



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CRIMINAL APPEAL NO. 56 OF 2016

SAMUEL KIMUTAI BOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Judgment, Conviction and Sentence imposed in Criminal Case

*Number 543 of 2015 in the Senior Resident Magistrate's court at Tamu delivered by S.A. Opande, S.R.M.
on 6.7.16).*

JUDGMENT

The trial

The Appellant herein **Samuel Kimutai Bor** has filed this appeal against his conviction and sentence on a charge of stealing stock contrary to Section 278 of the Penal Code. The particulars of the offence were that:-

“On the 6th November 2015 at Homaline village in Muhoroni District within Kisumu County jointly with others before court stole one cow valued at Kshs. 40,000/- the property of Apollo Owuor Kwama

The prosecution called a total of five (5) witnesses in support of their case. The brief facts were that at about midnight on 6th November 2015, Apollo Owour Kwama, the complainant herein was awoken his dogs that were barking seriously. That he opened the door to find out what was happening outside and someone threw a stone at him as a result of which complainant rushed back into the house and locked the door. That someone tried to push the door open and on failing to gain access, locked it from outside and broke the security light bulb near the door. That while complainant was inside the house; he heard his cow mooing and also heard someone say “ndiyo hiyo”. That he suspected that the people that were talking outside had an intention of stealing his cow and he thus called the area assistant chief and also raised an alarm that attracted his neighbors who opened the door for him. That he went to the cattle boma and found his cow missing. That in company of his neighbors; they followed the foot marks of the cow but didn't get it. That the following day; he was informed that police at Kapsoit Police Station had recovered a cow. That he went to the police station and identified the cow as his.

PW3 Julius Maritim of Kapsoit location testified that on 6th November 2015, he was woken up by Bor, accused herein who asked him to keep a cow for him as he went out to look for a buyer. That when accused did not return; the witness became suspicious about the ownership of the cow and reported the matter to the chief. That accused later returned collected the cow and was arrested while he was driving it away. PW4 Charles Kibet Tuei, chief Ketitui location recalled that he arrested accused on 6th November

2015 and recovered from him a brown cow that was suspected to have been stolen and he handed him over to the police. PW5 CIP Lucheveleli recalled that the cow was later identified by complainant as his.

At the close of the prosecution case the appellant was ruled to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied the charges. On 6.7.16, the learned trial magistrate delivered her judgment in which he convicted the appellant and after listening to his mitigation, sentenced him to serve ten (10) years imprisonment.

The appeal

Being dissatisfied with the conviction and sentence, the appellant lodged the instant appeal. In his amended grounds of appeal filed on 28th February 2017, the appellant raised three grounds to wit:-

(i) THAT he is an orphan and the only working person in the family

(ii) THAT the appellant should not be prejudiced since the property was recovered by the owner

(iii) THAT the appellant was not given sufficient an ample time to prepare his defence and this contravened Article 50 (2) of the constitution

In support of the aforesaid grounds of appeal, the appellant tendered written submissions which I have carefully read and considered.

The appeal was opposed by the state. In opposing the appeal, Ms. Nyamosi, learned state counsel submitted that ground one is irrelevant to the appeal. She further submitted that appellant committed a serious crime that must be punished recovery of the stolen cow notwithstanding. Counsel additionally submitted that the trial magistrate explained to the appellant his right under section 211 of the Criminal Procedure Code and he opted to give an unsworn defence and to call now witness. It was also submitted that there was overwhelming evidence against the appellant since the cow was stolen on the night of 6th November 2015 and accused took the stolen cow to PW2 on the morning of 7th November 2015 at 5.00 am thereby raising suspicion as to its ownership. According to the counsel, the conviction of the appellant was safe and cannot be faulted.

Analysis and Determination

As the first appellate court in the instant appeal, this court is required and is indeed duty bound to subject the evidence tendered in the lower court to thorough re-evaluation and analysis so as to reach its own conclusion as to the guilt or otherwise of the appellant. In doing so, I am guided by the ruling of the Court of Appeal in the case of **OKENO VS. REPUBLIC [1972] E.A.32**, where it held that:-

“It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”

This appeal court must always bear in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

In dealing with this appeal, I have perused the written submissions of the appellant and I note that he has raised three (4) grounds of Appeal which I will consider as hereunder.

- His mitigation
- Recovery of stolen property
- That he was a first offender

- His right to have adequate time and facilities to prepare a defence under Article 50(2) (c)

With respect to mitigation and recovery of stolen property; the appellant raises issue with the fact that the learned magistrate neither considered his remorsefulness, recovery of the stolen property nor that he was a first offender.

In ***Otieno v. Republic [1983] eKLR*** the court stated that

“the general rule is that a maximum sentence should not be imposed on a first offender”.

Section 278 of the Penal Code provides:-

If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years

The maximum sentence under this section is 14 years. In sentencing the appellant to 10 years, the learned trial magistrate observed that the appellant had previously been charged with a similar offence and acquitted on a technicality and found that to be an aggravating factor. Aggravating factors are those which may increase the sentence. The fact that the appellant had been charged and acquitted is in my view not an aggravating factor and the finding that the previous charge had a bearing on the sentencing decision is a serious misdirection on the part of the learned trial magistrate.

The learned trial magistrate rightfully observed that the appellant was a first offender. The stolen cow was also recovered. These were mitigating circumstances that warranted a more lenient penalty than would have been ordinarily imposed in their absence.

The fourth ground of appeal is that the appellant was not given sufficient time to prepare for his defence contrary to Article 50 (2) (c) of the Constitution. He goes further to state that defence witnesses were not called. I have examined the trial record and there is no evidence that the prosecution did not disclose in advance of the trial, all the witnesses and evidence it was relying on. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. The appellant indicated he wished to give an unsworn defence and had no witness to call. From the foregoing; I find that the appellant was not deprived of his right under Article 50(2) (c).

Having considered this appeal and the submissions by the learned state counsel and the appellant, I am satisfied that the appellant was convicted on very sound direct evidence. The upshot of this is that the appellant's conviction is upheld but the sentence is set aside and substituted with a term of 4 (four) years imprisonment from the date of conviction.

DATED AND DELIVERED THIS 3rd DAY OF April, 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk

Appellant

For the State