



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 65 OF 2013

BETWEEN

EDWIN OLOO OGUMA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 238 of 2013 at Chief Magistrate's Court at Homa Bay, Hon.P. Mayova, Ag. SRM dated on 27th May 2014)

JUDGMENT

1. In the subordinate court the appellant, **EDWIN OLOO OGUMA**, 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 diverse dates between 7th and 14th April 2013 at Lwala Village, Ngodhe Sub-location, Gembe East Location, Mbita District, Homa Bay County, he stole 2 bulls, 6 goats and 6 sheep all valued at Kshs. 84,000/-, the property of Zaddock Oguma Wayanza.
2. He was tried, convicted and sentenced to 6 years imprisonment. He now appeals to this court on the basis of grounds filed on 19th September 2014. In summary the grounds are that he was framed by the prosecution witnesses and that the complainant and his wife were not called upon to explain why they caused him to be prosecuted yet he was their son. He also contends that there was insufficient evidence to convict him as no one saw him steal the livestock and that the photographs of the animals were never produced. He submitted that the receipts produced to show that he sold the complainant's bulls at the market were fraudulent and that the buyer of the bulls was never called to testify despite his name appearing on the receipt.
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 the complainant's caretaker and after he stole the animals he abandoned the home and was later seen with the animals which he sold at the market. He submitted that the sentence imposed was neither harsh nor excessive.
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). The prosecution marshalled 7 witnesses who testified as follows.
5. PW1, the complainant, testified that he worked in Nairobi and that the appellant was his caretaker and was in charge of taking care of his animals. He recalled that on 7th April 2013 while he was in hospital,

his cousin, PW 3, called to inform him that his 2 bulls, 6 sheep and 6 goats had been stolen from his home. PW 1's wife, PW 2, confirmed that the appellant was their caretaker and that she also received information that their animals had been stolen. PW 3, the assistant chief of Ngodhe Sub-location, received information from the complainant's brother in law that he had visited PW 1's home and did not find the appellant or the animals. He went to PW 1's home and confirmed that the animals were missing whereupon he called PW 1. He launched investigations and was informed that the appellant had been seen with two bulls on 14th April 2013 going to Kipasi market. He also made inquiries from Suba County Council employees who had receipts confirming that the appellant had sold the bulls.

6. PW 4, recalled that on 7th April 2013, as he was going to Kipasi market, he met the appellant, whom he knew as the caretaker of PW 1's home with 1 goat. He saw the appellant sell the goat at the market. PW 5, was with PW 4 when they met the appellant on his way to Kipasi. He confirmed that the appellant sold the goat he had on that day.

7. PW 7, a revenue collector for Mbita County at Kipasi market, testified that he was stationed at the market where he would normally issue receipts to traders. He had receipt books which he would give the buyer the original and the duplicate would be taken back to the office. He recalled that on 14th April 2012 at about 10.00 am at Kipasi, he issued receipts in favour of a transaction where the appellant sold 2 bulls; a brown and dark brown one for Kshs. 24,600/- and Ksh. 24, 100/- respectively to one Edwin Oloo Ogoma. He recorded the details on the receipts no. 62748 and 62749 which he produced.

8. When the appellant was put on his defence, he elected to make an unsworn statement. He gave an account of how he was arrested on 19th April 2013 by the chief and assistant chief who asked him about a cow. He stated that he had left the homestead 3 weeks prior to his arrest and that he left because his father did not want him to marry but to get a job. As a result of the differences between him and PW 1, he was arrested and charged. He denied that he was an employee of the complainant.

9. From the evidence outlined above, it was established that the appellant was employed by PW 1 to be the caretaker and the other witnesses PW 2, PW 3, PW 4 and PW 5 knew him as the caretaker. PW 1, PW 2 and PW 3 confirmed that the animals were missing from PW 1's homestead and the appellant was seen by PW 4 and PW 5 with a goat proceeding to sell it at Kipasi market. Furthermore, the evidence of PW 7 proved that on 14th April 2013, the appellant sold two bulls. The testimony of PW 7 was that of an independent witness who did not know the accused. It was not necessary to call the person who bought the bulls from the appellant as the testimony of PW 7 coupled with documentary evidence of the receipts was sufficient to prove that the appellant sold the animals.

10. Although no one saw the appellant steal the animals, the circumstantial evidence implicating the appellant was watertight. The appellant, as the caretaker, was the only one with custody of PW 1's livestock and when called upon to explain the circumstances of the loss of the animals he had been employed to take care of, he could not furnish any reasonable explanation. His explanation that he went away 3 weeks prior to his arrest due to a disagreement with PW 1 only confirms that he had disappeared from the home after he had stolen the animals. Like the learned magistrate in the lower court, I find his claim that there was a grudge between PW 1 and the appellant an afterthought as he did not put any questions to PW 1 and PW 2 to suggest that there was such a grudge. His defence was therefore a sham.

11. As regards the sentence, the learned magistrate took into account that the appellant had been entrusted with the care of PW 1's home and animals and the theft took place at a time when PW 1 was vulnerable. I also note that the appellant sold the animals for gain and spent the money with abandon. Considering that the maximum term for the offence is 7 years imprisonment. The sentence was neither harsh nor excessive.

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

DATED and DELIVERED at HOMA BAY this 9th June 2015

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.