then arrested and charges.

PW2 **Paul Kariuki** a veterinary officer testified that on 24/8/2005 the complainant reported to him that his cows had been injured. He accompanied the complainant to his home and saw the four injured cows which he examined and found that they had sustained various injuries. He embarked on treating them with antibiotics and also dressed some that had cuts. PW2 then prepared a medical report that was tendered in evidence.

PW3 **P.C. Stephen Kinyua** of Mugumo Police Patrol Base testified that on 23/8/2005 the complainant's son reported that four of their cows were sick. PW3 then released the complainant from police custody whereupon he made the complaint that his cows had been injured by the appellant. PW3 then referred the complainant to the veterinary officer who examined the injured cows and prepared a medical report which handed over to him.

PW3 testified that he then arrested the appellant and charged him. He went on to testify that when the complainant's cows were injured on 22/8/2005 the complainant had not been arrested.

Put on his defence the appellant elected to make unsworn statutory statement and called one witness, his wife (DW!). The appellant stated that he did not injure the complainant's cows as charged. The appellant's sole witness DW1 **Leah Wacheke** testified that on 22/9/2005, the complainant took his cows to graze in a parcel of land that she and the appellant were custodians. That the appellant told the complainant to move his cows from the shamba but the complainant declined although he had earlier on cautioned him against grazing in that shamba. It was then the appellant and the witness forcibly drove away the complainant's cows from the shamba. It was her testimony however that the appellant did not injure the complainant's cows as he had no weapon.

Having considered all the evidence adduced by the prosecution witnesses and the defence of the appellant, the learned magistrate found for the prosecution, convicted the appellant and sentenced him to a fine of Kshs.20,000/= in default 9 months imprisonment. That conviction and sentence triggered this appeal. Through **Messrs Mwangi Kariuki** and company Advocates, the appellant faults his conviction on the following grounds that:-

- 1. The learned Senior Resident Magistrate erred in failing to direct her mind to the issue of the approximate age of injuries alleged to have been inflicted on the cows the subject of the charge.**
- 2. The learned Senior Resident Magistrate erred in failing to consider the circumstances under which the report of the commission of the offence was made and particularly that he complainant despite having an early opportunity to do so did not make the report at the earliest opportunity.**
- 3. The learned Senior Resident Magistrate erred in failing to direct her mind to the fact that the scientific examination of the cows was made inordinately long after the alleged injuries.**
- 4. The learned Senior Resident Magistrate erred in failing to consider that the police did not after the alleged crime was reported take steps to preserve the evidence and especially the exhibit which formed a cardinal part of the prosecution case.**
- 5. The learned Senior Resident Magistrate erred in failing to consider that there was no investigation or poor investigations were carried out in the case.**
- 6. The learned Senior Resident Magistrate erred in failing to take into account the contradiction between the evidence of PW1 and PW2 with regard to the time of the examination of the cows.**
- 7. The learned Senior Resident Magistrate erred in arriving at the conclusion that the complainant was telling the truth and in disbelieving the evidence of the appellant.**

At the hearing of the appeal, **Mr. Kariuki**, learned counsel for the appellant submitted in support of the appeal that the scientific evidence of PW2 did not say when the injuries to the cows were inflicted. That the complainant was on 22nd August 2006 in the hands of the police having been arrested on the complaint by the appellant over illegal grazing. The complainant did not bother to report the incident to the police at the earliest opportunity. To counsel this was evidence of fabrication of the case against the appellant. The complainant in his testimony stated that he went to see DW2 on 24th September 2005. That the time lapse raises doubt as to credibility of that report. That the cows were examined on 24th September 2005 a month after the alleged offence. The delay according to counsel for the appellant is inordinate. Counsel further submitted that after the report was made PW3 did not bother to see the injured animals to ascertain the credibility of the report. He left the investigations to the complainant by asking him to see a veterinary officer to look at the cows consequently there was lack of impartiality in the investigations.

In response, **Ms Ngalyuka**, learned state counsel in opposing the appeal submitted that there was no delay on the part of the complainant in filing the complaint. The evidence of PW3 indicates that on

23rd August 2005 the complainant was in police custody over another complaint by the appellant. That the difference in dates as to when the cows were examined was a typographical error. As to the delay in charging the appellant, it is not fatal as there is no limitation as to when a person can be charged with a criminal offence. Finally counsel submitted that the appellant's defence was considered and found wanting. The appellant's conviction was thus safe.

As a first appellate court I am required by law to subject the evidence tendered during the trial to fresh and exhaustive examination so as to reach my independent decision as to the guilt or otherwise of the appellant. In doing so however I should not lose sight of the comparative advantage the trial court enjoyed in hearing and observing the witnesses as they testified. (See **Okeno v/s Republic (1972) E.A. 32.**

It would appear that the appellant and the complainant are neighbours. However their relationship is not something to write home about. It is obvious that their relationship is strained. The appellant and his wife were custodians of a shamba bequeathed to them by another neighbour. It would appear that on the material day, the complainant was grazing his cows in the said shamba. The appellant, his wife and two children were not amused. They ordered the complainant to move his cows from the shamba and when the complainant hesitated, the trio took the matter into their hands and forcibly drove the cows from the shamba by hitting them with sticks. In the process four of the cows were injured. I do not believe for a moment the evidence of the appellant and his wife that they merely drove the cows from the shamba with their bare hands. It is unbelievable and indeed incredible that four people can drive a herd of 13 cows from where they had been grazing using their bare hands. From the recorded evidence, it is apparent that the appellant was in a charged mood spoiling for a fight with the complainant. How else can one explain the utterances made by the appellant upon confronting the complainant. He is reported to have uttered words to the effect whether the complainant had ears. The record shows that this is not the first time that the appellant had confronted the complainant over the complainant grazing his cows in the shamba.

It is not disputed therefore that on the material day both the appellant and complainant met. Whereas the complainant states that that he was grazing his cows when the appellant forcibly drove them away from the shamba by hitting them with sticks, the appellant on the other hand concedes that he drove away the cows but without injuring them. There is unchallenged testimony of the Veterinary Doctor. He is reported to have examined the injured cows on 24th August 2005 and not 24th September 2006 as submitted by counsel for the appellant. Clearly the difference in dates as to when the cows were examined is a typographical error as correctly submitted by the learned state counsel. It could not have been in September 2006 when from the record the offence was committed on 22nd September 2005 and the appellant was arraigned in court on 20th September 2005 when the prosecution was already in possession of the medical report. Indeed the veterinary health certificate itself is even dated 24th August 2005. This was barely two days after the attack on the animals. It was the testimony of the veterinary officer that the 4 cows had bruises on several parts of the body that were swollen. He opined that the bruising and subsequent swelling could have been occasioned by whipping the cows with a stick. It was the testimony of the complainant that when driving away the cows, the appellant, his wife and two children were armed with sticks. There was no other evidence tendered that would remotely suggest that the injuries sustained by the four cows could have been caused by anything else other than being whipped with sticks. The testimony of PW2 would seem to corroborate the evidence of the complainant as to how the injuries on the 4 cows were inflicted. They were caused when the cows were whipped by sticks as they were being driven from the shamba by the appellant, his wife and children. At least the complainant was a witness to all these.

The offence was committed on 22nd August, 2005. However the complainant was arrested on 23rd August 2005. Contrary to the submission of the learned counsel for the appellant that the complainant was in police custody on 22nd August 2005 over a complaint by the appellant over illegal grazing. I do understand the appellant to be saying that since the complainant was in police custody, the offence was not committed and therefore the whole case is a frame up. This cannot be possibly correct going by the evidence of the complainant himself, the veterinary Doctor and the investigating officer. They all attest to one thing; that the offence was committed on 22nd August 2005 by which time, the complainant had

not been taken into custody by the police. There is absolutely no merit at all in the submission that the complainant did not bother to report at the earliest opportunity regarding the incident. To counsel for the appellant, the complainant made the report much later on 18th September 2005. Nothing can be further from the truth. The complainant in his testimony stated that he went to see a veterinary officer on 24th August 2005. This was soon after he had made a report to PW3, a police officer, regarding the incident and who advised him to seek out the services of a veterinary doctor. The cows were thus not examined on 24th September 2006 as submitted by counsel for the appellant. The delay in examining the cows was a mere two days which cannot be described as inordinate. The circumstances that led to the cows not being examined immediately can be attributed to the appellant. He is the one who caused the appellant to be arrested on flimsy grounds and locked up for 2 days. The appellant cannot be allowed to benefit and or take advantage of his own mischief.

Much as the appellant was unhappy that the complainant had grazed his cows in the shamba under his care and control despite his earlier warning it was not reason enough to inflict on the cows the injuries aforesaid. He took the law into his hands and he must suffer the consequences. Nothing stopped him from taking up the matter with the provincial administration and or the police. The appellant appears to have learned the folly of his actions and decided to report the incident to the police. But this was after he injured the cows. He caused the complainant to be arrested over alleged illegal grazing. This is what he should have done initially instead of forcibly and violently ejecting the cows from the shamba by hitting them with sticks with the consequence that they sustained serious injuries.

The end result of this appeal is that it lacks merit. Accordingly it is dismissed.

Dated and delivered at Nyeri this 22nd day of September 2008

M. S. A. MAKHANDIA

JUDGE