



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Criminal Appeal 55 of 2004

NJAGI NGUNGI NDEREVA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Criminal Appeal No. 55/2004 and 56/2004 have been consolidated having arisen from the same trial.

First appellant is Njagi Ngungi Ndereva and 2nd Appellant is Jonah Njeru Naaman. Both had filed separate petitions of appeal.

The first Appellant complains that the learned Trial Magistrate erred and acted irresponsible when he addressed the importance of elementary principles of criminal law and that he failed to consider that the conviction cannot stand because identifying witness had only a fleeting glance at the suspects. And that Trial Magistrate failed to consider that in identification the initial report to police should not be different from the evidence in court.

The second appellant complained that the Trial Magistrate failed to consider that his case arose from domestic problems and that Trial Magistrate failed to consider that the alleged conspiracy with first Appellant cannot stand since he was a stranger. And also that Trial Magistrate failed to consider that doctrine of recently recovered cow. And also that the Trial Magistrate failed to consider an element of mistaken identity featured in his case and that he was unlawfully framed. The charge for which appellants were facing was Stock Theft contrary to section 278 of the penal code in that on 14th/15th night of February 2004 at Karambari jointly stole one cow valued at Sh.15,000/- They were convicted and sentenced to serve 6 years imprisonment with hard labour.

On the morning of 15/2/2004 the complainant found that his cow missing. His son Denis accompanied by PW2 went out to trace the cow. They walked following the foot marks of the people who had stolen the cow. They reached on the way member of public told them that some two people were seen driving a cow to Mutuabare. They followed and found both accused persons with a cow. At that point Appellant No. 1 (accused 2) ran away into the bush on recognizing this witness. Appellant one and two was arrested with the cow. Assistant chief and the police arrived and arrested the Appellant No. 2. All went to Kiambere chief's camp. At about 7.00 p.m. Appellant one was brought to the chief's camp by member of public. From the evidence of PW2 and 3 when the Appellant No. 2 was caught with the cow he had no chance of escape until he was delivered to Kiritiri Police. There was there is not issued of error in identification. As for appellant number one, he was known to the witnesses as a neighbour and

was seen with the cow by PW4 who recognized him at night when Appellant one was brought to chief's camp by members of public. PW4 APC said he recognized him as the man he had earlier found with the cow and second Appellant. PW5 was the officer who received the appellant and rearrested the appellants. Both Appellants made unsworn statements Jonah Njeru Namaan said he was at Kiambere Market buying a cigarette when he saw first appellant Njagi Ngungi Ndereba take to his heels. People there called him a thief and they arrested him. He said he was arrested because he was a stranger in that area and he denied the offence. The first appellant also in his unsworn statement was sued on 15/2/2004 he was selling miraa at about 8 p.m. at Kirathe Market. Five people approached him and interrogated him about a cow which had been stolen. He told them that he knew nothing about the stolen cow. But nevertheless they arrested him escorted in to the chief's camp where he found second Appellant. He admitted that PW2 was from his village and was known to him. He then said he was framed as he was a stranger and that he knew nothing about the cow.

Considering the grounds of appeal by the first Appellant there is no evidence that he was seen stealing the cow from the home of the complainant. The evidence of people who were following the cow said this appellant glanced back and saw them and being known to them he ran away if it was true. They did not follow him. They are not the ones who arrested him. The people who arrested him did not give evidence in court as to circumstances of his arrest. He was not found with the cow.

Considering the evidence of 2nd Appellant he was found with the cow and there is no error in his identification. This appellant speaks of the charge sheet. The theft was at Kariambari sublocation Kagumori village, PW2 talked of Kagumori village. He was a neighbour of the complainant.

I have perused the record and it is my finding that the circumstances of identification of first Appellant was flawed. It leaves room for error in identification and therefore his arrest and identification was not proved. Regarding the second appellant he was arrested with the cow and he had no opportunity to escape. There was no error in his identification his unsworn statement does not in any way weaken the prosecution case.

The upshot is that the first Appellant's appeal is allowed. The prosecution did not prove his case beyond reasonable doubt and I quash the conviction and set aside sentence. Regarding the second Appellant I find this case against him proved beyond reasonable doubts. I do not see any reason to interfere. The first Appellant shall be set at liberty at once unless otherwise lawfully held.

The second Appellant's Appeal is dismissed.

Dated on 14th December, 2006.

J. N. KHAMINWA

JUDGE

14/12/2006

Khaminwa –Judge

Njue – Clerk

Mr. Kimathi for State

Appellant (2) present.

Judgment read in their presence.

J. N. KHAMINWA

JUDGE