



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.138 OF 2001

(Being an Appeal from Original Conviction and Sentence in Criminal Case No.756 of 2000 of the Snr. Resident Magistrate's Court at Voi – E.N.Maina, SRM)

CASSIAN MWANYALO MWAGHANGA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant was charged with the offence of Stock theft contrary to Section 278 of Penal Code. He was tried convicted and sentenced to serve two years imprisonment.

The Prosecution evidence is that on 6/8/2000 at about 6.00 p.m. the complainant tethered his cow for the night. On the morning of 7/8/2000 he found the cow missing. He organized his neighbours to search for the cow. It appears they searched far and wide. It was on 13/8/2000 that he received information that the cow was in Mwachia's home. On that day he visited Mwachia's home and took the cow home. In cross examination he said he was told that the Appellant had sold the cow to Asman for Shs.5,000/-. On re-examination the complainant said the cow was "at my brother Mjomba Mwakio Mwaki's place" when it was stolen. This bit of evidence makes his story confusing because initially he said he tethered the cow at nightfall in his boma.

The evidence of PW.2, Elvis Rigah was to the effect that on 7/8/2000 he learned of the theft of the cow and joined in its search and that the cow was brought home from Wundanyi on 13/8/2000. With others he went to Wundanyi to find out how the cow had gone there. At Wundanyi he met Athuman the butcher who told him that the cow was sold to him by the Appellant. This information contradicts that of Athuman (PW.7) who says he never bought the cow and therefore he did not pay Shs.5,000/- for it. Nevertheless the PW.2 says they went to the home of the Appellant and arrested him and took him to police station.

The evidence of David Mjomba, PW.3 is similar. On 13/8/2000 he learned the cow was at Mwachia's home and the owner was not known. No one seemed to know how the cow had reached the home of Mwachia. However one Asumani told him that he had bought the cow from the Appellant. Again this evidence is inconsistent with that of PW.7.

PW.4 Oliver Mwachia came home on 10/8/2000 at 5.00 p.m. and found his son had tethered a cow in the compound. The son informed him that he found the cow in the garden destroying the vegetables. This witness said he did not know how the cow came to his compound.

PW.5 police constable Andrew Songwa of Wundanyi Police on 8/8/2000 received report of the stock theft from the complainant. On 14/8/2000 he received further evidence that the cow had been recovered and the complainant had a suspect. This suspect must have been told to him by the Asman mentioned in the complainant's evidence.

The cow was photographed by PW.6 and photographs used in court for identification purposes. The further evidence given by PW.7 Athuman Mwangeru Juma a butcher is that on 7.8.2000 at 8.00 a.m. he was looking for a cow to buy. That he met Appellant driving a cow which he said he wanted to sell. PW.7 said he would buy so long as evidence of ownership was given to him "unless he brought witnesses to confirm it was his" This witness does not say that he bought the cow for 5,000/- or any other sum. He says the Appellant tethered the cow by the roadside and went away. And that the cow remained tethered there up to 4.00 p.m. and it was still there next morning. This story is surprising because the witness PW.7 did nothing about this grade cow tethered from 8.00 a.m. to 4.00 p.m. and even on the following day. He did not report to anyone of the fate of the cow. He also did not report that the Appellant was trying to sell to him the cow which he did not have evidence of ownership.

Considering that all the other evidence summarized about concerning the appellant is hearsay, I find that the evidence of PW.7 is unbelievable. Also there is no evidence of taking the cow from this roadside to the home of Mwachia PW.4 from 7.8.200 to 10.8.2000. I also find the prosecution evidence contradictory. The Appellant did not sell the cow to PW.7. The fact of the matter is that no one found the Appellant stealing the cow from the home of the complainant. The only evidence which brought the appellant to the scene is that of PW.7 which contradicted other witnesses and which I say I find unbelievable and therefore unreliable. There was no reason why the Appellant should have abandoned the cow by the roadside for such a long time. There must have been other butchers in the area who could have taken interest in the cow. For these reasons I find that the Trial Magistrate relied on unsafe evidence to convict when there was no sufficient evidence to prove the case beyond reasonable doubt. For those reasons I allow the appeal, quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held.

Dated at Mombasa this 9th Day of May, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Read in open court in presence of: Ms. Kwena, State Counsel

Appellant in person.

J. KHAMINWA

COMMISSIONER OF ASSIZE