



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL NO. 19 OF 2016

ALEN LEINA PIRIANOI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence dated 11th April 2016 in the Chief Magistrates Court at Narok in Criminal Case No. 835 of 2015, Republic v. Alen Leina Piriano.)

JUDGMENT

1. The appellant was convicted and sentenced to 5 years imprisonment in respect of the offence of stealing stock contrary to Section 278 of the Penal Code (Cap 63) Laws of Kenya.
2. The State has supported both the conviction and sentence.
3. The appellant was convicted on circumstantial evidence. He was found in possession of the recently stolen cow of the complainant, Peter Marasimi Mpoe (PW2).
4. In this court the appellant has raised six (6) grounds in his amended grounds of appeal.
5. In ground one, he has complained that his right to be charged in court within 24 hours was violated and that no explanation was given by the police for such contravention. This he says contravened Article 49 (i) (f) (ii) of the 2010 Constitution of Kenya.
6. The record shows that he was arrested on 5th June 2015. It further shows that he was charged in court on 8th June 2015. In this regard Mr. Omwega for the Respondent submitted that if the rights of the appellant were violated, his remedy lies in being compensated by way of damages.
7. I find that this court is concerned primarily as to whether the offence was proved beyond reasonable doubt or not. The issue of violation is for the civil courts to determine.
8. I therefore agree with Mr. Omwega that the remedy for the violation of the appellant's rights lies in an award of damages. In ground two, the appellant faulted the trial court for failing to consider how the appellant was arrested and detained in police custody. According to Corporal Bethuel Nyangate (PW4), who was the Investigating Officer, he only found the appellant in police cells.
9. Furthermore, according to the evidence of Milton Mongei Kerongo (PW5), he was rang by the complainant and was informed to be checking on the road in respect of the presence of his stolen cow.
10. Furthermore, as a result of information received, PW 5 went to Olposimoru. While there he saw a brown cow, which was being sold by the Appellant. The appellant was then arrested for selling his cow. It was the evidence of PW5 that he knew the appellant before this incident.
11. Finally PW5 testified that it is the police who arrested the appellant. In this regard PW5 identified a photograph of that cow, which had been taken by the scenes of crime officer (Henry Kiboma) (PW3). The photograph was put in evidence as Exhibit 1.
12. The evidence of the complainant (PW1), is that the appellant was arrested in the course of selling the stolen cow on 4th June 2015. The evidence of PW2 is supported by that of No.51894 PC Godfrey Muriithi (PW1), who arrested the appellant in the process of selling the cow of the complainant.

13. It is clear from the preceding evidence that the appellant was arrested in the process of selling the stolen cow on a day following its disappearance on 3rd June 2015. There is further evidence that it was not a market day. In circumstances, I find no merit in ground 2 and I hereby dismiss it.

14. In ground three, the appellant has faulted the trial court in failing to find that the vital witnesses were not called to testify. In his submissions in this court, the appellant submitted that the wife of the complainant, who locked the cow in the boma was not called as a witness. Furthermore, he also submitted that one Daniel who rang the complainant in respect of stealing that cow also ought to have been called as a witness.

15. I find that the appellant was found in possession of a recently stolen cow within hours of its disappearance from the boma of the complainant. I find that it was desirable to call those two witnesses. The failure to call these witnesses did not weaken the prosecution case against the appellant, which evidence proved that it was the appellant who stole the cow. I find no merit in this ground and is hereby dismissed.

16. In ground four, the appellant has faulted the trial court for relying on contradictory and inconsistent evidence. I find that there were minor contradictions which did not dent the evidence of the prosecution witnesses. In the circumstances, I find no merit on this ground of appeal and I hereby dismiss it.

17. In ground five, the appellant has faulted the trial court for failing to consider his defence. The unsworn defence of the appellant was that he was arrested on 5th June 2015 after leaving the home of his in-laws. While en-route, a vehicle stopped and those on board asked him where he was going. He told them he was heading towards Soit. As a result they gave him a lift. As they were approaching his home, he asked them to drop him. They refused to do so. Instead they arrested him and took him to the police station where he was detained for two days. Thereafter he was charged with this offence.

18. Finally, he testified that when he was released from police cells he found a cow at the police station.

19. This defence evidence appears not to have been considered. As a first appeal court I have re-assessed both the prosecution and defence evidence and I find that the defence evidence was rightly rejected for being incredible. In the circumstance I find no merit in this ground of appeal which is hereby dismissed.

20. In ground six, the appellant has faulted the trial court both in law and fact for failing to appreciate that being a Maasai, he may not properly have understood the language used in court namely English/Kiswahili. In addition, he has stated that he was unrepresented.

21. In this regard, the record of the proceeding shows that the appellant participated in the trial by cross examining PW1, PW 2, PW 3, PW 4 and PW 5, all of whom testified in Kiswahili. It is therefore, clear that the Kiswahili language used in court was interpreted to the appellant in Kimaasai. In the circumstance I find no merit in this ground of appeal and is hereby dismissed.

22. In ground seven, the appellant has faulted the trial court for failing to find that the offence was not proved beyond reasonable doubt. In this regard, I have reassessed the entire prosecution and defence evidence. After doing so, I find that the offence was proved beyond reasonable doubt.

23. The offence carries a maximum sentence of 14 years imprisonment. The appellant was a first offender. The stolen cow was recovered. The appellant has been in prison custody since 5th June 2015, which is a period of about 3 years.

24. I may add that the trial court did not take into account that the appellant had been in custody since 5th June 2015, which is an error of law in terms of section 333(2) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

25. The offence is a serious one. However, the aggravating factors are less compared with the mitigating factors and I therefore find that the sentence of 5 years imprisonment was manifestly excessive.

26. In the view of the foregoing considerations I hereby reduce the sentence to the period the appellant has served.

27. The upshot of the foregoing is that the appellant is hereby set free unless otherwise lawfully held on other warrants.

Judgment delivered in open court this 3rd day of October, 2018 in the presence of the appellant and in the presence of Ms Nyaroita for the respondent.

J.M.BWONWONGA

JUDGE

3/10/2018