



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 9 OF 2005

MOHAMED MUTEKE BAKARIAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

Mohamed Muteke Bakari, the appellant herein and three others namely Alfani Deche Piri, Jumaa Njemo and Ali Charo were charged with the offence of stock stealing contrary to Section 278 of the Penal Code. They also faced an alternative count of handling stolen goods contrary to Section 322(2) of the Penal code. Jumaa Njemo and Ali Charo pleaded guilty to the main count and were convicted and each sentenced to serve 10 years imprisonment. Alfani Deche Piri and the appellant underwent the full trial. Alfani Deche Piri at the end was acquitted of the offence under Section 215 of the Criminal Procedure code. The appellant was however convicted on the main charge and sentenced to serve 10 years imprisonment with hard labour. Being aggrieved he now appeals to this court.

The prosecution's case against the appellant before the trial court is that the appellant and the three aforementioned people stole three bulls from the homestead of Michael Mutuku (P.W. 1), the complainant, on the night of the 23rd day of June 2004. In the alternative count it was the prosecution's case that if they did not steal, then they dishonestly received or retained them as they were found in possession of the two bulls on 24th June 2004.

Michael Mutuku (P.W. 1) found out in the morning of 24/6/2004 that 3 of his bulls were missing from his herd of thirty. He also discovered that one of his employees Jumaa Njemo Chuphi, the 3rd accused person had left his homestead with all his belongings. P.W.1 set to search for the animals and eventually found the four accused persons driving away 2 of his bulls which he easily identified them. The bulls were photographed and later released to P.W. 1. The photographs were later on produced in court as evidence after being identified by P.W. 1.

On his part, the appellant gave an unsworn statement in his defence. He claimed he was a businessman at Jakaba and that on 22nd June 2004 he left for Kongowea Market in Mombasa where he brought 60 gunny bags. He said he proceeded to sell the bags in Tezoroka in Kilifi where he spent the night in a friend's home until 23rd June when he left to purchase coconuts. He further claimed that he was not successful to get coconuts at Dzitsoni but was lucky to get some from a lady at Mwarakaya whom he sold 20 gunny bags to her. He claimed that he left Mwarakaya and on the way he met a big crowd who upon seeing

started to shout that he was one of the thieves because he had a white cap. He was then stopped, searched and taken to be joined to a group of three people who were tied together on suspicion of being stock thieves. He vehemently denied having committed the offence.

The appellant has put forward four (4) grounds of appeal in his petition. These grounds may be summarized to three namely:-

First, that the trial magistrate failed to find that P.W. 2 did not identify him as one of those persons who was seen driving the animals on the night of 23.6.2004.

Secondly, that the trial magistrate erred when he failed to appreciate the fact that there was no nexus between him and the stolen bulls.

Thirdly, that the trial magistrate erred when he failed to consider the appellant's defence which created doubt on the prosecution's case.

Miss Mwaniki the learned Senior State Counsel opposed the appeal for various reasons. She was of the view that the stolen animals were properly identified by the complainant. She argued that the appellant was arrested while he was under the interrogation of an administration police officer who had stopped him. The respondent further pointed out that the appellant's defence was considered and rejected by the trial court.

As a first appellate court in this appeal this court is bound by law to reconsider and re evaluate the evidence tendered before the trial court and come up with its own conclusion and bearing in mind that it did not have the benefit of observing the demeanour of the witnesses. The prosecution tendered the evidence of four witnesses before the trial court. P.W. 1, Michael Mutuku, the complainant herein, told the trial court that when he found his 3 bulls missing he made inquiries from people from the neighbourhood. He was told by P.W. 2, Japhet Mumo, that he saw 3 people drive away three cows along a route next to his farm at around 1.00 a.m. on 23rd day of June 2004.

P.W. 2 accompanied P.W. 1 to follow the hoof marks using P.W.1's Motor vehicle registration No. KAB 159x. At Banda la Salama, P.W. 1 and P.W. 2 found the appellant and three other accomplices being interrogated by members of the public and administration police officers over the ownership of two bulls they were driving. P.W. 1 managed to identify the two bulls to be his. P.W. 1 also identified Ali Charo and the appellant to be his neighbours. He identified Jumaa Chuphi as his employee who had left his homestead at the time when his bulls disappeared. The bulls were photographed and later released to the complainant (P.W. 1). P.W. 1 identified the photographs before the same were produced in evidence. P.W. 2 also identified the photographs in respect of the stolen bulls.

An administration officer attached to **Chonyi D.O.'s office A.P.C. Vincent Bosoti (P.W.3) told the trial court that on 24.6.2004 at 10.00 A.m. with another officer followed and caught up with four people driving a way 2 bulls at Kolowa. He said he interrogated them for a while and when they did not given him satisfactory answer he took them to Chonyi D.O.'s office and on the way he met P.W. 1 who identified the 2 bulls to be his and the appellant to be his neighbour. P.W.3 said he saw the appellant as among the four people who drove away the 2 bulls.**

P.W. 4, PC David Gejara said he received two bulls from Chonyi D.O.'s office at Mariakani Police Station at 8.00 p.m. on 26.2.2004 He said he recorded statements from P.W. 1 before the bulls were photographed by scenes of crime officers from Mombasa before releasing them to P.W. 1. He identified the photographs. He also went to Kilifi to collect the four suspects.

Let me now deal with the first two grounds of appeal together. It is the submission of the appellant that he was not identified by P.W. 2 at the night of 23/6/2004 and that there was no nexus between him and the offence.

It is quite clear that the appellant is a person well known to P.W. 1 as they neighbours. P.W. 8 had

interrogated him at Kolowa and while heading back to Chonyi D.O.'s office he was identified by P.W. 1 as his neighbour. He was seen by P.W. 3 physically driving one of the bulls using a stick to beat it. He was among the four people who were stopped by P.W. 3 with the assistance of members of the public. The appellant's claim that he was not identified by P.W. 2 is correct. But that does not absolve him from the offence because he was found driving away the two bulls he had stolen from the homestead of P.W. 1. The appellant did not give an explanation as to how he came to gain possession of the two bulls. I am convinced that there was overwhelming circumstantial evidence that the appellant was involved in the commission of the offence and doctrine of recent possession comes into play. The property was stolen at about 1.00 a.m. in the morning of 23/24 June 2004 and the same were found in possession of the appellant and his accomplices at about 10.00 a.m. On 24/6/04 about 9 hours after the theft and not far away from the vicinity. I am convinced that the doctrine of recent possession supported an inference that the appellant was one of the people who stole the bulls from the complainant's homestead.

The third ground is that the appellant's defence was not considered by the trial magistrate. The record shows that the trial magistrate considered the appellant's defence and found no merit in it. In fact the learned Resident Magistrate termed it as dishonest, unreliable and a story cooked up to create a defence. In the end I am satisfied that the trial magistrate considered the appellant's defence and properly rejected it. The same was unbelievable. The trial magistrate in humble view properly applied the doctrine of recent possession in this case.

The appellant did not appeal against sentence. However, the learned Senior State counsel urged this court not to disturb the sentence because the same was neither harsh nor excessive. The law provides a maximum sentence of 14 years in such offences. The appellant is a first offender. He was sentenced to serve 10 years imprisonment with hard labour. I have already pointed out that the appellant did not appeal against sentence. However, Miss Mwaniki has argued this ground thus provoking this court to consider it. After a careful consideration, I think the sentence is harsh for a first offender. The law does not provide for hard labour though the trial magistrate added such a penalty in his order in the sentence.

In the end the appeal as against conviction is dismissed. However, I will allow the appeal on sentence by setting aside the sentence of 10 years imprisonment and the order on hard labour and substituting it with a sentence of 6 years imprisonment from the date of sentence.

Dated and delivered this 28th day of February 2006.

J.K. SERGON

J U D G E

In the presence of Mr. Ademba h/b for Miss Mwaniki

In the presence of the Appellant.