



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**Criminal Appeal 87 of 2004**

**(Arising from Original Sirisia RM Cr. Case No.212 of 2004)**

**RONALD KUNANI ..... APPELLANT**

**VS**

**STATE ..... RESPONDENT**

**JUDGMENT**

The appellant herein, Ronald Kunani, was tried for the offence of stealing stock contrary to section 278 of the Penal Code. He also faced an alternative count of handling stolen property contrary to section 322 (2) of the Penal code. At the end of the trial, he was discharged of the alternative count but was convicted on the main charge and sentenced to serve seven (7) years imprisonment. Being dissatisfied he now appeals to this Court to upset the learned Resident Magistrate's decision.

On appeal the appellant listed four main grounds which may be summarized as follows: First, that the sentence was harsh and excessive. Second, that the evidence were not corroborated.

Thirdly, that the trial magistrate was actively biased during cross-examination.

Let me begin by giving a brief summary of the case that was before the trial Resident magistrate. The prosecution's case was supported by the evidence of six witnesses. The complainant in this appeal, Joseph Watila Matete (P.W.1) told the trial Resident magistrate that he securely tied his bull within his homestead before retiring to bed on the 26th day of April 2004. He said the bull was black in colour with a brown spot on its head. It also had a scar on its right leg due to an injury it sustained while ploughing. P.W.1 said he woke up at 2.00 a.m. to relieve himself only to find that his bull was missing. At 4.00 A.m he took a torch and followed the footmarks up to Cheptais trading centre where he later discovered that his bull had been slaughtered. He managed to recognize the hide and the head of his bull. Hussein Saddam Chebus (P.W.2) told the trial Resident Magistrate that he was approached by the appellant at 6.30 A.m. on 27.4.2004 to assist him to slaughter a cow. He introduced the appellant to one Hassan Kundu Wamoto (P.W3) to assist the appellant in that respect because P.W2 only did the pre-slaughter prayers while P.W3 did the actual slaughtering. P.W2 and P.W3 took the appellant's particulars from his Ford Kenya Membership card before agreeing to perform the job at a cost of Ksh.420/=. P.W3, slaughtered the bull at about 7.30 A.m on 27.4.2004. P.W2 and P.W3 took the meat to the butchery christened Olympic Butchery owned by one Festo Kimatia Kisieno (P.W4) as per the appellant's instructions. P.W4, confirmed that he was approached by the appellant on 26.4.2004 to lease his butchery. He agreed to rent to him the premises at Ksh.200/= per day. P.W.4 said he knew the appellant as a cobbler within Cheptais Trading Centre. He confirmed he saw the appellant bring meat to sell in his butchery on 27.4.2004.

P.W2, said he met John Watila Matete (P.W1), the complainant, inquiring about his lost bull. He said he took P.W1 to where the bull was slaughtered. He said he showed P.W1 the hide and where the appellant sold the bull's head. It would appear the appellant got wind of the inquiries made by P.W1. One A.P.C Joseph Masai (P.W.5), an administration police officer attached to Cheptais D.O's office said on 27.4.204, the appellant and one Celestine Omuse came to report to him that there was one person from Sirisia who was alleging that the duo had stolen his cow. P.W5 said that the appellant and his companion appeared suspicious. He said he took them to his sergeant who then placed them in custody awaiting investigations. P.W5 said he and his superior visited the slaughter house where they took possession of

the hide and reported the matter to the anti-stock theft where the appellant and his companion were re-arrested. P.C Titus Sirma (P.W.6) confirmed that he re-arrested the appellant and his companion when they were brought by P.W5 and another Administration Police Officer. P.W.6 took possession of the hide. P.W.6 recorded the witness statements. P.W1, said he found the appellant and another young man already in custody at the D.O's office. P.W.1 said he managed to identify that his bull was slaughtered from the colour of the hide which he recovered from Cheptais. It tallied with the description of his bull.

On his part, the appellant admitted that he actually slaughtered a cow and that he was selling meat at Cheptais trading centre. He said he had gone to purchase wrapping paper from another shop and that when he came back he found his butchery closed. He said he reported the matter to the D.O's office whereupon he was arrested on allegations of stock theft. In brief this was the case that was before the learned trial Resident magistrate.

After giving a brief summary of the case before the trial magistrate it is now time to consider the grounds of appeal. I will start with the ground that the learned trial Resident magistrate was biased during witness cross-examination. The learned principal state counsel did not address this court over this ground. I have perused the entire record. I do not understand the appellant's contention. I have been unable to trace where the trial magistrate intervened or interrupted during cross-examination. The entire record shows that the trial Resident Magistrate did not even ask a question. It is not alleged that the learned trial Resident magistrate did not record some of the proceedings. In the absence of proof of such allegations then the ground remains unsubstantiated and without a basis in law. It is dismissed for want of merit.

The second ground put forward by the appellant is that the evidence on record were not corroborated. The appellant did not pin point whose evidence needed corroboration amongst the six prosecution witnesses. The recorded evidence show that the evidence of the complainant (P.W1) were corroborated by the evidence of P.W2, P.W3, P.W5 and P.W6. The complainant was able to identify the lost bull from the peculiar marks attributable to the complainant's bull. The appellant did not claim in his evidence that he owned the animal he caused to be slaughtered. Without shifting the burden of proof on the appellant, it was incumbent upon him to show how he came to the possession of the meat and hide. In the absence of such an explanation, the doctrine of recent possession applied. I am satisfied that the trial magistrate came to the correct decision when he convicted the appellant. The evidence presented by the prosecution proved that the appellant indeed was the person who committed the offence and no one else. The prosecution proved its case beyond reasonable doubt. I see no merit on this ground. It is consequently dismissed.

The final ground argued by the appellant was that the sentence was harsh and excessive. The learned principal State counsel was of the view that the sentence was not harsh nor excessive. I have considered the submissions of the learned State Counsel and that of the appellant. The record shows that the trial learned Resident magistrate considered the appellant's mitigation and the fact that the offence the appellant committed was prevalent in the area. The trial magistrate however did not consider the fact that the appellant was a first offender and the fact that the complainant sold part of the meat which was discovered. In my view, these were relevant factors which should have been considered. The failure to consider such factors entitles me to interfere with the discretion on sentence. In the end, the appeal on conviction stands dismissed for lack of merit. However the appeal on sentence is allowed with the result that the sentence of 7 years is set aside and substituted with a sentence of 5 years with effect from the date of sentence.

**Dated and delivered this 28th day of October 2005.**

**J. K. SERGON**

**JUDGE**

**In the presence of Mr. Onderi for the State. NA for the appellant.**