



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

Criminal Appeal 108 of 2011

**JAMES MWAURA NGUGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

James Mwaura Ngugi was charged with the offence of injuring an animal contrary to **Section 338** of the **Penal Code**. The particulars of the charge are that on 11/12/2009, at Githunguchu Village in Nyandarua District, within Central Province, willfully and unlawfully wounded an animal capable of being stolen, namely a calf worth Kshs.8,000/-, the property of Shelmith Wairimu Kiama. The appellant denied the offence. The case was heard by C.K. Obara, Resident Magistrate Nyahururu, who convicted and sentenced the appellant to 12 months imprisonment on 15/4/2011.

The brief facts of the prosecution case were that Shelmith Wairimu Kiama had on 11/11/09, tied her cow at the boundary between her land and the appellant's land. at that time PW1 was PW2 Jane. PW1 sent Nyambura and Hellen Wanjiru to check on the cow when she heard the children scream. PW1 said the appellant had cut the cow on the tail and hind leg and she reported the matter at Mairo Inya Police Station. She identified a panga as the weapon that the appellant had used. The cow was treated by Kabuchu on 14/12/09 and he prepared a report.

PW2, Jane Wanjiku Ndungu recalled that she was with PW1 on 11/11/2009 when PW1 sent Hellen Wanjiru and Margaret Nyambura to go and check on the cows. The children returned after 10 minutes and reported that the appellant had cut the cow. She said the accused told them that they could go and report. She saw the cow had been cut on the tail and rear leg and shoulders. She said that accused had a panga which she could not identify.

PW3, Ephantus Munene Kabuchu recalled that on 11/12/09, Njoroge Ndugu reported that his heifer had been injured. He found the heifer to be 3 months old, Arsha type, and had a 4cm long 1½ cm wide wound on the hind leg, the back and tail, all caused by a sharp object. He prepared a report on 14/12/09 (PWEx.2).

PC Benson Onkoba of Mairo-inne police station received a report from the complainant and

Administration Police about the injury inflicted on the cow by the appellant. He visited the scene. The appellant was arrested with the panga.

The appellant although given a chance to cross examine the witnesses, did not do so. He opted to remain silent in his defence which is his right. The trial court found that the prosecution evidence was not controverted in any way and convicted the appellant. The appellant being aggrieved by the said decision, preferred this appeal based on the following grounds:-

- (1) That the trial court erred by relying on hearsay evidence received from children of tender age;**
- (2) That the offence was not proved to the required standard;**
- (3) That the court did not give him a fair trial;**
- (4) That the sentence was excessive and harsh.**

The learned counsel for the state, Mr. Nyakundi, opposed the appeal. He submitted that the appellant and complainant are neighbours; that PW1 found the appellant at the scene of the attack; she found the appellant armed and PW3 did confirm that the cow was injured. He said that the maximum sentence for the offence is 14 years and the sentence of 12 months was lenient.

I have considered the evidence on record and submissions of the appellant and the learned state counsel. As the first appellate court, it is required of me to analyse and evaluate the evidence afresh and arrive at my own conclusion bearing in mind that I did not have a chance to see the witnesses and assess their demeanour. Both PW1 and PW2 told the court that it is Hellen Wanjiru and Margaret Nyambura who went to check on the cow and screamed or informed them about the injury to the cow. Neither PW1 nor PW2 said that they went to the scene and found the appellant. There is a total disconnect in PW1's evidence. She told the court as follows:-

**“I sent Nyambura and Hellen Wanjiru to check on our cow. I heard them scream. I had tied the cow at the boundary between my land and accused's land. He had cut the cow on its back. Its tail and the hind leg. I was with my sister Jane. We went and reported the matter to the nearby AP Post. I wrote my statement at Mairo inya police station. He had a panga PMF1 – 1 on his hand. It was a sharp panga. The edge was sharp and the handle was tied with a rubber tyre. Panga identified by witness. Dr. Kabuchi treated the cow and wrote a report. Veterinary report dated 14/12/09 – PMF2. I have had problems with the accused. He never wants anyone's cow near his land. He had problems with many of my neighbours.”**

No where did PW1 state that she went to the scene where the cow had been injured. She talked of the appellant having had a sharp panga but the court was not told at what stage she saw the panga. From the evidence, PW1 never saw the appellant at the scene nor did she see him cut the cow. Similarly, after the two children informed PW1 and PW2 about the cow having been injured, PW2 did not say whether they went to the scene or not. It is not clear at what time she saw the accused with a panga. Lastly, the witnesses did not tell the court why the two children who first witnessed the incident did not testify as to what they found and saw. Even though the appellant kept silent in his defence, the burden of proof still remained on the prosecution to prove its case beyond any reasonable doubt. The burden did not at any one time shift to the appellant. I find that the prosecution evidence was scanty and there was no evidence directly connecting the appellant with the offence. It seems that the trial court was carried away by PW1's evidence that she had had disputes with the appellant and that the appellant had disputes with other neighbours before this incident.

The appellant also alleged that he was not given a fair hearing. The appellant did not specify what the court did or failed to do that his right to a fair trial was prejudiced. He was accorded a chance to cross examine witnesses but he opted not to.

As to whether the sentence was excessive, **Section 338** of the **Penal Code** provides the maximum sentence to be 14 years imprisonment. Twelve (12) months imprisonment is not harsh but since the trial court only handed the appellant 12 months, the court should have considered a non-custodial sentence for example Community Service Order.

Having found that the prosecution did not prove its case beyond any doubt, I find the conviction to be unsafe, it is hereby quashed and sentence set aside.

**DATED and DELIVERED this 13<sup>th</sup> day of July, 2012.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

The appellant present – in person

Ms Idagwa for the State

Kennedy – Court Clerk