

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 464 OF 2002

(Being an appeal against Conviction and Sentence in Criminal Case No. 514 of 2002

by the District Magistrate's Court at Taveta – G.M. Gogwe)

MUTHIANI MULI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

The appellant was charged and convicted for the offence of stock theft contrary to Section 278 of the Penal Code. He was sentenced to serve 3 years imprisonment plus 4 strokes of the cane. He has preferred an appeal against the Conviction and Sentence on the grounds that the evidence was contradictory and based on hearsay. He also said the court failed to take into account his defence. The State Counsel did not support the conviction either. The evidence before the trial court was that PW1 who was related to the Appellant woke up on the morning of 18.8.02 to find her 2 heifers and one Bull missing. She send a report to her husband and mobilized neighbours to search for the same. She was in the Company of PWII ERICK MASAI and PW3 ESTHER WANJIKU PETER among others and they followed the hoof marks for about 2 kilometres till they crossed to the Tanzania side. The nest day they were given a letter from the Police authorizing them to crossover to Tanzania and noted the hoof marks disappeared into a gouge. They did not enter the gouge but according to PW1, PW2 and PW3 they saw three people in the gauge who ran away and recognized one of them as the appellant None of the witnesses describe the distance they were at when they saw the 3 people and what features lead them to recognizing the appellant as one of them. It is also in their evidence that the cattle were found at the police station having been taken there by a village elder. There is no evidence to show where the cattle was recovered and by whom. In cross-examination the Appellant did put to the 3 witnesses the issue of an existing grudge between him and the 3 witnesses who are members of his family. PW4 a police officer only received the report of the stolen cattle from PW1's husband. Later he and other officers recovered them from the Tanzanian police. The appellant was arrested and to the station the same day by members of the public and he charged him with the current offence. In crossexamination he said he had charged appellant because the 3 witnesses had seen him in the gauge.

PW5, evidence is of no much value as it is based on hearsay while PW6, also a relative said he helped to arrest the appellant because PW5 had told him that PW1 had said she saw the appellant running away.

In his sworn defence the appellant stated that he was indeed away on the material date for Voi and did not return until after midnight on 18.8.02 and arrived at his home on 19.8.02 at 6.30 a.m. only to find people waiting for him and on enquiry he was told it was his uncle PW5 and his sons. Later he went to the shopping center and was told PW5 was baying for his head and proceeded to report the matter to a police officer by name of Malatya but he chased him away. He stated that there had been bad blood between him and his uncle since the death of his father on issue of their property and consequently he had been charged severally for theft. He said the charges were a way of trying to get rid of him.

In Cross – examination he gave the name of the neighbour he had travelled to Voi with on material date and that he was to call him as witness. He denied he was arrested at lessessia as alleged by PW6. He denied having been to the Tanzanian side and that he had gone to report the threat on his life the same day before his arrest. His witness however did not appear. The court has considered the evidence on record and agree that there is no direct evidence connecting the accused with the offence. Even the fact of him having been seen at the gouge is suspect and even assuming he was there, there is no evidence to show the cattle was indeed recovered at the same place. The appellant maintained a defence of grudge which the police did not investigate and the fact of his having reported a threat on his life by PW5 on same day to the police is not challenged. In the circumstances the evidence was not save to arrive at a conviction and the same is quashed. Sentence is set aside and appellant is to be set free forthwith unless held for other lawful reasons.

Dated and Delivered at Mombasa this 26th September, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE