REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 12 OF 2019

1. PETER ONGERI MURULI.....1ST APPELLANT

2. PATRICK OMBUI MOTI.....2ND APPELLANT

VERSUS

THE REPUBLIC.....PROSECUTOR

{Being an Appeal against the Judgement of Hon. S. K. AROME - SRM Keroka dated and delivered on the 28th day of February 2019 in the original Keroka Principal Magistrate's Court Criminal Case No. 562 of 2018}

JUDGEMENT

On 7th March 2019 the appellants were sentenced to serve three (3) years imprisonment for the offence of stock theft contrary to Section 278 of the Penal Code. The particulars of the offence were that on 30th May 2018 at Raganga Sub-location in Masaba South Sub-county within Kisii County they jointly stole one cow valued at Kshs. 15,000/= the property of Veronicah Kwamboka.

Being aggrieved by the conviction and sentence they preferred this appeal the grounds thereof being that: -

> **"1. The trial magistrate erred in law and facts by passing judgement against the weight and evidence on the face of records.**
>
> **2. That the trial magistrate erred in law and facts by passing out judgement in total disregard of the appellants case.**
>
> **3. The trial magistrate erred in law and facts by passing out judgement and sentence without giving reasons for the same.**
>
> **4. In the circumstance the appellants humbly pray that you may be pleased to admit the appeal, call for the records and after hearing the appellants, quash the conviction and set free the appellants or pass such other orders as the ends of justice may call for and your petitioners as is duty bound shall ever pray."**

At the hearing of the appeal the appellants were represented by Nyamwange Advocate and the respondent by Senior Prosecution Counsel Mr. Majale. The appeal was canvassed by way of written submissions.

I have carefully considered the submissions by Learned Counsel but as an appeal is in the nature of a retrial, I am obligated to re-consider and analyse the evidence in the court below so as to arrive at my own independent conclusion. I have done this while keeping in mind that I did not see or hear the witnesses who gave evidence and it is my finding that the charge against the appellants was proved beyond reasonable doubt.

The stolen cow belonged to the mother of the 1st appellant and the appellants were seen by the complainant driving the cow together with two others and when she asked them where they were taking them they pretended it was for grazing. It was in broad day light (in the morning hours) and she knew the appellants well enough not to mistake them for anybody else. She also positively identified the cattle she saw them with as hers. It is not unusual or strange that a mother would allow her son to take her animals to pasture. She believed what the 1st appellant told her as he is her son. There was nothing sinister in her believing her son and I refuse to draw an inference that for believing him then she is not a serious person. The fact that the cow was not found its whereabouts then became a fact within the special knowledge of the appellants and under **Section 111 of the Evidence Act** the burden fell upon them to give an explanation of its whereabouts. This was more so given that by the time they were found they were not only drunk but they had a lot of money on them. In the case of **Dorcas Jebet Ketter & another v Republic [2013] eKLR** the court stated: -

> ***"In our minds the facts of the case point to none other than the two appellants either alone or jointly with others as the people responsible for the death of the deceased. In any event under the provisions of Section 111 of the Evidence Act (supra), they had***

to explain what happened to the deceased who was last seen with them and in their custody and who was being tortured by them from later (sic) afternoon of 30th September, 2003 to early morning of 1st October, 2003. That Section provides as follows: -

> ***"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."***

Thus as the deceased was removed from his house and home by the two appellants among others to the second appellants where Wilfrida saw him being tortured as the first appellant was also present and thereafter he was never seen again, the burden of showing what happened to him was on the appellants which burden is only confined to some explanation not amounting to proof beyond reasonable doubt. This was not availed and hence on these circumstances, they and their colleagues were responsible for the death of the deceased."

It is my finding that in the absence of some explanation it is reasonable to draw an inference that the appellants sold the cow. If I understood the complainant properly it was her evidence that after the 1st appellant told her that they were taking the cattle to graze she went home. Later when she went to the place she thought they would have taken the cows and did not find them she inquired from some children within the vicinity if they had seen the appellants and the children told her they had seen the appellants leave with the cow. The conviction herein is not based on what the children told her since that is hearsay as they were not called as witnesses but on her own testimony that she saw the appellants driving away the cattle. The identity and ages of the children are therefore not material as her testimony alone suffices to sustain a conviction. Counsel for the appellant pointed out what he referred to as inconsistencies and contradictions in the evidence of the prosecution witnesses. My finding however is that those are minor and not fatal to the prosecution case. Counsel also raised speculation that the cow may have been given as a gift for meat and not necessarily sold for money and submitted therefore that no offence was committed. My finding is that even donating the cow as a gift would amount to stealing as it was clearly done fraudulently with intent to permanently deprive the complainant of the cow without her consent and the appellants did not have claim of right ***(see definition of stealing in Section 268 of the Penal Code).*** The cow belonged to the complainant but not to the appellants and nowhere did the Assistant Chief (Pw3) state it belonged to the 1st appellant. Further, the fact that the cow was never recovered only goes to confirm that the appellants had formed an intention to deprive the complainant of it permanently and it does not help their case that the person to who it was converted was not found. I am satisfied the conviction is supported by the evidence on record. The defence mounted by the appellants was weak and could not resist the cogent and credible case put up by the prosecution. The sentence imposed by the trial court was lawful in the circumstances of the case and accordingly I find no merit in the appeal either against conviction or sentence and the appeal is dismissed in its entirety.

Signed, dated and delivered in open court this 20th day of February 2020.

E. N. MAINA

JUDGE