



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIIAYA

CRIMINAL APPEAL NO. 122 OF 2017

(CORAM: R. E. ABURILI - J.)

GERALD OMONDI OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence on a judgment delivered on 22/11/2017 at Siaya PM's Court vide Cr. Case No. 781 of 2015, before Hon. J. Ongondo, PM)

JUDGMENT

1. The appellant **GERALD OMONDI OTIENO** was jointly charged with another with two counts. In count one, they were charged with the offence of Stealing Stock contrary to **Section 278 of the Penal Code**. **The particulars of the offence are that on the night** of 21st October 2015 at unknown time at Ramula sub-location in Gem, Siaya County, the appellant jointly with another who was acquitted at the trial stole 2 cows valued at KES. 45,000/=, the property of **Emmaculate Auma Otieno**.

2. In count two, the appellant jointly with another who was acquitted at the trial faced the offence of obtaining money by false presences contrary section 313 of the Penal Code. The particulars of the charge are that on the 22nd October, 2015 at 0930 hrs at Kwanda market in Emuhaya, Vihiga County, the appellant with another, jointly with intent to defraud obtained from **WASHINGTON OTIENO JAMES**, the sum of KES. 14,300/= by falsely selling a cow to the said Washington Otieno James knowing or having reasons to believe it to be stolen animal while pretending to be the real owners which is the property of **EMMACULATE AUMA OTIENO**.

3. The appellant and his co accused Ibrahim Opondo Adosi pleaded not guilty and after a full trial, the appellant herein was found guilty on all the two counts whereas his co accused was acquitted on both counts. After mitigation, the appellant was sentenced to serve 5 years imprisonment on count one and one year imprisonment on count two. The sentences were to run concurrently hence he is serving six years imprisonment from 22/11/2017.

4. Being dissatisfied with the judgment, conviction and sentence meted out on him the appellant lodged this appeal on 2nd December 2017 setting out the following grounds of appeal reproduced verbatim:

1. That: *I plead not guilty to the charge and still stand on that.*

2. That: *the trial magistrate erred in law and facts is not evaluating the evidence rendered by the prosecution. I am of the finding the prosecution failed to prove this case of stock theft beyond any shadow of doubts as required by law. As the circumstances of the case to gather with the defence by the appellant were innocent.*

3. That: *the lower court magistrate did error in both law and facts in failing to comply with the provision of **Section 329 of CPC** in that I was never granted an opportunity to submit in respect of the sentence I was given. The same decision violates my constitutional rights to protection of the law under **Article 50(2)(k)**.*

4. That: *the Lower court magistrate erred in law and facts by failing to appreciate that poor investigation was done and owing to the foregoing. The court could have not come up with the findings, it did since the said animal was later brought to the station and after my arrest.*

5. That: *Since I cannot recall all that were adduced during the trail. I pray to be furnished with certified true copy of the trial court proceedings and judgment to enable me erect more grounds of appeal and further wish to be in person during the hearing of this appeal.*

SUBMISSIONS

5. In support to his appeal, the appellant also filed written submissions which he highlighted orally. ***On the allegation of biased and unfair trial amounting to unsound judgment based on misevaluated evidence by inconsistent, uncorroborated and contradictory witnesses***, the appellant submitted that the evidence tendered by the prosecution against him during the trial was hardly enough to prove any case against him but was ridiculously misevaluated by the trial magistrate resulting into complete bias, unfair trial and manifest unsound and fraudulent judgment.

6. The appellant submitted that the evidence adduced by PW1, the complainant was hearsay and quite untruthful. That PW1 stated that she never saw the person who stole her cows (pg 15 line 13 of the trial records) and that she stated that she only got information that someone had been selling her alleged cows at Kwanda, market (pg 14 line 15-16) in the view of the appellant, the complainant failed to reveal the identity of the person who gave her such information. He submitted that PW1 stated that it came to her knowledge that Gerald, the appellant herein was seen selling the alleged cows to PW2 and his uncle (PW3) and that PW2 also confirmed before court that was the second accused person who had the cow and not the appellant herein (pg 16 line 13). According to the appellant, PW2, stated that the appellant herein only went to the second accused person to intervene when PW3 who was the buyer insisted to be given a receipt, because the appellant was conversant with legal procedures of buying and selling livestock at the market. He submitted that he only acted out of good faith by taking PW3 to the County Officer to be issued with a receipt (pg 16 line 16 and 18). Your Lordship, this was support, and that this evidence was supported by the testimony of PW3 that he bargained and bought the alleged cow from the second accused appellant herein (pg 20 line 3 - 4).

7. The appellant further submitted that PW2 also stated that the person who was in the company of the second accused Samuel and not the appellant herein (pg 17 line 9). That PW2 confessed in his testimony before court that after the cow had been sold, the cash was handed over to Samuel and not the appellant herein (pg 17 line 17).

8. The appellant submitted that the prosecution failed to call upon this witness (Samuel) to testify before court to give any information he had that connected the appellant to the alleged offence.

9. In light of the above, the appellant submitted urging this court to consider contradictions in the prosecution evidence as demonstrated hereinabove find that the prosecution did not prove their case beyond reasonable doubt and allow the appeal and quash the conviction and set aside the sentence.

10. The appellant also submitted that the arresting officer did not say why he believed the complainant that it was the appellant who stole her cow. Further, that the prosecution did not call as many witnesses including Ouma Ouma Ombara in order to provide overwhelming evidence to prove its case beyond reasonable doubt.

11. The appellant also submitted that considering the evidence in the testimony at PW6, the investigating officer, in his view, the investigations were shoddy and that the prosecution failed to call James Oduor who was arrested for writing a receipt, to say what he knew about the case involving the loss of the complainant's cow. He further claimed that both PW1, PW4, PW5 and PW6 were incompetent to testify before court according to the provision of **Section 125 of the Evidence Act**.

12. The appellant further submitted that basing on the contradictory statements of the prosecuting witnesses, it is clear that the incident did not have positive identification of the perpetrator and thus it might have occurred under unclear circumstances. Further, that precedent has shown that numerous contradictions by the prosecution witness create manifest doubt on the prosecution case and that should work to the benefit of the appellant herein.

13. The appellant submitted that the trial magistrate erred in both law and fact by failing to comply with the provision of Section 329 of the Criminal Procedure Code in that he was never granted an opportunity to submit in respect of the sentence that was meted out on him. He claims that he was not supplied with court proceedings upon request hence he did not submit. He believes that the refusal thereof violated his constitutional rights to protection of the law under **Article 50(2)(k)**. he relied on **Hamisi Juma Nguo vs Republic (2012) KLR as held by Justice Odera in Criminal Case Number 12 of 2012 that:**

“it is established tenet of our law that mere suspicion alone no matter how strong cannot form the basis of conviction against an accused person.”

14. The appellant also submitted that the learned trial magistrate fatally erred by failing to consider the alibi defence statement of the appellant herein that did not connect him to the alleged incident. He faulted the trial magistrate for not carrying out a thorough evaluation of the evidence on record, in violation of section 47 of the Evidence Act

15. Further submission was that the learned trial magistrate erred in law by failing to observe the provision of **Section 169 of the Criminal Procedure Code** before delivering his judgment. The appellant contended that under **Article 50(4) of the Constitution**, evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of the justice.

16. He submitted that the admission of all the above evidence obtained in such dubious means, aimed at convicting the appellant was in total infringement and contravention of his constitution rights and fundamental freedom to a fair trial and a slap in the face of natural justice.

17. The appellant urged the court to allow the appeal herein and set him at liberty.

18. In his oral highlights, the appellant adopted his written submissions and added that PW3 stated that he was given a receipt.

19. On the part of the Respondent, Senior Principal Prosecutions Counsel Mr. Okachi opposed the appeal and submitted that the prosecution proved its case against the appellant beyond reasonable doubt. Further, that appellant was found with the appellant and that the cow was identified by the owner hence the conviction of the appellant was sound and the sentence meted out lawful and lenient as it was meted out after considering mitigations by the appellant.

20. I have considered the petition of the appeal and the rivals submissions of both parties. This being a first appeal I am under an obligation to re-consider and re-evaluate the evidence tendered before the trial court afresh with a view to arriving at my own independent conclusion. **See Okeno vs Republic [1912] EA 32.**

21. Revisiting evidence adduced in the trial court, the Prosecution's case was that on 21st October 2015, the PW1, Immaculate Awuor had securely tied her two 2 cows in the shed next to her house and went to sleep. When she woke up the following day, she found the cows missing. She reported the loss at Ramula AP Camp and continued to search for the animals. Later in the day she got information that someone had been seen trying to sell the cows at Ekwanda Market in Vihiga. She proceeded to the market and was led to the home of PW3, Washington James Otieno where one brown heifer was recovered.

22. According to PW2 Alfred Ambwa Riga and PW3- Washington James Otieno they had gone to Ekwanda Market to buy a cow. PW3 was pleased with a brown heifer and started talking with the second accused whom he described as the seller. As they negotiated the price, the appellant arrived and told the second accused to hurry up so they could leave. They agreed and PW3 paid Kshs. 14,300 to the second accused who promptly handed over the cash to the appellant. PW3 asked for the original County Receipt for the purchase of the cow and that is when the second accused advised the appellant to take PW3 to Kwanda Market to get a receipt.

23. PW3 further testified that at that time, it was the second accused person who was following-leading the cow as the appellant walked together with PW3 to a place where PW3 was issued with a receipt and PW3 proceeded to where the second accused person was and collected the cow and he went to his home with the cow. The following day, the area Assistant Chief called PW3 and informed him that the cow had been stolen. He went to Ekwanda Police post on 24th October 2015 and reported that he had bought the cow which was allegedly stolen. The police advised him to surrender the cow and he did. He stated that when the owner came, the cow saw the owner and raised its ears, indicative of the fact that it could recognize its owner. Later, the appellant and his co accused were arrested at different times and PW3 was called and he identified them as the people who sold to him the cow.

24. In cross examination he stated that the second accused did not tell him that he was the owner of the cow. He maintained that although he bargained the price of the cow with the second accused, after he had paid the money to the second accused, the latter handed over the cash to the appellant herein and that it was the appellant who lead him to the offices where they fetched the receipt for purchase of the cow and that the receipt showed the seller to be Michael Otieno.

25. PW4 AP Peter Ochieng stationed at Lamula AP Post received a report from PW1 on the loss of her 2 cows on 22/10/2015. He advised her to investigate which she did and in the evening she went back to the police and informed them that she had received a report that the cow had been seen with the appellant herein. That PW1 led PW4 to where the appellant was and he arrested the appellant and handed him over to the police officers from Yala Police station.

26. In cross examination he stated that the complainant only recovered one cow which was the calf alive as its mother was found to have been slaughtered

27. Michael Otieno testified as PW5 and stated that on 22nd October 2015 his sister inlaw the complainant herein called him in the morning and told him that her two cows had been stolen. He tried following the footsteps of the animals to Luanda through Awachi and reported to cattle markets and local authorities in the area and went to Ekwanda Police Post to report the loss and that they kept asking from passersby about the animals. They received some information from a boy whom they met on the way who told them that he had seen Dusla driving the two animals. He stated that Dusla is the other name(nickname) for the appellant. According to PW5, the witness then called the Assistant Chief and briefed him that Dusla had been seen with the animals. Dusla was not traced on that same day but that on the following day, Dusla was traced and arrested and that it was Dusla the appellant who led the police in the recovery of the calf at Maseno area where it had been sold to PW3. The cow was taken to Yala Police Station where the complainant identified the cow. He stated that he had known the appellant for over 10 years as they both hailed from the same village. He identified the photograph of the recovered cow.

28. In cross examination, the witness stated that the appellant used to sell cows in their village and that he was known as Dusla. Further, he reiterated that he met a boy called Ouma Ombara wh had seen the appellant pass with 4 animals among them were the two cows for the complainant.

29. PW6 CPL Miliccent Ongere attached to Yala Police station testified that she investigated the case of stock theft referred to them by AP at Raogi, who also handed over to them two suspects including the appellant herein and James Oduor. The witness released James Oduor because no witness statement mentioned him. She recorded all statements, the stolen cow was recovered at the home of PW3 who alleged to have bought it at Kwanda Market and that PW3 produced a receipt for the same and identified the appellant as the person who sold the cow to him in the company of the second accused. She arrested the second accused and charged him jointly with the appellant herein with the two offences of stock stealing and obtaining money by false pretences. The cow was photographed and the certificate of production was produced together with the photograph for the cow, as exhibits.

30. At the close of the prosecution's case, the appellant and his co accused were placed on their defence. The appellant gave unsworn statement of defence and stated that he was not Otieno but Gerald Omondi Magidha, a cattle trader in Luanda, Akala and Yala areas but lives at Ramula. He denied both counts and contended that on 21st October 2015, he was at his house with his family. On 22/10/2015, he went to Ekwanda Market to buy cows. That he got one Otieno a.k.a Otis with a brown cow which he liked. He did not agree on the price and so he told the second accused to bargain. That they agreed and the second accused took the cow. He stated that as the second accused drove the cow home, as they were to meet ahead, suddenly, PW3 emerged and claimed that the cow was his and so they went to register the transaction at Luanda Market. He stated that then he was arrested in relation with the theft of the cow. He identified photographs of the

subject cow which had been produced by the prosecution and marked as exhibit 1.

31. In his sworn testimony, the second accused Ibrahim Odongo also known as Adosi acknowledged his nickname to be Adosi and stated that he came from Kwanda and that his business was to drive cattle after the owners had purchased. He recalled that on 22/10/2015 he met the appellant herein whom he knew well, at the market. The appellant gave him Kshs 40/- to take tea and gave the second accused a cow to transport for the appellant. Later, the appellant sold the cow to PW3, with who the appellant herein went to collect the receipt and returned to the second accused to pick the cow. He denied knowing that the cow had been stolen. He also denied meeting Michael Otieno nor seeing the receipt for the purchase of the cow. He identified the subject cow in the photograph produced as exhibit. He denied receiving the proceeds of sale of the cow from Washington, and stated that it was Samwel who negotiated the price for the cow and received cash for the cow.

32. DW3 gave evidence which was totally irrelevant and therefore not worth reproducing it here.

DETERMINATION

33. On the first issue of whether the trial of the appellant was unfair, the appellant contended that he was not accorded an opportunity to submit in respect of the sentence he was given hence his rights under **Article 50(2)(k) of the Constitution** were violated. He also claims that the trial did not comply with **Section 329 of the Criminal Procedure Code**.

34. I have read the trial court record. On 22/11/2017 when judgment was pronounced convicting the appellant, he was given a chance to mitigate after the Prosecutor stated that the appellant herein was a first offender. The record reads: -

“Mitigation:

I have family and I am the one who is bread winner. My father ran away from home.

Court:

Sentence:

Mitigation is noted. Accused is a first offender.....”

35. With the above record in mind, the appellant in my view is not genuine in his allegation that he was not given an opportunity to mitigate. The allegation of unfair trial is therefore found to be baseless and is hereby dismissed. Furthermore, the appellant was on 28/12/2015 supplied with statements of witnesses at his own cost and he was on bond throughout the trial.

36. The second issue is whether the prosecution evidence was inconsistent, contradictory and uncorroborated. According to the appellant, the testimony of PW1 is hearsay and untruthful. That as the complainant, she confessed to not seeing the person who stole her cows, that she only got information that someone had been selling animals at Kwanda a.k.a Ekwanda Market, that she failed to reveal the identity of the person who gave her such information.

37. The appellant went on to state that the evidence on record was that it was the 2nd accused who had the cow and not the appellant, according to PW2.

38. In addition, the appellant claims that he only acted in good faith by assisting PW3 to get the receipt from the county office because he knew the procedures of buying and selling animals. In addition, he alleges that PW3's evidence supported the appellant's assertion that it was the second accused who had the cow and that PW3 bargained on the price of the cow not the appellant.

39. I have perused the trial record in detail and I observe that the evidence of PW3 was that he bargained and bought the cow from the second accused person and that it was the 2nd accused who received the purchase price and handed over the money to the appellant. PW3 further testified that the appellant appeared and told the second accused to hurry up so that they could leave the place.

40. The trial court discredited the evidence of PW3 and believed the evidence of the second accused person who said that he only drove the animal to the market on behalf of the appellant.

41. The trial court also found that because the appellant came from Gem where the cow was stolen from, unlike the 2nd accused who came from a different place. He faulted PW3 for implicating the second accused as A2 only drove the cow to the market and that it was the appellant who went to get the receipt from the county offices.

42. It is not in dispute that PW1's cows were stolen and the fact that she reported the theft to the police who told her to investigate is uncontroverted. It is also not in doubt that PW1 did not see the person who stole her cows but as she looked for them, she asked various people and PW2 on learning of the theft, followed the foot prints and joined in the search for the stolen animals.

43. What is also clear is that the parties knew the Market day at Kwanda when animals are sold and so they followed leads from their informers who led them to the appellant herein. The appellant conceded that he is a cattle trader. He also did not deny the fact that he was involved in the bargain for the sale of the calf that was recovered from PW3.

44. In my view, the prosecution were not bound to look for all the witnesses who saw the animals pass by the road enroute to the market

place as the information which was relayed to PW1 and PW2 led them to the appellant who does not deny getting involved in the sale of the animal which was recovered and which belonged to the complainant. The appellant's contention is that he himself went to Kwanda Market on 22/10/2015 as a cattle trader to buy the cow which was recovered from PW3 and that he tried to buy a cow from Otieno (Otis), a brown cow with small horns, and cut ears but they did not agree so he asked the 2nd accused to talk to Otis and they agreed so the second accused took the cow and drove it away and they were to meet ahead but Washington, came and claimed that he had sold the cow to Otis and so they went to register the transaction at Kwanda Market is all but made up. This defence evidence does not add up at all. It is mixed up. One cannot tell if it was the appellant that was buying the cow from Otis or whether he is saying that the 2nd accused person is the one who bought the cow for himself and if the latter is the position, why would the second accused be the one to buy the cow for himself but agree with the appellant that they meet ahead?.

45. The second accused also claimed that his work only involved transporting cows for traders who have brought. That he knew the appellant well so when they met at Kwanda Market, the appellant gave him a cow to transport and that after the appellant and one Samuel went and obtained the receipt, they returned and he handed over the cow to the appellant. The second accused introduced another person called Samuel but it is not clear who this Samuel is. The evidence of the second accused was also not clear as to how he was to transport the cow and from the market to where. This evidence of DW2 is equally mixed up, evidence of persons who were trying to cover up their common intention. DW3's evidence was very irrelevant to this case.

46. PW3 was clear that he bought the cow from the appellant because when he gave money to the second accused, the appellant appeared and he was handed the money by the 2nd accused and that the appellant led PW3 to obtaining a receipt for the cow.

47. The receipt produced as an exhibit regrettably, reads that the seller was Michael Otieno, PW5 who had nothing to do with the cow as the cow belonged to his sister in-law, PW1 and PW1 only reported to PW5 who assisted in tracing the lost cow. PW5 was also clear that it was the appellant who led them to the recovery of the stolen calf at PW3's home at Maseno.

48. Although the boy whom PW5 met on the way and who told him that he had seen the appellant with 4 cows including the 2 cows of the complainant was not called as a witness, in my humble view, the circumstantial evidence that led to the recovery of the calf and the arrest of the appellant was sufficient enough to link the appellant to the theft of the cow which was recovered from PW3 as the appellant himself led to the recovery of the cow and he could not demonstrate that the cow was his. He conceded that the recovered cow is the one which, according to him, he wanted to buy at Kwanda Market but that he could not agree on the sale/purchase price.

49. In my humble view, the prosecution witnesses were consistent as to the disappearance of PW1's cows, the information relayed to PW5, the follow up and investigations that led to the recovery of the calf from PW3.

50. I do not find any material contradictions or inconsistencies that would go to the root of the case to vitiate the conviction of the appellant, neither do I find that failure to call the informers was fatal to the prosecution's case.

51. Accordingly, I find that there were no material inconsistencies or contradictions in the prosecution's evidence and that failure to call the informers who saw the appellant drive the stolen animals was not fatal to the prosecution's case as the evidence adduced sufficiently linked the appellant to the theft of the animal which was recovered from PW3.

52. I would however mention that it is the appellant's submissions which are inconsistent and contradictory and quite confusing to the court. further, it is highly doubtful that the second accused person was rightly acquitted as his involvement in the conveyance of the recovered cow is not that of an innocent bystander. However, as the prosecution did not lodge any appeal against his acquittal, I say no more.

53. On the third issue of whether proper investigations were carried out, the appellant claimed that the police investigations into the case leading to his arrest, trial and conviction was shoddy. That PW6 who investigated the case after receiving the report was clear that she released one James Oduor after recording statements of witnesses who failed to mention him in connection with the theft of the complainant's cows.

54. I reiterate that albeit the appellant claims that the evidence of PW6 was contrary to that of PW3 on who sold the cow to PW3, PW3 was clear in his testimony that on 22/10/2015 he went to Ekwanda Market at Luanda to buy a cow and he saw the subject cow, chose it, bargained with the second accused and while he was still bargaining, the appellant went and told the 2nd accused to hurry up so that they could go. After agreeing on the price of Kshs. 14,300/=, he paid the money to the second accused who handed it over to the appellant. PW3 insisted on the sale receipt and the 2nd accused advised the appellant to take PW3 to Lwanda to get a receipt and as the 2nd accused followed behind with the cow, the appellant and PW3 went and obtained a receipt then PW3 went and fetched the cow from the second accused and went his way. PW3 later was informed that the cow sold to him was stolen so he handed it over to the police as the cow recognized its owner the complainant in count one, who also identified it positively.

55. In my humble view, the investigations were not shoddy. They revealed the intention of the appellant to steal and to obtain money from PW3 by falsely pretending that he had a cow to sell to him yet the cow was stolen property of Emmaculate Auma Otieno.

56. The evidence as a whole pointed to a case where the appellant, involved the 2nd accused to help him cover up the theft so that the second accused would appear as the seller on the face of it. On the other hand, knowing that the cow was stolen, he used the second accused to convey it to PW3 while posing as the seller yet the appellant was on standby to receive the proceeds of the sale of the stolen cow.

57. And if the appellant was clear in his conscience, why did he obtain for PW3 a receipt that read the name of the seller to be Michael Otieno and not the second accused or even himself? In my view, the appellant knew and had reason to believe that if he was to use his name on the receipt, he would be caught easily that is why he faked another person Michael Otieno, who had nothing to do with the theft of the cow.

58. In my view, since the two accused persons were together and it was the 2nd accused who posed as the seller by negotiating the price whereas the appellant stood by waiting for the proceeds, any reasonable bystander could easily have concluded that the two were acting in concert and not independently, and therefore the appellant cannot claim that the investigations were shoddy or that the prosecution evidence was contradictory, inconsistent or uncorroborated.

59. PW3 could have been confused as to who the owner of the cow was in the first instance in view of the conduct by the second accused person who behaved like an owner by negotiating the price but the court can infer from the said conduct that the person who received proceeds of sale held a higher stake in the stolen animal as there is no reason why one would oversee the sale of the animal and receive all the proceeds yet claim to be innocent in the whole chain and process.

60. On whether the prosecution proved their case against the appellant beyond reasonable doubt on both counts to warrant the conviction of the appellant, the prosecution was expected to prove their case against the appellant beyond reasonable doubt. That burden does not shift to the defence throughout the defence.

61. In this case, the appellant attempted to allege alibi defence but I find no substance in that allegation as the appellant was seen on the Kwanda Market receiving proceeds of sale of one of the stolen cow and therefore whether or not he personally took the cow from the complainant's home as they are village mates, or whether, acting in concert with the second accused organized for the cow to be stolen and brought to the market, it is clear that the cow which he identified as one that he intended to buy was not his as one cannot buy their own property.

62. Secondly, there was sufficient evidence adduced by the prosecution to the effect that the appellant intended to deprive the complainant of her cow permanently by selling off the stolen cow and pocketing the money.

63. Thirdly is that the appellant was proven to have received the proceeds of sale of the recovered cow from PW3 by pretending that he had the subject cow to sell to PW3 while knowing that he had no proprietorship rights over that cow and therefore neither did he have the right to sell what he did not own.

64. Fourth, is that I do not find any ground for the complainant or any of the prosecution witnesses framing the appellant with such an offence.

65. The complainant lost two cows which were to be found together in her homestead. Only one was recovered, a calf. The other cow was not recovered. The complainant on making inquiries after reporting the loss to the police learnt that the cows had been seen in possession of the appellant and that they had been sold to an uncle to one Alfred so she followed up and recovered one cow at the home of the said uncle of Alfred, Mr. Washington who is PW3.

66. The evidence of the prosecution witnesses 1, 2,3 and 5 on how the cow was recovered and PW5 on how he followed the recovered of the cow at the home of PW3 leads to an irresistible conclusion that the appellant jointly with others stole the complainant's cow and went to sell it and pretended to own the cow by selling it to PW3 who was in the company of PW2.

67. That evidence was sufficient to prove theft of the complainant's cow which was recovered and photos produced in court as an exhibit.

68. There was also sufficient evidence to prove that the appellant received Kshs. 14,300/= from PW3 Washington Otieno James with intent to defraud him as he knew that the cow he was selling was not his and if recovered, the owner thereof Emmaculate Auma Otieno, PW1 would take possession thereof thereby PW3 losing it out altogether.

69. Accordingly, I find and hold that the prosecution proved their case against the appellant on both counts, beyond reasonable doubt. The conviction of the appellant was therefore sound and safe. I uphold it and dismiss this appeal against conviction.

70. On whether the sentences imposed on the appellant were excessive, Section 354 (3) (b) of the Criminal Procedure Code provides:

“In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence.”

24. The principles guiding the court's exercise of discretion to review or alter sentence were set out in the case of **Ogalo S/o Owuor v Republic (1954) EACA 270** as follows:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly well established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a different sentence and it will not ordinarily interfere with the discretion exercised by the trial judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.”

25. Section 14 of the Criminal Procedure Code sets out the applicable principles for sentences to run concurrently or consecutively thus:

“(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—

(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.”

26. The practice by the courts has been that where an accused person commits a series of offences at the same time in a single act and/or transaction, a concurrent sentence should be given. In instances where separate and distinct offences are committed, in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. In **Nganga vs Republic (1981) KLR 530**, it was held that concurrent sentences should be meted out for offences committed in one criminal transaction. Similarly, in **Ondieki vs Republic (1981) KLR 4320**, it was held that except in exceptional circumstances, if a person commits more than one offence at the same time in the same transaction, the sentence imposed ought to run concurrently.

27. In the instant case, I note from the particulars in the charge sheet that there are two offences of stock theft and obtaining money by false pretenses were committed by the appellant on different subsequent dates and obtaining money by false pretenses followed the theft of the cow which was put up for sale. The complainants are different but one transaction of stealing stock led to the commission of the other offence of obtaining money by false pretenses.

28. The offence was committed at different places by virtue of the fact of transporting the stolen animal to a market that fell in a different jurisdiction. However, as the transaction that led to the arrest, charging and conviction of the appellant for the two offences was one transaction, I find and hold that the trial court erred in imposing consecutive imprisonment sentences for the two offences. I set aside the consecutive sentences and substitute the order thereof with an order that the sentences imposed shall be concurrent.

29. On the length of the prison term, Section 278 of the Penal Code provides for a maximum sentence of 14 years imprisonment, for the conviction of the offence of stock theft. The appellant was sentenced to serve 5 years imprisonment. He was a first offender, according to prosecutor's address to the court. The appellant also mitigated. There is no justification for a cattle trader to steal animals in order to succeed in his business, at the expense of his neighbours. He deserved a sentence that was deterrent. Furthermore, one of the cows that was stolen was never recovered. The two cows were tethered together and got lost at the same time.

30. I find that the prison term of 5 years was not harsh and or excessive in the circumstances of the case, considering the fact that the appellant did not plead guilty to the offences though he was a first offender and a family man. Before stealing and defrauding the complainants he should have stopped to reflect on the consequences thereof.

31. The appellant has already served nearly three years in prison and therefore subject to his conduct and industry, he can benefit from remission from the prison authorities if he demonstrates that he has fully reformed.

32. As earlier stated, as the offences were committed in a series of transactions one leading to the other, the appellant will serve concurrent sentences instead of consecutive sentences.

33. Accordingly, the appeal against conviction and sentence is dismissed. Orders accordingly.

Dated, signed and delivered at Siaya this 7th day of October, 2019.

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

Mr. Okachi Senior Principal Prosecution Counsel

CA: Brenda and Modestar