

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 247 of 2006

(From original conviction and sentence of the Resident Magistrate's Court at Maralal in Criminal Case No. 224 of 2005 – S, Mbungi [R.M.]

JAINO LEMPISIRION.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Jaino Lempisirion was charged with the offence of Stealing stock contrary to Section 278 of the Penal Code. The particulars of the offence were that on the 25th December 2005 at Sirata area in Samburu District, the appellant, jointly with another, stole one bull valued at Ksh.30,000/=, the property of Likayanti Lenaituksho. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve seven years imprisonment. The appellant was aggrieved by his conviction and sentence, and has appealed to this court.

In his petition of appeal, the appellant faulted the trial magistrate for finding him guilty in the absence of any evidence that proved his guilt to the required standard of proof beyond reasonable doubt. He was aggrieved that the trial magistrate had relied on inconsistent and uncorroborated evidence to convict him of the offence charged. He was finally aggrieved that the trial magistrate had failed to consider his defence before convicting him. At the hearing of the appeal, the appellant submitted that he was innocent and had been arrested while he was going to the market to buy sugar. He stated that the person who stole the animal was one Lokishil, his co-accused in the lower court who was also convicted. He urged this court to re-evaluate the evidence and reach an appropriate determination finding him not guilty. Mr. Mugambi for the State submitted that the bull, the subject of the criminal case, was recovered in the possession of the appellant and his accomplice, a day after it was stolen from the complainant. He submitted that the bull was recovered in the possession of the appellant while he was at the market intending to sell it. He maintained that the evidence adduced by the prosecution witnesses was overwhelming and proved the guilt of the appellant to the required standard of proof beyond reasonable doubt. He submitted that the complainant's testimony was corroborated by two witnesses who testified before the trial court. Mr. Mugambi urged this court to dismiss the appeal and uphold the sentence of the appellant.

This being a first appeal, this court is mandated to re-evaluate and re-consider the evidence adduced in the trial before the magistrate's court so as to reach its own independent determination whether or not to uphold the conviction. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any finding as regard the demeanour of witnesses (See **Okeno -vs- Republic [1972] E.A. 32**). The issue for determination by this court is whether the prosecution proved, to the required standard of proof beyond reasonable doubt, that it was the appellant who stole the complainant's bull. I have considered the submissions made before me. I have also re-evaluated the evidence adduced by the witnesses in the trial court.

In the present case, the prosecution established that the complainant's bull was stolen on the

25th December 2005 at Sirata area of Samburu District. The said bull was recovered on the 26th December 2005 at Maralal open air livestock market. The said bull was recovered in possession of the appellant and his accomplice. Although the appellant denied that he had stolen the said bull, the doctrine of recent possession applies in his case. The appellant was found in possession of the stolen bull so soon after the same was stolen from the complainant. The appellant was found in possession of the said bull a day after the same had been stolen from the complainant. The appellant did not give an acceptable explanation of how he came to be in possession of the said bull. (See *Malingi vs Republic [1989]KLR 523*). In his defence, the appellant denied that he had stolen the said bull. He did not give an explanation for being found in possession of the said bull. The only inference that this court can make, like the trial court, is that the appellant stole the said bull from the complainant. I find no merit in the appellant's appeal against conviction. His appeal against conviction is dismissed.

On sentence, the appellant was sentenced to serve seven years imprisonment. Taking into consideration the value of the stolen livestock, this court is of the view that the said sentence was excessive in the circumstances. The appellant was arrested on the 26th December 2005 and convicted on the 4th April 2005. The appellant has been in lawful custody for nearly two years. It is the view of this court that the appellant, being a first offender, has been sufficiently punished. The period which the appellant has been in lawful custody has taught him a lesson that crime does not pay. The sentence imposed by the trial magistrate is therefore set aside and substituted by a sentence of this court commuting the sentence of the appellant to the period already served.

The appellant is ordered set at liberty and released from prison unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 21st day of November 2007

L. KIMARU

JUDGE