REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

H.C.CR. APPEAL NO. 188 OF 2004

ALI DUME ATHMAN …… APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(Being an appeal from Original Criminal Conviction and sentence in Criminal Case No.749 of 2003 of the Resident Magistrate's Court at Kaloleni – K. Bidali, RM)

Coram: Before Hon. Justice Mwera
Miss Mwaniki for the State
Mrs. Abuodha for the appellant
Court clerk – Sango

J U D G E M E N T

The appellant (accused 1) in the lower court was charged under S.278 Penal Code in that he with another jointly stole a bull worth Sh.8000/- the property of Lugo Kitonyi on 24-5-2003 at Jimba, Kilifi. After the trial both men were convicted and sentenced to serve 2 years imprisonment w.e.f. 29.7.04.

The appeal filed here had nine grounds which Mrs. Abuodha argued. She had earlier on sought bail pending appeal but the court considered it prudent to deal with the appeal itself once and for all.

The appeal grounds ranged from the interpretation of S.124 Evidence Act, wherein the court was told that it was fatal for the learned trial magistrate to rely on evidence of Kilonzo Lugo (PW.2) who was a minor without corroboration. That the appellant was convicted of theft when no linking evidence was led; that the appellant ought to have been given a fine instead of a prison term. That his evidence was not considered in the judgment before its rejection.

The learned State Counsel did find corroboration in the evidence of PW.1 (father of PW.2) and PW.3 (Cpl. Mwakio) basically in that the loss of the bull was discovered and reported by PW.2. That the learned trial magistrate may have misdirected himself to remark in the judgment that there was no corroborating evidence while it was in fact there. That the conviction was safe and the sentence of 2 years was well below the maximum of 14 years under S.278 Penal Code. And that the option of fine is not found thereunder.

Indeed the option of fine could only be in the learned trial magistrate's discretion but S.278 Penal Code does not create it.

Beginning with the ground on corroboration, as provided for under S.124 Evidence Act and what the learned trial magistrate stated in his judgment, it is not in doubt that Kilonzo (PW.2) was a minor. He however gave evidence on oath and he may have been credible. The learned trial magistrate said of him:

> *"PW.2 was a minor. His evidence is not corroborated in material respects by other independent witnesses. Section 124 of the Evidence Act (Cap.80) provides that the court may convict on the uncorroborated evidence of a minor if it is satisfied that the minor is speaking the truth. In this case the court had a chance to examine the demanour of the minor. He was very consistent in his evidence. I am satisfied that he was speaking the truth." (see original record)*

The learned trial magistrate had examined the minor and was satisfied under the Oaths & Statutory Declarations Act that he understood nature of the oath and the duty to say the truth and he could thus testify on oath. While the learned magistrate put the law correctly in the first part of his judgement reproduced above in that evidence of minors needs corroboration, he went astray in the second part when he said that he could still convict on that uncorroborated evidence so long as he was satisfied that the minor had said the truth.

S.124 of Cap 80 says:

> *"124. Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicat ing him."*

This court did not find corroborating evidence either in PW.1 or PW.3 to support that of PW.2 in material particulars that the appellant indeed stole the bull. Those two witnesses only received reports of the theft from PW.2 and PW.1. Therefore without that crucial corroboration of PW.2's evidence (a minor) and he was the key witness, conviction ought not have followed. It was unsafe to do so.

This court however adds that the learned trial magistrate did confuse the evidence of a minor in general criminal trials and what the proviso introduced by the amendment under Act No.5/03 brought in. That amendment specifically provides for a minor's evidence in case of a sexual offence. There a court may convict on a minor's uncorroborated evidence if it is satisfied by reasons to be recorded that the child was telling the truth. This appeal could as well be allowed on this ground same to add the ground of disregarded defence.

The relevant part of S.169 Criminal Procedure Code on the contents of judgment reads:

> *"169 (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court and shall contain the point or points for determi nation, the decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.*

In essence this means that to write a judgment a judicial officer needs to review and refer to all evidence adduced for the prosecution and in defence. That is what enables him to mark out points for determination followed by reasons for the decision. One of the points of determination in a criminal trial is whether a reasonable doubt has emerged whether from the evidence of the prosecution itself or it is raised by the defence. So if the defence has to be termed as not worth much, or not raising a reasonable doubt, the evidence in that defence ought to be examined and reasons given why it does not raise any reasonable doubt. The usual way is to look at the defence evidence vis a vis the prosecution case etc.

In the present case the learned trial magistrate did set up the defence case and after finding that PW.2 had said the truth (see above) concluded:

"The defence raised by the accused persons does not hold any water."

Except for declaring that PW.2 had been saying the truth there was no other reason to reject the defence yet the truth did not amount to PW.2 saying that he saw the appellant (and his co-accused) driving away the bull or that some evidence linked the appellant to the lost bull. In fact there was none. All that PW.2 said was that the appellant (and another) came where he was grazing. The told him that some of his goats were wandering off. He went to return them. On his return he noticed that one of the bulls was missing from his herd. It is not disputed that the appellant came to where PW.2 was grazing. They are neighbours but there is no link between the appellant and the lost bull. One could surmise that by being in the grazing field and PW.2 having gone off to return some straying goats then the appellant had an opportunity to steal the bull. But did he actually steal it? There is no evidence on this.

In sum this appeal is allowed. The conviction is quashed and the sentence set aside. The appellant to be set at liberty forthwith unless otherwise lawfully held.

And in the interests of justice his co-accused, Kahindi Karisa should be set at liberty forthwith on the basis of allowing this appeal.

Judgment accordingly.

Delivered on 27th September 2004.

J.W. MWERA

JUDGE