



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 5 OF 2016

PATRICK NJERU MUGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in CR. 2015/14 at Embu Chief Magistrate's Court by Hon. S.K. Mutai - SRM on 1st February, 2016)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of five years imprisonment imposed upon him on 1st February 2016 by the court of the Senior Resident Magistrate 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. Appellant was convicted on the evidence of Patrick Mbogo Njeru (PW 1), who was the complainant. He testified that his brown bull (or cow as described by other witnesses) went missing in the night of 22nd December 2014. He reported the loss of his bull to both Manyatta and Itabua police stations. Four days later on 26th December 2014, he was called by one Muchangi Gichuru, who told him that there was a cow at Kameo. He proceeded there and found a crowd of people and the police. He saw the cow there which he identified as his. While there, police took photographs of the cow and released it to him. At the same scene was the appellant, who was in handcuffs.
4. Furthermore, the evidence of Jacob Njagi (PW 2) was that he was a watchman at Kameo factory at Karanja Society. PW 2 testified that on 26th December 2014 at around 9 a.m when he had gone to look for grass for his cows, he saw a brown cow with white spots on the head tied to a tree. In company of Lawrence Mbogo who is the in charge of Kameo factory, they went together and reported the matter to the area sub-chief. He further testified that there was no person, where the cow was tied. He then heard the sub-area shouting that the owner of the cow had been found. Thereafter, he returned briefly to the same scene and it is at that point in time that he saw the appellant who claimed that that bull was his property.
5. The evidence of PW 2 is supported by that of Jane Kanyi Njiru (PW 5). PW 5 testified that the appellant claimed that the bull was his property. According to PW 5, the appellant explained that he had bought the bull and had taken it to a lady whom he was wooing and it was taken there but that they later disagreed with the lady and the cow was returned to him. PW 5 further testified that the appellant stated that he had stolen the bull. Shortly thereafter, the owner of the bull came and both the suspect and the bull were taken to Itabua police station.

6. The appellant was then arrested by police and charged with this offence. Upon being placed on his defence, the appellant gave sworn evidence. He testified that on 26th December 2014 he was called by a customer to go and repair his bicycle in Embu town. He then proceeded to Embu town. Upon reaching Kameo factory, he found one woman and four men. He left them and proceeded on his way. Shortly thereafter, he saw the four men running behind him. These men told him that they wanted him to go back. They then suddenly started to beat him and proceeded to go back. It is then that he was told that he was a thief. He was then asked about cows. Another man arrived on the scene and stated that he was the owner of the cow that had been stolen during the night. Finally, he testified that these men wanted to lynch him and that he was framed and labelled as a thief.

7. The appellant has raised seven grounds. In ground 1 he has stated the unchallengeable fact that he did not plead guilty to this offence. In ground 2 he has faulted the trial court in failing to find that none of the witnesses saw him steal the cow. In this regard, it is important to point out that the appellant was convicted on circumstantial evidence. He was found in possession of the stolen cow four days after its being stolen. He told Jacob Njagi (PW 2) and Jane Kanyi Njiru (PW 5) that the stolen cow was his property. This cow was positively identified as the property of Patrick Mbogo Njeru (PW 1). In the light of this evidence, this ground of appeal is without merit and is hereby dismissed.

8. In ground 3 he has faulted the trial court for failing to find that the appellant was a mere passerby on a public road near the bush where the stolen cow was found. In the light of the evidence I have referred to, that the appellant was in possession of the stolen cow, this ground of appeal is lacking in merit and is hereby dismissed. In ground 4 the appellant has faulted the trial court for failing to find that the photographs of the cow that were put in as exhibit 1 (a) and (b) did not connect him with the stolen cow. Again in the light of the evidence that he was found in possession of the stolen cow four days after its theft, this ground of appeal is without merit and is hereby dismissed.

9. In ground 5 the appellant faulted the trial court for failing to find that the charge as framed against him was defective in that it alleged that the value of the cow was Kshs 70,000/-. In this regard, the evidence of the complainant (PW 1) was that the value of the cow was Kshs 10,000/-. The appellant has asserted that this violated **section 214 (1) of the Criminal Procedure Code** (Cap 75) Laws of Kenya. Section 214 is in relation to the variance between the charge and the evidence produced. The provisions of that section empower the court to amend the charge to be in line with the evidence tendered in court. The amendment to the charge may be done upon the application of the prosecutor or by the court on its own motion (*suo-motu*). This ground of appeal succeeds because the trial court ought to have caused the charge to be amended to show the value of the cow as being Kshs 10,000/- and not Kshs 70,000/-. However, this defect is curable in terms of **section 382 of the Criminal Procedure Code**. The reason being that this error did not occasion a failure of justice.

10. In ground 6 the appellant has faulted the trial court for failing to consider his defence which he asserts is in violation of section 169 (1) and section 212 both of the Criminal Procedure Code (Cap 75) Laws of Kenya. I have considered the judgement of the trial court and I have found that the evidence of the appellant was fully considered and rightly rejected for being untruthful. In other words, the evidence of the appellant was not credible. The second reason for the rejection of his evidence was that the evidence produced by the prosecution was overwhelming and this is clear from the judgement of the trial court. I find that the trial court complied with the provisions of **section 169 of the Criminal Procedure Code**, because the reasons for the judgement were given. Additionally **section 212 of the Criminal Procedure Code**, does not apply to this appeal as it relates to the right of the prosecutor to call evidence in rebuttal to that given by the appellant. In the circumstances, this ground of appeal is lacking in merit and is hereby dismissed.

11. In ground 7 the appellant has faulted the trial court for failing to find that the offence was not proved beyond reasonable doubt as required by the law, which in his view is contrary to **section 111 of the Evidence Act** (Cap 80) Laws of Kenya. Section 111 of the Evidence Act is in relation to shifting the burden of proof to an accused person in certain cases. The provisions of the law under which the appellant was convicted do not shift the burden of proof to him. It is therefore clear that the provisions of section 111 are inapplicable to the instant case. I find as did the trial court that the offence charged was proved

beyond reasonable doubt against this appellant. This ground of appeal is lacking in merit and is hereby dismissed.

12. The conviction of the appellant is sound in view of the overwhelming evidence in support of the conviction.

13. As regards sentence, the maximum sentence provided for is a period of imprisonment not exceeding 14 years. In sentencing the appellant, the trial court took into account that he was a first offender and was not remorseful. That court failed to consider that the stolen cow had been recovered. This notwithstanding, I find that the sentence of five years imprisonment was merited.

14. The appellant's appeal is hereby dismissed in its entirety.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this 1st day of September **2016**

In the presence of the Appellant and Ms Marete for the Respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

01/09/2016