



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 47 OF 2019

(Appeal arising out of conviction and sentence of Hon. V. Karanja (Principal Magistrate)

in Kitale Chief Magistrate's Court Criminal Case No. 687 of 2019 delivered on 23rd April 2019)

LOMUNYUNY LOMOLEL APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, **Lomunyuny Lomolel** was jointly charged alongside **Limukal Tepangiro** with the offence of **stealing stock** contrary to **Section 278 of the Penal Code**. The particulars of the offence were that on the 13th day of February 2019 at Kaptega Makunga "C" Farms in Kapomboi Location within Trans-Nzoia County, they jointly stole five (5) cows all valued at Kshs. 200,000.00 the property of Joseph Kiiru Macharia. In the alternative, they were charged with the offence of **handling stolen property** contrary to **Section 322 (1) and (2) of the Penal Code**. The particulars of the offence were that on the 14th day of February 2019 at Kaitukum area near Suam river in Kacheliba Sub County within West Pokot County, jointly, otherwise than in the course of stealing, dishonestly retained five (5) cows knowing or having reason to believe them to be stolen property.

The Appellant pleaded not guilty to the main charge and the alternative charge when arraigned in court. The trial court found him guilty of the main charge and sentenced him to imprisonment for a term of **seven (7) years**.

The facts giving rise to the charges are recorded as follows. On the night of 13th February 2019 at around 11: 00 p.m., the Complainant, Joseph Kiiru Macharia noticed that five (5) of his cows were missing. He immediately alerted his neighbours. In their company, the Complainant reported the matter to the KPR officers who immediately commenced investigations. It was their informed decisions to follow the trail of the cows observing the direction of their fresh hoof prints. The same led them to West Pokot Kanyruat where the said five (5) cows were found in the company of the Appellant and one Limukal Tepangiro. The area was a forest. Thereafter, the KPR officers apprehended the Appellant and the other accused person to Kapkoi Police Station. The cows were also escorted thereto. Photographs of the cows were taken at the Kapkoi Police Station. The Complainant was then called to identify the cows which he did so positively. The Complainant confirmed that the accused persons (Appellant included) were not known to him at all and could not therefore recognize them. His evidence was corroborated by PW2, John Kongo Adale, and his neighbour in testimony save he could identify the Appellant as milk vendor. PW3, Senior Sergeant Joseph Kiptarus further corroborated the evidence of the Complainant, PW1. In his further evidence, PW3 produced photographs and a certificate of photographic print as Prosecution Exhibits 1 (a) & (b) and 2 respectively. PW3 further confirmed that he was one of the members of the search party.

When placed on his defence, the Appellant gave unsworn testimony stating that he was arrested at 3: 00 p.m. when persons unknown to him sought directions from him for a certain school.

The Appellant is dissatisfied with the conviction and sentence of the Trial Magistrate and has filed a Petition of Appeal. This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate's so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (**See Njoroge -Vs Republic [1986] KLR 19).**

In the present appeal, the issue for determination by this court is whether the Prosecution established to the required standards of proof that the Appellants committed the offence that they were charged with. Put differently, did the Prosecution prove its case beyond reasonable doubt to sustain the conviction and sentence meted out against the Appellant?

The Petition of Appeal is premised on grounds that no photographs were taken at the crime scene linking the Appellate to the offence; no arresting officers testified thus breaching the provisions of **Section 150 of the Criminal Procedure Code**.

During the hearing of the appeal, the Appellant fortified his Appeal with written submissions. He submitted that the evidence presented in court was uncorroborated. He stated that he did not know the Complainant prior to the charges levelled against him. He further added that none of the witnesses who testified on behalf of the Prosecution were eye witnesses. Consequently, the Prosecution failed to meet the irreducible minimum standard of proof. He thus prays that his conviction be quashed and his sentence be set aside.

On the part of the State, Learned Prosecutor Mr. Omooria opposed the Appeal. He relied on the doctrine of recent possession for the presumption that the Appellant was the thief or handler of the stolen goods in question. He fortified his submission with the case of **Chaama Hassan Hasa –Vs- Republic (1976) KLR 6, 10** and **Isaac Ng’ang’a Kahiga alias Peter Ng’ang’a Kahiga –vs- RNYR CA Criminal Appeal No. 272 of 2005**. Mr. Omooria further challenged the Appellant’s assertion that no arresting agents testified. He submitted that **Section 143** of the **Evidence Act** cushions their case. He added that the Appellant was caught red handed in possession of the stolen cows. As such, there was no need for photographic evidence. In the upshot, Learned Prosecutor submitted that the conviction should be substituted with that of the alternative count and that the sentence be upheld.

This court has considered the rival submissions presented by the parties herein. The court has also taken the liberty to look at the trial court’s proceedings. This court shall now pronounce itself thus:

Stealing under Section 268 of the Penal Code is defined as follows:

“(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say:

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) ...

(3)

(4)

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.

From the proceedings, it was evident that the prosecution relied on the doctrine of recent possession to secure the Appellant’s conviction. For prosecution to sustain the conviction of the Appellant by applying the doctrine of recent possession, certain facts must be established. As was held by the Court of Appeal in **Eric Otieno Anim –Vs- Republic [2005] eLKR:**

“ in our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect; Secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant; and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another.”

In the present appeal, it was the complainant’s testimony that his five (5) cows were stolen from his homestead at Kapkoi village in Trans Nzoia County at 11.00 pm on the night of 13th February 2019. When he realized that his cows had been stolen, the Kenya police reservists were immediately mobilized and tracked the hoof prints of the animals. The said cows were traced in a forest within West Pokot County on following day i.e 14th February 2019 at about 1.00 pm. The recovered cows were positively identified by the complainant as the cows that were stolen from his cowshed the previous night.

The cows were found in the Appellant’s possession. He was with an accomplice who was also convicted. The Appellant did not give a satisfactory explanation why cows which were stolen from the complainant about fourteen (14) hours prior thereto, were found in his possession.

It is the evaluation of this court that indeed the prosecution established to the required standard of proof that the Appellant stole the said cows from the complainant. Although no one saw him steal the said animals, in application of the doctrine of recent possession, the Appellant cannot escape culpability. He was found in possession of the said cows so soon after the theft of the same from the complainant; the complainant positively identified the said cows; indeed the Appellant did not claim that he owned the cows, neither did he give a reasonable explanation regarding how the said cows came to be in his possession; from the nature of the animals, it was reasonable to expect that such cows were driven from the complainant’s home to the place in the forest where they were recovered from. The prosecution established that

the cows were recently stolen. It did not matter therefore that no one identified the Appellant at the scene of crime; the recovery of the cows in his possession raised the presumption that he was the one who stole the said animals from the complainant. The Appeal on conviction lacks merit and is hereby dismissed.

As regards sentence, the same was legal. It fitted the crime. Taking into account the prevalence of such crimes within this County, a deterrent sentence was called for. This court will not disturb the exercise of discretion by the trial court in sentencing the Appellant. The Appellant's appeal against sentence is similarly dismissed. It is so ordered.

DATED AT KITALE THIS 11TH DAY OF NOVEMBER 2021.

L. KIMARU

JUDGE