



REPUBLIC

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.83 OF 2013

DAVID OMONDI NYONGESAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(An appeal arising out of the conviction and sentence of J.N. Maragia RM in Busia Cr. Case No.1306 of 2013 delivered on 16/10/2013)

J U D G M E N T

1. In this Appeal, David Omondi Nyongesa (**the Appellant**) challenges his conviction and sentence on the offence of Stealing Stock contrary to Section 278 of the Penal Code. It had been alleged that on the night of 24th July 2013 at an unknown time at Sikura village within Busia County, the Appellant stole 1 cow value at kshs.9,000/= being the property of Stephen Onyango Oyweri. (PW1).
2. PW1 is a farmer in Butula within Busia County. On the morning of 25th July 2013, as a good farmer would do, he went to check on his 3 cows which he had locked securely on the night before. To his disappointment, his brown bull was missing. He reported this loss to the village elder by which time he found that the Appellant had already been arrested.
3. The person who arrested the accused was Martin Obago Nande (PW3). He is a businessman who deals with cows at Kogalo market. PW1 had informed him about the loss of his cow. Later, his wife informed him that a certain boy had been seen with the lost cow. Using a motor cycle he followed the suspect. When the Appellant saw him, he started to run away but it was in vain as he was arrested and taken to Tingolo Police Post.
4. Simon Oduori (PW2) recalled that on the morning of 25th July 2013, he saw a young man with a bull on his shamba. The bull was brown in colour. The young man told him that he wanted to sell him the animal. But as he did not have any identification document on himself, PW2 asked him to return with a person who could identify him. Later, PW2 heard screams and went to the direction of those screams. There he found that the boy who had earlier on attempted to sell to him the cow was under arrest.
5. On 25th of July 2013 Corporal Alex Algegana (PW4) attached to Tingolo Administration Police Camp received the Appellant who was under arrest. Later in the company of his 2 colleagues, he visited where the stolen cow was. Constable Peter Moses (PW5) investigated the matter after the Appellant had been brought to the Police Station at Tingolo by some Administration Police officers.
6. The investigations included taking photographs of the stolen cow. PC Macharia of the Crime Scene Support Services based in Bungoma received one unexposed film from PW 5 with a request that he processes the photographic prints. This was on 28th of August 2013. The photographs that were processed by PC Macharia were produced in Court by Corporal Benjamin Wechuli (PW6).

- The animal in that photograph were identified by the complainant to be stolen Bull.
7. When put to his defence, the Appellant made an unsworn statement in which he told Court that on 20th of July 2013, he was called by his father Martin Nyongesa and informed that there was a land dispute. His father promised to call village elders to resolve the land dispute. Later, on 25th of July 2013 the village elder told him that he had been suspected of stealing a cow and subsequently he was arrested and charged.
 8. In the recital part of the Petition of Appeal, the Appellant states that his Appeal is against both conviction and sentence. But in the grounds that followed, the Appellant only raises issues in respect to sentence. Similarly, in his submissions to Court which are styled “mitigation grounds”, the Appellant merely seeks reduction of the sentence. This Court therefore treats this Appeal as one against sentence only. I must nevertheless observe that an Appeal against conviction would have been unlikely to succeed as the Appellant was found with the stolen cow a few hours after it had been stolen and was unable to account for its possession. The Doctrine of Recent Possession sealed the fate of the Appellant.
 9. On the question of sentence, it has been repeatedly stated that a Court on Appeal will only interfere with the Sentencing Courts’ discretion where the sentence is unlawful or the sentence imposed is against legal principles, or where relevant matters were not considered, or where extraneous matters were considered, or where the sentence is manifestly excessive or lenient in view of the circumstances of the case. It is not open for the Appellate Court to interfere with the Sentence only because it would have imposed a different one.
 10. Before passing the sentence, the Trial Court was informed that the accused was a first offender. When invited to mitigate, the Appellant prayed for a non-custodial sentence. In sentencing the Appellant the Court stated;

“I have carefully considered the mitigation by accused and the fact that he is a first offender. Offence of stealing stock is a serious offence and a deterrent sentence is called for. In the circumstances, the court sentences the accused to 3 years imprisonment.”

The offence for which conviction was entered attracts a maximum imprisonment of 14 years. The Learned Magistrate correctly, as the Appellant was a first offender, did not impose the maximum sentence. I would agree with the State that a prison sentence of 3 years cannot in the circumstances be said to be manifestly harsh.

11. For this reason, I would as I hereby do, dismiss the Appeal in its entirety.

F. TUIYOTT

J U D G E

Dated, delivered and signed at Busia this 12th day of November 2014.

In the presence of:

KadenyiCourt Clerk

Present in person

Owiti.....for State