



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT

MACHAKOS

APPELLATE SIDE

Criminal Appeal 245 of 2003

(From Original Conviction(s) and Sentence(s) in Criminal Case No 797 of 2002 of the Senior Resident Magistrate's Court at Kangundo N.N. Njagi SRM on 21/1/03)

SAMUEL MUASYA MULI APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant, Samuel Muasya Muli, was convicted by the Senior Resident Magistrate's Court, Kangundo in Criminal Case 797/02 for an offence of Stock theft contrary to Section 278 of the Penal Code. In the alternative he was charged with Handling stolen goods Contrary to section 322 (2) of the Penal Code but no finding was made on that charge. He appeals against both conviction and sentence. He was sentenced to 10 years imprisonment plus 10 strokes of the cane.

His Memorandum of Appeal contains 5 grounds of appeal which can be summarized as follows: that the trial magistrate relied on hearsay evidence; that his defence was not considered by the magistrate and the charge against him was therefore not proved beyond any doubt.

Briefly, the prosecution case was that on 21/12/02, PW1 and 2 Francis Musyoka and Christine Musyoka were at their home when accused was taken to them for employment.

They did not give accused any work but left for a party. They were waiting to discuss the terms of employment the next day. When at the party they learnt that the appellant had driven away their 8 heads of cattle and 8 goats. PW3, Moses Kivuva, heard PW2 scream and allege that her cattle were stolen, he helped trace the foot prints of the cattle and PW3 said he found the appellant driving the cattle away. He arrested and took appellant to police station. PW3 said that he found the appellant 21 Kilometres away from PW1 and 2's home.

In his sworn defence, the appellant testified that on 20/12/02, the complainant and his wife had asked him to go and graze their cattle. He was taking the cattle to the river.

PW3 stopped him and alleged that he had stolen. He denied having stolen the cattle.

The appellant reiterated his defence in his submissions.

The State Counsel, Mr O'Mirera, opposed the appeal on grounds that it is not disputed that the appellant was found driving away the complainants' cattle and the only issue is whether he was legally in possession of the animals or not. It was his submissions that the evidence of PW1 was corroborated by that of PW2 that they never employed the appellant and the defence was not plausible. It was further argued that the prosecution case was watertight.

As a first appellate court, I am required to review and reevaluate the evidence before the lower court. It is not in dispute that the appellant was found driving away the complainants' animals. The issue was therefore whether the appellant had authority to take the animals away from complainants' home to graze or to the river as he alleges.

Though the appellant gave sworn statement in his defence, PW1 and 2 are adamant that they never asked him to go graze the cattle or take them to the river. The appellant had been brought to them for employment and they were yet to discuss the terms. The evidence of PW3 does corroborate that of PW1 and 2 as he said that the appellant was arrested 21 kilometres away and could not have been going to the river to water the cattle. Appellant had no explanation for going so far from complainants' home. I do find the prosecution case convincing and watertight. The magistrate did carefully consider this evidence and also the defence of the appellant which he found not to be plausible. I reach the same finding and find the conviction to be safe.

The appellant was sentenced to 10 years imprisonment and 10 strokes. Corporal punishment has been done away with in the Criminal Amendment Act of 2003 and the appeal does succeed to that extent. On the prison sentence, I find that the appellant was found to be a first offender, the complainants' animals were recovered, appellant is a young man and in my view 10 years imprisonment is on the higher side. The court will reduce the sentence to 5 years imprisonment. The appellant will therefore serve a sentence of 5 years imprisonment. Right of Appeal 14 days.

R.V. WENDOH

JUDGE

Dated at Machakos this 17th day of August 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE