REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 64 of 2006

[From the original conviction and sentence in Criminal Case No.1 of 2005 Chief Magistrate's Court Nakuru – H.M. Nyaga, SRM]

DERRICK KORIR CHUMA …….....…….1ST APPELLANT

FRANCIS KIPCHUMBA CHEBII ……..…… 2ND APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

JUDGMENT

The 1st and 2nd appellants were charged with the offence of stealing stock contrary to section 278 of the Penal Code.

The particulars of the charge stated that on the night of 4th and 5th day of December, 2004 at Miruari farm in Nakuru District of the Rift Valley Province, jointly with others not before the court stole 2 freshian cows and 1 freshian heifer valued at kshs.200,000/- the property of Jimmy Mathenge.

The 2nd appellant faced an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars of the charge stated that the 2nd appellant on the 28th day of December, 2004 at Wei farm Nakuru District of the Rift Valley Province otherwise than in the course of stealing dishonestly received or retained one freshian heifer valued at kshs.20,000/- knowing or having reason to believe it to be stolen goods the property of Jimmy Mathenge.

The appellants pleaded guilty to the charges and after a full trial both the appellant were found guilty and sentenced to 7 years imprisonment for both counts.

Being aggrieved by the said conviction and sentence, the a appellants have appealed and in the petition of appeal they have challenged the judgment of the trial court for failing to give reasons for the conviction. Secondly, the judgment is faulted for shifting the burden of proof from the prosecution . The appellants are also dissatisfied with the judgment which disregarded their defence which if taken into consideration would have entitled the appellants to an acquittal. Finally the appellants contended that there was no evidence to support the charge of handling stolen goods and the application of the doctrine of recent possession could not have been applied in the circumstances.

During the hearing of this appeal counsel for the State Mr. Mugambi did not oppose the appeal in

respect of the 2nd appellant. He contended that the 2nd appellant was able to give an explanation of how he purchased the alleged cow by producing a written agreement between him and the 1st appellant. The learned State Counsel however supported the conviction of the 1st appellant on the grounds that there was sufficient evidence by PW1 and PW4 that it is the 1st appellant who sold the recovered cow to the 2nd appellant. Counsel also submitted that there was no defect in the way the proceedings were conducted by the trial court. The charge was read to the appellant who pleaded not guilty and there is no indication that he was not able to understand the language of the court as the records shows the proceedings were conducted in Kiswahili.

This being a first appeal, this court has a duty to re-evaluate and reconsider the entire evidence and judgment of the trial court and arrive at its own independent determination on whether to uphold the conviction. In doing so, this court has to bear in mind that it never saw or heard the witnesses as they testified before the trial court and give due consideration in that regard. (See the case of Njoroge V R 1987 LKR page 19). I therefore briefly set out the summary of the evidence before the trial court.

Jimmy Mathenge (PW1) received a call from the **supervisor Johnson Ndungu (PW4)** on 5th December, 2004 that three herds of cattle were missing. The report was made to the police and on 28th December, 2004 PW1 and PW4 got information that some cows were found at Mimai farm. PW1, PW4 in the company of CP William Ngunjiru(PW5) proceeded to Mimai farm where they found a cow grazing in the compound. PW1 told the court that he was able to identify his cattle by an injury on rear left leg. They produced the photograph of the cow as an exhibit. Although PW1 said that they used to attach tags of their herds of cattle, the tag had been removed. At the place where they found the cow, the wife of the 2nd appellant was at home and she informed the witnesses that her husband had purchased the animal from the 1st appellant somebody called Derrick. Within a short time the 2nd appellant appeared and confirmed that he had bought the animal from Derrick. The 1st appellant was also arrested and he admitted that he sold the animal to the 2nd appellant but he also claimed that he had bought it from a broker whom he did not name.

Put on their defence the 1st appellant gave unsworn statement of defence and claimed that he bought the cow from a broker after which he sold it to the 2nd appellant. The 2nd appellant similarly claimed that he bought the cow from the 1st appellant he had no knowledge that the cow had been stolen and he produced a copy of an agreement for the sale of the cow. The trial court found that the prosecution had proved its case and while applying the doctrine of recent possession, made the following observations:

"it is upon the accused to dispel the inference that they were not involved in the theft, or rather to rebut the presumption that they are the thieves, the attempt that they had made herein clearly falls short. The alleged agreement has been brought to court at the defence stage. It is in record that accused 2 had been asked for the same prior to the arrest. This agreement is not even signed. In my view this agreement was made recently and was then back dated to 12th December, 2004."

In consideration of the above observation I agree with counsel for the 2nd appellant that the trial magistrate tended to shift the burden of proof to the 2nd appellant by remarking that the agreement was produced at the defence stage when he didn't during cross-examination the records show that it was a constant issue that the 2nd appellant had purchased the animal. Since the State concedes to the appeal in respect of the 2nd appellant nothing needs to be said as the records clearly show that the conviction of the 2nd appellant was an error. The principles to be applied when dealing with the evidence of possession of stolen items, the Court of Appeal recently held in the case of ***Isaac Nganga Kahia Vs Republic C.A. Cr. Appeal No.272 of 2005 (Nyeri)*** unreported that:

"***It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant,***

and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another. I order to prove possession, there must be acceptable evidence of search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."

As regards the appeal in respect of the 1st appellant the 1st appellant was not charged with the offence of handling stolen goods and therefore the doctrine of recent possession cannot apply to him. However the 1st appellant challenged the conviction on the grounds that the evidence adduced by the prosecution witnesses proved to the required standard the charge of stock theft. Firstly, PW1 testified that their animals carried a tag for identification but in this case the tag had been removed and identified the animal because of an injury on the ears. This identification was challenged and rightly so as the witnesses did not give any unique features or produce any documents to prove ownership that the animal was theirs.

Counsel for the 1st appellant also challenged the proceedings which he contended were conducted contrary to Section 198 of CPC. When plea was taken there in no indication of whether there was interpretation to the language of the appellant. Evidence was given in Kiswahili and in the absence of any record showing that Kiswahili was the language of the 1st appellant, this court should find that the proceedings were not conducted in accordance to the provisions of Section 77(2)(b) of the Constitution. Counsel put forward the case by the **High Court in Bungoma where Sergon and Kariuki, JJ** in the case of ***Swahibu Simbauni Simiyu & Another V Republic Cr.Appeal No.243 of 2005*** held that failure to show the language of the court from the record it is not possible to know whether the appellants spoke English or Kiswahili and allowed the appeal and set aside the judgment. Looking at the proceeding before the trial court, there is no indication whether there was interpretation when the plea was taken. It is clear evidence was given both in Kiswahili and English and the appellants also testified during the defence hearing but there is no indication what languages they used. The appellants also did not indicate that they had any problem in following the proceedings or that they needed the services of an interpreter. They pleaded not guilty, they gave their defence which clearly shows that they followed the proceedings and the fact that the record does not indicate the language of the court did not occasion any miscarriage of justice.

I would not have allowed this appeal solely on the above ground. I am however, not satisfied with the evidence by the complainant regarding the identification of the stolen animal although photographs were produced which were taken when the animal was recovered, the same photographs were not matched with similar photographs taken before the animals were stolen to prove that they are the same animals that belonged to PW1. The complainant also did not describe and give distinctive features of the animals. The tag which was meant for identification were not found on the animal which was recovered . I find the conviction of the 1st appellant unsafe and I accordingly allow the appeal. The upshot is that the appeal in respect of both the 1st and 2nd appellant is allowed, the conviction and sentence is quashed and unless otherwise lawfully held they are to be set at liberty forthwith.

Judgment delivered on the 10th day of May, 2007.

M. KOOME

JUDGE