

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 120 OF 2003

(Webuye SRM 242 OF 2003 before L.N. Mutende)

ERICK WEKESA NATEMBEYA APPELLANT/APPLICANT

VS

REPUBLIC RESPONDENT

J U D G M E N T

This appeal is against the decision of L.N. Mutende, S.R.M. Webuye dated 19th August 2003 in which the learned magistrate convicted the appellant for the offence of stealing stock contrary to Section 278 of the Penal Code. The particulars of the offence is that on the nights of 13th and 14th day of March, 2003 at Kakimanyi village, Webuye location in Bungoma District of Western Province, jointly with another not before court stole one ox valued at Ksh.8,000/= the property of Jacinta Murundi Machasio. She then sentenced the appellant to two years imprisonment with hard labour thus this appeal.

The prosecution's case before the trial court was backed by the testimonies of four witnesses. Briefly one Jacinta Machasio, the complainant herein who testified as P.W.1, was woken up by her workers who informed her about her missing ox on the night of 13.3.2003. The ox is said to have white spots on its skin. She immediately reported the matter to both her area assistant chief and the chief. She made a report to Webuye Police Station on 14.3.2003. She later received a report from P.W.1, David Nyongesa that the appellant with one Harrison Wanyama and another Eric Wekesa Natembeya were seen on that night driving an ox with the assistance of moonlight. The appellant and his accomplices were people known to him. This witness even spoke to the appellant and his companions who informed him that they borrowed the ox from the complainant who was his neighbour. This information led to their arrest. The ox was not recovered by the time of the Judgment before the trial court.

When the appellant was placed on his defence he denied committing the offence. He narrated to the trial court how he received a report on 14.3.2003 from one Joyce Nanjala who told him that he and another were suspected to have stolen the ox. Being alarmed he made a report to his village elder and later to his area chief who referred him to the police where he was then arrested and arraigned before the trial court.

The appellant put forward six grounds of appeal. However when the appeal came up for hearing the appellant's advocate, H.P. Wamalwa argued all the grounds together. He contended that the trial magistrate concentrated on shooting holes on the defence case instead of considering the case in its totality. Mr. H.P. Wamalwa complained that the learned trial magistrate shifted the burden of proof to the defence. He further submitted that the evidence of P.W.1 the complainant herein were not corroborated. He further faulted the evidence of P.W.2 David Nyongesa, saying that there was no positive identification.

The learned senior state counsel opposed this appeal. He pointed out that there was positive identification by recognition of the appellant by P.W. 2 whose evidence corroborated the evidence of P.W.1 the complainant. He was of the view that the prosecution's evidence proved the offence to the standard of beyond reasonable doubt.

This is the first appellate court hence I am enjoined by law to reevaluate and critically assess the evidence before the trial court and arrive at my own conclusions. What is clear from the onset is that the

complainant's case heavily depend on the evidence of a single witness, P.W. 2, David Nyongesa. The subject matter of the offence is said to be an ox with white spots on its skin. This description was provided by the complainant. The same was corroborated by the evidence of P.W. 2, David Nyongesa who is a neighbour to the complainant. P.W. 2, told the trial court that he saw the appellant and his accomplices driving an ox with white spots with the assistance of moonlight. It was at around 11.00 p.m. at night. This witness even had a chance to talk to the appellant and his companions. They were people well known to P.W. 2. His evidence were unshaken even under intense cross-examination. The appellant told the trial court on cross examination by the prosecutor that he had no grudge or bad blood with the complainant. The appellant further confirmed that he had no grudge nor quarrel with P.W.2 David Nyongesa. With this piece of evidence therefore I am convinced that there was frame up of the appellant.

I have examined the sum total of the evidence on record and I find that the trial magistrate did not shift the burden of proof to the appellant. The evidence on record were properly appreciated and the trial magistrate correctly arrived at her decision. I also concur with her findings. The appellant and his accomplices were people well known to the main witness P.W.2, David Nyongesa, who had a chance to exchange pleasantries with them. There was no mistaken identity. The ox was owned by his neighbour hence it was properly identified. It is obvious that the trial court arrived at its decision on the basis of a single eye witness. This does not in anyway render a case weak. His evidence was sufficient.

In the end I find this appeal lacking in merit. It is dismissed in its entirety.

DATED AND DELIVERED THIS 30th DAY OF July 2004

J.K. SERGON

JUDGE