



BONFACE MBURURU WANDERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from original conviction and sentence in Nyahururu criminal case No.482 of 2011 by Hon. D.N. Musyoka, RM Nyahururu dated 21st July, 2011).

JUDGMENT

The appellant, Bonface Mbururu Wanderi, was charged that on the night of 23rd and 24th February, 2011 at Kisiriri Village in Laikipia West District within Rift Valley Province jointly with James Lekitashara and others not before the court they stole five (5) herds of cattle valued at Kshs.120,000/=, the property of Stephen Lekifish Lekamario contrary to **Section 278** of the **Penal Code**.

The trial court found the evidence presented before it sufficiently proved the main charge against the appellant and the alternative charge against his co-accused and upon convicting them sentenced each of them to serve two (2) years imprisonment.

Aggrieved by the conviction, the appellant has filed this appeal challenging the decision of the trial court on four grounds to the effect that:

- i) the evidence was insufficient to prove the offence;
- ii) he was not caught with the stolen cattle;
- iii) he was merely implicated by his co-accused and;
- iv) there was no eye witness to the theft.

Learned counsel for the respondent conceded that the evidence was insufficient to establish the main charge but disclosed the offence of handling stolen property. As the appellant was not charged with the offence of handling the stolen cattle, he urged the court to use the provision of **Section 354(3)** of the **Criminal Procedure Code** to alter the finding of the trial court and substitute the charge with that of handling stolen property.

I have considered the appellant's submissions alongside those of the respondent. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced during the trial in order to arrive at its own independent conclusion, bearing in mind that it did not hear or see the witnesses testify.

It was the case for the State that on 24th February, 2011 at about six o'clock the complainant, Stephen Lekifish Lekamario, found five (5) of his cattle missing from his cowshed. He reported the theft at Rumuruti Police Station where he was given police officers to assist in tracing the stolen animals. While in the bushes searching the animals, they received a report of some animals that were being driven to the market by Tony (the appellant). They proceeded to where the animals were,

intercepted the convoy and arrested the appellant's co-accused as he tried to flee. Upon interrogation he informed the police that he had been hired by the appellant to drive the cattle to the market.

P.W.2, Petrol Kirera Ndegwa, recalled that they were driving cattle from Rumuruti to Nyahururu with P.W.3 and his other colleagues when they were joined by the appellant's co-accused; that he had no cattle at that time but claimed that his cattle were ahead. Upon reaching a place called Kahutho a herd of five (5) cattle joined them from the bushes. The appellant's co-accused told them that those were the animals he was hired to drive. When they asked him whether he had a permit to move the animals, he said that he would get it at the market. On the way, the appellant appeared in the company of some other people on a motorbike and gave his co-accused some shoes. As they suspected the cattle to have been stolen, P.W.3 (Nganga) called the police who followed them and caught up with them at the market and arrested the appellant's co-accused after he unsuccessfully attempted to flee. P.W.2, however, admitted that he did not see the 2nd accused driving the cows.

The foregoing evidence was confirmed by P.W.3, David Nganga Njihia, who was with P.W.2 and others. P.W.4, C.I. Nicholas Nyongesa, carried investigations into the alleged crime, arrested the suspects and charged them in court. Although P.W.4 did not see the appellant at the market, he gathered information to the effect that the appellant was at the market but fled when he saw his co-accused being arrested.

In his defence the appellant denied either having stolen the cattle or having had any business dealings with his co-accused. He also denied the claims that he gave his co-accused shoes.

This was the evidence upon which the trial court found the offence of stock theft proved against the appellant and accordingly convicted him.

From the evidence there is no doubt that the complainant's cattle were stolen and that the cattle were found with the appellant's co-accused shortly after they were stolen. There was no eyewitness to the theft but the appellant's co-accused and the prosecution witnesses led circumstantial evidence to link the appellant to the theft.

From the evidence, it is clear that the appellant was not one of the six (6) people who allegedly handed over the cattle to the appellant's co-accused and that P.W.4 who caused the appellant to be arrested and later charged, only acted on the allegation that the appellant was the owner of the stolen cattle.

In dealing with the evidence of the appellant's co-accused, the trial court ought to have confirmed that he was a credible witness and then looked for some other independent evidence connecting the appellant with the offence as corroboration. See Nguku V. Republic (1985) KLR 412, where the Court of Appeal held:

“In dealing with evidence of an accomplice the court should first establish whether the accomplice is a credible witness and then look for some independence evidence as corroboration connecting the accused person with the offence”.

See also Mwangi V. Republic (1984) KLR 596 where the court said:

“The trial court should have treated the evidence of Muthoni as that of an accomplice and it had been a serious misdirection to treat her evidence as that of a reliable witness. Muthoni's evidence should have been held to be untrustworthy for the reason that she was likely to swear falsely in order to shift blame from herself and being a participant of crime, she could easily disregard the sanctity of the oath to tell the truth.”

There is no doubt that the trial court did not believe the appellant's co-accused. This can be inferred from the following remarks from its judgment:

“... every time he (first accused) was asked by P.W.2 and P.W.3 about the permit he kept on changing goalposts that the permit was either to be brought or it was to be stamped and then brought.as usual if the first accused had nothing to hide and had been hired by the second accused then he should have waited for the police and explained to them what had happened instead of running away....he must have known or had reason to believe that he was dealing with stolen stock”.

The trial court having doubted the appellant’s co-accused ought to have treated his evidence with caution. It did not. It in fact treated the evidence of the appellant’s co-accused as the gospel truth and in so doing misdirected itself. The moment it entertained doubt about the credibility of the appellant’s co-accused, it should have disregarded his evidence altogether.

Without the evidence of the appellant’s co-accused, the only other evidence adduced against the appellant is that of P.W.2 and P.W.3 both whom admitted that the appellant was not one of the six persons who handed the cattle to the appellant’s co-accused. The only reason why they linked the appellant to the theft is because the appellant’s co-accused said that the cattle belonged to the appellant. Secondly they suspected the appellant because he stopped his co-accused on the way and gave him shoes and money and thirdly because he fled when his co-accused was arrested. This was merely evidence of suspicion.

To convict the appellant on the said evidence of suspicion, this court has to be satisfied that the suspicious conduct of the appellant is incompatible with his innocence and incapable of explanation upon any hypothesis other than his guilty. See **Paul V. Republic** (1980) KLR 100 where the Court of Appeal held:

“Where the prosecution relies upon circumstantial evidence to establish guilty of the accused, the inculpatory facts must be incompatible with the accused’s innocence and incapable of explanation upon any hypothesis other than his guilty.”

In the case at the lower court, none of the prosecution witnesses saw the appellant with the stolen animals. There is no explanation as to why and for what reason the appellant gave his co-accused shoes or money. The allegation that the appellant fled after he saw the police arresting his co-accused was not proved to the required standard and there was no evidence that the appellant went into hiding after the incidence. On this, I am unable to find that the only inference that can be drawn from the appellant’s conduct is that he was helping his co-accused in driving the cattle or paying him for driving the cattle. I am also unable to believe that the only reason that would have made him to leave the market, if indeed he left, was fleeing from the police.

For this reasons, I find the evidence presented before the trial court against the appellant incapable of proving either the offence of theft or handling of the stolen cattle. The upshot of the foregoing is that the appeal has merit. Consequently, I allow the appeal, quash the conviction, set aside the sentence and order that the appellant be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Nakuru this 5th day of October, 2012.

**W. OUKO
JUDGE**