



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
HIGH COURT CRIMINAL APPEAL NO. 98 OF 2001
(ORG. D.M'S KIGUMO CR. CASE NO. 1428/2000)

JOSEPH GITHINJI KIMANI APPLICANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant Joseph Githinji Kimani, being aggrieved and dissatisfied with the conviction and sentence imposed upon him by the District Magistrate Kigumo, Mr. P. Wangulu, on the 27th day of February, 2000 has preferred appeal to this court.

The charge was that of stealing stock contrary to section 278 of the Penal Code.

The particulars of the charge in count 1 is that Joseph Mbethe Kambara and Joseph Githinji Kimani on 13th June, 2001 at Gathima village in Maragua District of the Central Province jointly stole one cow valued at Sh.15,000/= the property of Waithira Thuo. In count 1 the particulars of the charge is that Joseph Mbethe Kambara and Joseph Githinji Kimani on 13th November, 2000 at Kariua village in Maragua District of the Central Province otherwise in the course of stealing dishonestly retained one cow knowing or having reason to believe it to be stolen property or unlawfully obtained.

By record of proceedings the appellant pleaded not guilty. At the hearing PW1 (Waithera Thuo) a farmer testified that on 12th November, 2000 at 6 p.m. he locked his cow in the cattle boma. On the night of 13th November, 2000 at 5 a.m. he woke up and on reaching the cattle boma noticed that his cow brownish in colour with white patches valued at Ksh.15,000/= was missing. He tendered in evidence a photograph of the cow which was received as MFI-I and later exhibit I in these proceedings. He reported the matter to Kigumo police station. At 4 p.m. the same day the cow had been recovered from the appellant and Joseph Mbethe Kambara (2nd accused). The appellant had written an agreement of sale of the cow which was marked as MFI-3 and later produced as exhibit 3 in these proceedings. PW2 (John Kimani), a hotel worker at Karega trading center, but son to PW1, went to Kariua direction where he obtained information as to the missing cow. They went towards Mutheru area, where at a river he and his entourage found the appellant and Mbethe (1st accused) red-handed flogging the cow with a new rope. It was the testimony of this witness that Mbethe (2nd accused) blamed the appellant for the theft. Mbethe testified that they had written agreement. On the way to the police station the appellant and Mbethe tricked the witness and took off leaving him and his companions with the cow. Later the appellant and Mbethe were arrested. The cow was produced in court as exhibit 1 by way of a photograph.

PW3 (Elijah Ngugi Mwangi) received information about the stolen cow. He followed the lead and caught up with appellant having the cow at a river and Mbethe then showed the search party, MFI-2 dated 12th November, 2000, which was an agreement of sale. On the way to the police station appellant and Mbethe tricked them and abandoned the cow.

PW4 (Paul Kamiti No. 42803) a police officer attached to Kigumo police station received the report of stock theft. He booked it in the OB. A little while later he received report of recovery. Later appellant and Mbethe were brought to the station where he re-arrested them and charged them with the offence.

At the close of the prosecutions case the learned trial magistrate made a finding that the prosecution had made out a prima-facie case and accordingly put the appellant and Mbethe (2nd accused) on their defence.

In his unsworn testimony the appellant testified that it is the complainant (PW1) that sent him to Mbethe for purposes of selling the subject cow. The complainant, according to the appellant, instructed him to document the sale. Particularly the buyer would make sure that the owner had an identity card. Since, his companion Kimani had no identity card, the appellant used his to facilitate the documentation. It was further testimony of the appellant that Mbethe promised to pay at Kariua. On reaching a river Mbethe left the party to look for money. He failed to get the money and went home.

Kimani and Ngugi went back. The appellant left this group and went back home after giving them the documents of sale to take to complainant (PW1). Later he was arrested and taken to Kigumo Police Station where he was charged with the offence. The learned trial magistrate at the close of the defence case delivered judgment after carefully analyzing the evidence on record.

He disbelieved the appellant and sentenced him to 7 years imprisonment with hard labour with 2 strokes of the cane. In addition thereto corporal punishment subject to medical fitness.

The appellant has now raised five (5) grounds of appeal attacking both conviction and sentence. The appellant did not attend the hearing but relied on his grounds of appeal. See section 354 of the Civil Procedure Code.

I have endeavoured to re-evaluate the evidence as best as I can, as I am bound to do on first appeal.

At this stage it is necessary to enquire into the sequence of events that led to the recovery of the cow.

It was day time when the recovery party set for Kariua in company of Elijah Ngugi. On enquiry they learnt that the appellant and Mbethe had been seen with a cow. On the way they met red-handed the appellant and Mbethe with the subject cow. Mbethe said the appellant had sold him the cow. An agreement was produced. It showed that sale had taken place between Mbethe and Danson Maina Kahugu. The two were arrested but on the way tricked their way into freedom. They left the searching party with the cow. Later the duo were arrested and charged.

Defence of Mbethe (1st accused) is that he was sold the cow by appellant for Sh.10,000/=.

Appellant's defence is that it is the complainant who sent him, and Kimani and Ngugi to look for a buyer for the cow. Consequently he sold the cow to Mbethe and the sale was properly documented. At the river Mbethe left the appellant. The appellant gave Kimani and Ngugi the agreement to take to the complainant since Mbethe had not paid the price.

Later on he was arrested and charged.

On the basis of the foregoing evidence it was incumbent upon the learned trial Magistrate to believe the prosecution or the defence having noted their demeanour.

The learned magistrate, who had the opportunity of assessing the demeanour of the witnesses believed the prosecution evidence. I share the same view. In those circumstances the conviction was proper as the evidence was water-tight: It was a case of being caught red-handed.

On sentence the learned trial magistrate took into consideration the seriousness of stock theft and

the fact that the appellant was a first offender. The sentence of 7 years with hard labour and 2 strokes cannot be said to be harsh and excessive in the circumstances.

In my view the charge was proved beyond reasonable doubt.

Accordingly I find no merit in the appeal which I dismiss in its entirety.

23 Jul 2003

DATED and DELIVERED at NYERI this day of, 2003.

N. R. O. OMBIJA

JUDGE