



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.44 OF 2016

BETWEEN

ZADOCK JOHN ODONGO.....APPELLANT

AND

STATE..... RESPONDENT

(An appeal from original conviction and sentence of the SRM's Court at Ndhiwa in Criminal Case NO.55 of 2015 dated 01.07.2015 – Hon. B.R. Kipyegon,RM)

JUDGMENT

1. ZADOCK JOHN ODONGO (the appellant) was convicted on a charge of stealing stock contrary to **Section 278** of the **PC** and sentenced to serve 7 years imprisonment.

2. The Prosecution case was that on 26th February 2015 at **UPPER KAYAMBO** location in **NDHIWA** Sub County, he stole two bulls valued at Kshs.80,000/= the property of **BLASTO OBUYA OPIYO**.

The appellant denied the charge.

3. BLASTO OBUYA (PW1) a farmer at **KANYAMWA KAYAMBO** woke up on 26/02/2015 at 7.00 a.m to find his two bulls missing from where he had tethered them. One had very long horns, and the other one was brown in colour – he identified the two animals in photographs presented to the trial court.

4. PW1 made a report to **NDHIWA** police station and while at **NDHIWA** stage, he saw two people approaching with the self same animals. He followed them for a while and they entered the police station with the two animals. The two people reported that they had recovered the animals from a suspected thief.

5. JOSEPH NYAMBOK (PW2) a farmer at **KANYIDOTO** was sleeping in his house when he heard a dog barking at about 4.00 a.m. He got out of his house with a torch lit, and saw two bulls being driven by one man. The man tried to run away, but PW2 screamed and alerted neighbours who gathered and apprehended the person. He described the animals and identified them in the photographs presented in court as one brown one with long horns and the other borana reddish – brown with bad eyes.

6. The villagers wanted to lynch the man whom he identified as the appellant, but PW2 called the area chief who intervened.

7. The appellant said he'd brought the bulls from the house of **KASERA NDEGE**. As the appellant and the animals were being led to the police station, they met the owner of the bulls.

8. This evidence was corroborated by **CHARLES OWINO KIGA** (PW3) a village elder at **KANYIDOTO** who was called to the scene of the appellant's arrest by PW2's son.

9. The area chief, **ALFRED ODONGO OCHUODHO** (PW4) confirmed receiving a phone call from the appellant who said he had been intercepted with some 2 bulls, by villagers. The same information was also relayed to him by PW2. Apparently one **ODENY AGOL** had also reported the loss of 2 bulls, so the chief proceeded to the scene where he found villagers gathered around the appellant and the 2 bulls. The appellant claimed he had come from **KALAMINDI** where the 2 animals had been used to plough for 11 days.

10. Since the appellant was giving conflicting information about the animals, a decision was made to take him to the police station.

11. PW4 confirmed that he knew the appellant as one who treated animals around the village, but denied that the 2 bulls had been used to plough his field.

12. CPL WILLIAM KAPKORIS (PW5) who conducted investigations confirmed that the appellant was led to the station with the two animals.

13. The appellant's sworn defence was that he'd left **KALAMINDI** on 26/02/15 with his two cows intending to go and plough his farm at about 4.00 a.m. When he got to **GINGO**, the animals recognised his home, and got rowdy and entered into another man's home. The dogs barked and attracted the attention of the home owner who came out with a torch. He sought his help but instead the man raised an alarm, leading to the villagers apprehending him. He called the area chief as he used to plough his farm using another set of animals.

14. The chief called complainants who came and looked at the animals who held a discussion on the side before he was led to the police station. The animals refused to be led to the police station without him. While at the police station, he saw 2 complainants and 2 different cows which were blackish in colour, yet he had brown cows.

15. The trial magistrate upon considering the evidence noted that the physical appearance of the animals as presented to the court in the photographs showed:-

“two mature brownish bulls, one has notably long horns than the other and the other bull distinctively has abnormally red right eye ball with dark grown (almost black) neck, but generally brownish body.”

16. The trial magistrate pointed out that the appellant's claims that the animals he was found with were different from the ones eventually presented in court had no supporting evidence and that the appellant merely feigned being framed up in the circumstances. The trial magistrate wondered why all the members of the public would decide to replace the bulls with a different set of animals within hours of his being taken to the police station.

17. As for the disputed colour the trial magistrate in rejecting appellant's claims observed that:-

“The bulls are generally brownish even though the accused person insisted that “very blackish bulls” were availed at the police station. He said so merely because one and not even both of these bulls has a deeply brown/blackish part of the neck.”

18. The trial magistrate found that the appellant had taken away the 2 bulls with an intention of permanently depriving the rightful owner of the same.

19. The appellant contested the findings on grounds that the prosecution did not prove the case and faulted it for relying on witnesses who all hailed from one location whom he accuses of hiding his real bulls and presenting others belonging to a person from that locality, just because he was from a different

location.

20. He insists that there were four different animals and faults the investigating officer for failing to visit the scene to establish the truth. He submitted that the only reason photographs of the animals were taken and produced in court as exhibit instead of the true animals, was because the owner was in a hurry to dispose of them by sale.

21. In opposing the appeal, **MR. OLUOCH** on behalf of the State submitted that the appellant was caught red handed as he drove the animals away and was positively identified by PW1 and PW2.

22. He pointed out that the owner of the bulls (PW1) narrated how he woke up to find his animals missing and after making the report to police, he saw the appellant being brought to the police station accompanied by the 2 bulls. He also pointed at the conflicting explanation given by the appellant regarding the animals – were they his or did they belong to the unnamed woman he alleged to have engaged him to plough her fields.

23. Counsel urged the court not to interfere with the sentence saying that although recovery was made, the 7 year sentence was not excessive.

24. The appellant did admit that he was found driving two bulls at about 4.00 a.m. on the date in question but insists that the animals he was found with were different from the ones presented in court and in fact belonged to him. This is the claim the trial magistrate described as an afterthought.

25. Indeed when the two witnesses PW1 – PW3 testified, the issue regarding the animals being different from what was presented in court was never put to them during cross examination. I cannot therefore fault the observation made by the trial magistrate.

26. The appellant gave different versions to the different people who demanded an explanation from him about the bulls. The trial magistrate rightly observed that it was ordinarily suspect to find someone driving livestock at 4; and his failure to give a reasonable explanation about them led to a presumption of mischief on his part. The trial magistrate properly considered his defence and rejected it saying his claim that the bulls got rowdy as he approached his home, leading to the incident could not hold as the appellant was a stranger in the area – he was from West Kanyidoto but was found at in Central Kanyidoto – his explanation as to the presence in the area stood on quick sand and indeed it was doubtful why all members of the public would almost instantaneously replace them him with two different bulls – in any event the trial magistrate made a valid and rational observation regarding the dark patch on one of the animal which seemed to be the basis of the appellant insisting that the animals he had were of a different colour from the ones shown to court.

I find that the conviction was safe and is upheld.

27. As for sentence – the offence attracts a maximum sentence of 14 years, the animals were recovered, so he did not benefit from his mischief. The social inquiry pre-sentence report indicated he was not known to be involved in criminal activities – under the circumstances my view is that 7 years was rather harsh and I set aside the sentence and replace it with sentence of 3 years imprisonment which takes effect from the date of conviction. It is only to that extent that the appeal succeeds.

Delivered and dated this 15th day of May, 2017 at Homa Bay

H.A. OMONDI

JUDGE