



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 47 OF 2015

BETWEEN

ADONIJA AKOKO ANYENGO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 385 of 2015 at Chief Magistrate's Court at Homa Bay, Hon. S. Ngungi, PM dated 4th December 2015)

JUDGMENT

1. In the subordinate court the appellant, **ADONIJAH AKOKO ANYENGO**, was charged with stealing stock contrary to **section 278** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on 1st July 2015 at Sero Village within Homa Bay District, Homa Bay County, he stole one brown bull valued at Kshs. 25,000/-, the property of Joseph Odiembo Onyango. He also faced an alternative charge of handling stolen good contrary to **section 322(1) and (2)** of the *Penal Code*. It was alleged that on 1st July 2015 at Makongeni in Homa Bay District within Homa Bay County otherwise than in the course of stealing, dishonestly retained one brown bull knowing or having reason to believe it to be stolen property.

2. He was tried, convicted and sentenced to 3 years imprisonment. He now appeals to this court on the basis of grounds filed on 17th December 2015. In summary he contended that the officer who photographed the bull did not prove that he was authorized to carry out the exercise as he failed to provide this certificate of practice and where the photos were printed. That the prosecution produced two different photographs which could not be relied on to prove its case. The appellant also attacked the sentence as harsh and excessive in the circumstances. The appellant filed written submissions in which he contended that the court did not take into account his defence and that the chief who testified as PW 4 had a grudge against him.

3. Mr Oluoch, learned counsel for the respondent, who supported the conviction submitted that the totality of the prosecution evidence was that the appellant was found in possession of the stolen bull which he attempted to sell. He submitted that the complainant proved the bull was his and in any event the appellant did not lay claim to it.

4. As this is a first appeal, this court is enjoined to conduct an independent review of the evidence and reach an independent conclusion as to whether or not to sustain the conviction but bearing in mind that it neither heard nor saw the witnesses testify (see *Okeno v Republic* [1972] EA 32).

5. Joseph Onyango (PW 1) recalled that on 1st July 2015, he woke up to find his bull missing. He reported the matter to the Chief who issued a letter authorizing him to look for the bull. He sent his brother to look for it but he returned home without success. In the evening the chief called to inform him that a cow had been recovered and it was at the police station. He went there on the next day and found a brown bull with a mark on the right ear which he positively identified as his.

6. Shaffie Ayot Onyango (PW 2), a butcher at Shauri Yako Estate testified that on the morning of 1st July 2015, a man whom he identified as the appellant, came to sell to him a brown bull which was tethered nearby. Before they agreed on the price, he told the appellant they should get an agreement witnessed by the Chief. PW 2 called his friend Gordon Ouma (PW 3) and they went to the office of the Assistant Chief of Asego Sub-location, Tom Morris Ondiek (PW 4). PW 4 asked the appellant for his identity card but he did not have it. The appellant told PW 4 that he came from Kabuoch but when PW 4 called his counterpart, he denied knowing the appellant. When he inquired from the appellant once again where he came from, the appellant told him he was from Marram area. He called the Chief of the said area who confirmed that he knew the appellant and his father but was not sure that the appellant could afford a bull. Since PW 4 suspected the bull had been stolen, he reported the matter to Homa Bay Police Station. The Chief of Kalanya Konyango also informed him that a bull had been missing from the area.

7. The investigating officer, Corporal Fredrick Legatine (PW 6) recalled that on 1st July 2015 at about 3.00pm, he went to PW 4's office to investigate the case of a missing bull. He found appellant, PW 2, PW 3 and PW 4 present. He was informed that the appellant had attempted to sell bull but was suspected to have stolen it since he did not have identification documents. He arrested the appellant and took custody of the bull. PW 1 later came with a letter from the Chief of Kalanya Konyango confirming that his bull had been stolen. He identified the bull in police custody as his own by describing it as a brown bull with marks on the right ear. PW 6 caused the bull to be photographed by Corporal Shem Ondiek (PW 5), a gazetted officer.

8. When called upon to make his defence, the accused elected to give sworn testimony. He stated that the he had quarrel with his wife who had an affair with PW 4. When he confronted PW 4 about the issue, PW 4 threatened him with serious consequences. He stated that he reported the threats to him and his wife to 25th May 2015 and 1st July 2015 at Homa Bay Police Station. He claimed that he arrested by village elders on instruction of PW 4.

9. The prosecution case was based on the doctrine of recent possession. In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- R NYR CA Criminal Appeal No. 272 of 2005***, the Court of Appeal summarised the application of the doctrine of recent possession thus;

It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

10. In my view the elements of the doctrine were satisfied. PW 1 confirmed that his bull was stolen and on the very same morning, the appellant attempted to sell the bull to PW 2 in the presence of PW 3. When they went to PW 4 to consummate the agreement to sell the bull, the appellant could not provide any documents proving he was the owner hence the suspicion that the bull was stolen. The bull was found within a day of it being stolen. The appellant did not assert any ownership of the bull which was identified by PW 1 as his stolen bull.

11. As regards the photographs, I am satisfied that PW 5 was a gazetted officer with authority and the certificate produced (Exhibit No. 2) which certified the manner in which the photographs were produced. The two photographs (Exhibit No. 1A and 1B) show a brown bull with ear marks consistent with the description given by PW 1 and in fact identified by PW 1. In light of the entire evidence, I am satisfied

that the ownership and identity of the bull was proved.

12. As regards the appellant's defence, like the learned magistrate, I find his claim that there was a grudge between himself and PW 4 does not displace the overwhelming prosecution evidence. PW 1 was clear that he did not know the appellant and there was no reason for the appellant, PW 2 and PW 3, who were strangers to the appellant, to be involved in a scheme to implicate him in matter concerning PW 4 and the appellant's wife.

13. In reviewing the sentence I note that the appellant was a first offender and that the stolen bull was recovered. The aggravating factors are that the appellant's act was deliberate and he was caught before further damage could be done. The probation report points to lack of remorse and the fact that his ties to the community are tenuous rendering a non-custodial sentence useless. I find the sentence imposed on the accused neither harsh nor excessive. It is appropriate.

14. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 3rd March 2016.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.