

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPEAL NO. 397 OF 2001

REMPEYEN PERIKEN OLE MURINYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From the conviction and sentence of Mr. M.M. Muya, SRM in Naivasha

Criminal Case No. 808 of 2000)

JUDGMENT

The appellant, Rempyen Periken Ole Murinya, was jointly charged with another with stealing stock contrary to section 278 of the Penal Code. He alone got convicted and was sentenced to four years imprisonment with hard labour and three strokes of the cane. He appeals against both the conviction and sentence.

The prosecution case was that on the night of 8th and 9th day of January 2001, the complainant owned several heads of cattle of which 10 of them went missing from his heard. He commenced investigations and also made a report to the police. Later, one of his bulls was recovered at Dagoretti. The complainant managed to identify it as his and upon inquiry it was established that the appellant and his co-accused in the lower court were the persons who sold the bull to PW2 at Dagoretti. In his evidence, PW2, Lentala Ole Lakuni confirmed that he bought the bull from the appellant who was acting as a broker for the first accused in the lower court. The appellant is said to have been the negotiator during the sale but after the agreement of sale was reached, it was the second accused in the lower court who received and kept the sale price. John Kinyanjui Njenga, PW3 in the lower court bought the bull from PW2 Lentala Ole Nakuni at Kshs.27,000/-. He did not know that the bull was a stolen bull belonging to the complainant. He kept it for a day until the 11.1.2000 when the Anti-Stock Theft Unit Officer confronted him. He took them to PW2 as the one who had sold the bull. Both, he and PW2 were arrested but when PW3 established that the bull was sold by the two accused, the police decided to charge them and PW2 and PW3 were treated as prosecution witnesses.

The appellant in his defence stated that on 9.1.2001 he went to Dagoretti market to sell his father's cattle. While there, one Sindy Ole Kipishan requested him to help him sell a black bull for him. He claimed that he was a cattle broker who sold such cattle and received some commission in return. In the sale of the black bull, he was paid 10,000/-, he claimed. He then went home but was arrested after a while and charged with stock theft. He also stated that when he brokered the sale deal aforementioned, he did not know that the black bull was a stolen property. He asserted that his experience as a broker is well known and recognized. He never asks questions or questions touching the background of any animal before he sells it for any person who seeks his brokerage help. He denied stealing the animal or being involved in the theft thereof. The appellant's defence statement was on oath and he called his father and a brother to give evidence on his behalf. Both the father and the other defence witness confirmed mainly, that the appellant was an experienced broker who acts as such broker in both the purchase and sale of animals.

The trial magistrate thought that it was not a coincidence that the complainant's cattle were stolen on 8th and 9th night of January 2001 for them to be recovered the next day in the hands of the appellant.

He believed that a brokerage agency needed longer time to operate in that the issue of acting as a broker or agent for PW2 required more time, not just meeting in the market place and starting to act as such broker on simple request. He believed that the fact that the appellant was seen with the stolen bull at the market and that he sold it, was enough to raise the presumption that the appellant was in recent possession of the stolen bull and that he knew that the bull was stolen. In participating to dispose of it, he argued, he was participating in theft. He discarded the appellant's defence that the appellant was a mere agent of the first accused in the lower court. He accordingly found him guilty of stock theft and convicted him accordingly under section 215 of Criminal Procedure Code.

I have carefully considered the evidence on record, as did the trial magistrate. I have also considered the judgment of the trial magistrate and the grounds upon which he convicted the appellant. I find no dispute in the fact that the appellant was seen selling the complainant's black bull to one John Kinyanjui Njenga on 10.1.2000. There is the evidence of PW2, Lentala Ole Lakuni who clearly testified that the appellant was the one who sold the black bull to him on behalf of the 2nd accused in the lower court. The appellant, PW2 testified, sold the bull as a mere broker on behalf of the 2nd accused who finally absconded and was not before the court when the trial magistrate delivered the judgment appealed from. The witness confirmed further that the owner of the bull was the said 2nd accused in the lower court, who also is the person who took and kept the purchase price. The appellant did not deny this. Infact his defence is almost in all fours with the prosecution evidence in the testimony of PW2. In my view, and I so hold, this court cannot ignore the said evidence of PW2, who as pointed out, is a prosecution witness. In view also, of the fact that the defence story was in full agreement with PW2's story, I have no option but to accept it. This means that the appellant was a mere broker who sold the black bull for the 2nd accused in the lower court and his story that he did not know that the bull was stolen is possibly, nay, truly credible. This gives him a full defence.

The trial magistrate thought at one stage, that the appellant was found with a recently stolen property. Even if this were to be taken to be so, nevertheless, the trial magistrate was under a legal obligation to give the appellant a fair opportunity to explain how he came into such possession. The trial court would look for such innocent explanation in all the evidence on record, particularly in the defence evidence. In the said statement, which ended up being a sworn statement, the appellant gave an explanation, which in my view was a clearly one of innocence. He stated that he did not steal the bull but found the 2nd accused at the market with it. Not knowing that it was a stolen property but being asked to sell it for a commission, he proceeded to do so and obtained his commission. In my view and I so hold, this was a possible and indeed, a credible explanation especially since it was supported by one of the prosecution witnesses. It is trite law that the burden of proof in recent possession cases is much less than proof beyond a reasonable doubt. It is usually on the balance of probability and therefore much lighter. The trial magistrate's treatment of the defence evidence does not show that he was conscious of this fact and he in my view, erred in thinking that the appellant had a greater burden than just giving an explanation which could be possibly true. On the above grounds, I find that this appeal needs to succeed.

The upshot is that the conviction for stock theft must and is hereby quashed. The sentence of 4 years imprisonment with hard labour and 3 strokes of a cane is hereby set aside. The appellant is hereby set at liberty forthwith unless lawfully detained in prison. It is so ordered.

Dated and delivered at Nairobi the 4th day of April 2003.

D.A. ONYANCHA

JUDGE.