



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 409 of 2005

JOSEPH GITUTUMA NJOROGE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From Original Conviction and Sentence in Criminal Case 522 of 2005 of the Senior

Resident Magistrate's Court at Githunguri – Mrs. Lucy Mutai (SRM))

JUDGMENT

The appellant JOSEPH GITUTUMA NJOROGE was charged before the subordinate court with one count of stealing stock contrary to section 278 of the Penal Code. In the alternative he was charged with the offence of handling stolen property contrary to section 322(1) of the Penal Code.

After a full trial, he was found guilty of the alternative count of handling stolen goods, convicted and sentenced to serve 4½ years imprisonment. Being dissatisfied with the decision of the Learned Trial Magistrate he has appealed to this court against both conviction and sentence, on the following grounds that –

- 1. (He) pleaded not guilty to the charge of handling stolen property contrary to section 322(1) of the Penal Code.**
- 2. The conviction was against the weight of the evidence adduced by the prosecution to support the charge.**
- 3. The evidence given by the prosecution witnesses was contradictory, inconsistent and not corroborated and could not therefore be a basis for conviction.**
- 4. There was no sufficient proof that the alleged stolen item, a heifer, belonged to the complainant and there was no likelihood of mistake or error in its identification as it lacked an exclusive mark for its identification.**
- 5. The Learned Trial Magistrate did not take into account his defence even in the absence of concrete prosecution evidence to dissuade her otherwise.**
- 6. The sentence imposed against him was harsh and manifestly excessive particularly when the same did not take into account the fact that he had no previous conviction and that he was the**

family's sole breadwinner with school going children to support.

At the hearing of the appeal the appellant submitted that he did not know that the cow that he had bought had problems. That he merely discovered later that the cow had problems, when he had already lost his money. He asked for forgiveness.

Learned State Counsel, Mrs. Gakobo, opposed the appeal. It was counsel's contention that there was sufficient evidence to prove that the appellant had received the cow knowing that it was stolen or illegally obtained. It was counsel's contention that the evidence of PW1, the complainant, established that he left the cow in the boma and it was later found with the appellant. The cow was spotted by PW2, a vigilante, and was positively identified by PW1. When the cow was found, it was covered with sacks, which was evidence of concealment. The cow had a growth on its ear, which was an identification mark. PW6 gave evidence that the cow was left at her place at night, which evidence was not challenged. Though the appellant stated in his defence that the cow was sold to him by PW3, the said PW3 denied selling the cow to the appellant. The evidence of PW3 was not controverted. It was counsel's contention that the learned trial magistrate was justified in disbelieving the defence. There was evidence that the cow was moved at night which showed that it was not obtained lawfully.

On sentence, counsel argued that the offence carried a maximum sentence of 14 years imprisonment. The sentence of 4½ years imprisonment was lawful and was neither harsh nor excessive.

This being a first appeal, I am duty bound to evaluate all the evidence on record and come to my own conclusions and inferences, of course taking into account that I did not see the witnesses testify to determine their demeanor, and giving allowance for the same – see **OKENO – vs – REPUBLIC [1972] EA 32**.

The summary of the evidence is as follows. PW1 FRANCIS NJOROGE, a farmer at Kiambaa left his freshian cow in the boma at 9.00 p.m. on 9.3.2005 and went to sleep. The cow was valued at Kshs.30,000/= . Next morning which was 10.3.2005 he found his cow missing from the boma. He reported to the police and informed neighbours. On the 12th March 2005 in the evening he heard that a cow had been traced at Gathanji. He sent his two daughters the next day and they, with the assistance of vigilantes and Aps, recovered the cow. It was his evidence that the cow was expecting and had an identifying mark on the left ear.

Meanwhile on 9.3.2005 at 11.30 p.m. PW3 GEDEON NJOROGE NGANGA was in the company of a vigilante group patrolling, when they met the appellant dragging a cow. PW3 was together with PW5 PETER NJOROGE MUTHAMA. They stopped the appellant and asked him why he was dragging the cow at that time of the night. The appellant told them that he was from his sister's place at Limuru but that the cow was giving him problems. They knew the appellant before and told him to keep the cow with someone until the next day. The appellant kept the cow at the home of someone called WANGUI (PW6) till the next morning, before he came and took it.

On 13.5.2005, a woman asked PW3 whether the vigilante had seen a cow. They then went to the home of WANGUI (PW6) and were directed to the appellants house. The lady who had asked for a lost cow was PW4 RUTH WAMBUI NJOROGE. They went together to the house of the appellant. They in the absence of the appellant, saw a cow which PW4 said was not their cow. As they were about to get out of the homestead, they saw a place which was covered with sacks. When they went there, they found the subject cow in the case herein hidden in the sacks coverings. PW4 identified the cow as belonging to her father (PW1).

The appellant was arrested by PW2 AP Cpl. ANTONY KIHARA together with an AP Inspector. They questioned the appellant who said that he had bought the cow for Kshs.7,000/= but refused to identify the seller of the cow. They took the cow as an exhibit. The appellant was later charged in court.

In his defence the appellant gave unsworn testimony. It was his defence that he bought the cow from PW3, who was well known to him. The sale was a verbal transaction which was not reduced to writing.

He denied committing the offence.

Faced with this evidence, the learned trial Magistrate found that the prosecution had not proved the main count, but had proved the alternative charge of handling stolen property beyond any reasonable doubt.

The first complaint of the appellant is that he was convicted against the weight of the evidence to support the charge. I have reviewed the evidence on record. There is the evidence of PW1 and PW4 that a cow of PW1 went missing on the night of 9.3.2005. The appellant was found dragging a cow by PW3 and PW5 on the same night. A cow was found in his homestead on 13.3.2005 hidden behind sacks. The appellant contended that he had bought the cow. He did not deny possession of the cow on the night of 9th March 2005, nor its possession on 13.3.12005 when the cow was found in his homestead. He in fact told witnesses and even stated in court that he bought the cow. The appellant was convicted of dishonestly receiving or retaining the cow. The prosecution evidence of the theft of the cow occurred on the night of 9.3.2005, and that the appellant was found dragging a cow at 11.30 p.m. the same is not controverted. The cow was later found in the home of the appellant, which again is not controverted. The defence of the appellant that he bought the cow for Kshs.7,000/= which he initially did not disclose to the police and other witnesses shows that he knew that he did not obtain it lawfully. The fact that the cow was found in his homestead hidden behind sacks also, in my view, proves the dishonesty of the appellant in receiving and retaining the cow. He must have reason to believe that it was stolen property. I concur with the learned trial magistrate that the evidence on record proved the offence charged as against the appellant beyond any reasonable doubt. That ground of appeal is dismissed.

The second substantive ground of appeal is that there were contradictions in the prosecution case and that there was also no corroboration. Again, this ground of appeal cannot succeed. My perusal of the evidence does not show any contradictions in the prosecution case. Additionally the evidence of the prosecution case is consistent, cogent and corroborative. The evidence of PW1, PW3, PW4 and PW5 is quite consistent and corroborative of each other. I therefore dismiss this ground of appeal.

The third ground of appeal of the appellant is that the cow was not positively identified as belonging to PW1. In my view, the identification of the cow by PW1 and PW4 was positive. They knew the cow with a mark on the left ear. That was a special identifying mark, which was not controverted in evidence by the defence. I therefore dismiss that ground of appeal.

The last ground is on sentence. The appellant claims that the sentence is harsh and excessive. Sentencing is essentially the discretion of the sentencing court. An appellate court will be slow to interfere with the exercise of that discretion unless it is shown that the sentencing court took into account an irrelevant factor or that it failed to take into account a relevant factor, or that it applied a wrong principle or short of these the sentence is so harsh and excessive that an error of principle must be inferred – see **SHADRACK KIPROTICH KOGO – vs – REPUBLIC Criminal Appeal No. 253 of 2003 Eldoret** – (unreported).

The maximum sentence for the offence was 14 years imprisonment. The learned trial magistrate took into account that the appellant was a first offender and also that the cow was recovered, before sentencing the appellant to 4½ years imprisonment. I find no error committed by the learned trial magistrate in exercise of her discretion in sentencing. Therefore I dismiss the ground of appeal or the sentence.

Consequently, and for the above reasons, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the learned trial magistrate.

Dated and Delivered at Nairobi this 25th day of June 2007.

George Dulu

Judge

In the presence of –

Appellant

Mrs. Gakobo for State - absent

Eric – Court Clerk