



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Criminal Appeal 259 & 260 of 2010**

**NICODEMUS MAKORI MANWA ..... 1<sup>ST</sup> APPELLANT**

**GEORGE MOKAYA MAGETO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from original conviction and sentence dated 9<sup>th</sup> December 2010*

*by Hon. Were, SRM Keroka in Criminal Case No. 1040 of 2009)*

**JUDGMENT**

1. Nicodemus Makori Manwa and George Mokaya Mageto were the 2<sup>nd</sup> and 1<sup>st</sup> accused respectively in Keroka SRM Criminal Case No.1040 of 2009. They were arraigned before court on one count of stealing stock contrary to **section 278** of the **Penal Code**. The particulars of the offence were that on the 3<sup>rd</sup> day of June 2009 at Ekerubo village in Masaba District within Nyanza Province, jointly stole from Rachael Nyaboke one cow valued at Kshs.18,000/=, the property of the said Rachael Nyaboke. The appellants pleaded not guilty to the charge, thus forcing the case to go to full trial during which the prosecution called 4 witnesses.

2. The complainant, Racheal Nyaboke Naftali testified as PW1. Her evidence was that on 3<sup>rd</sup> June 2009, she left her red coloured cow tethered in her compound as she went to her child's school to seek permission because her child was sick. On her way from school, she met the two appellants walking along the road and with them was her cow. She was shocked at what she saw. On seeing her, the second appellant asked her why she looked shocked. The two appellants who were armed with sticks and threatened to beat her asked her to let them pass. When Rachael tried to find out why they had taken her cow, the second appellant told her that they had taken the cow because Rachael's husband had caused the death of the appellants' brother.

3. On seeing what she saw and hearing what she heard, Rachael went to the home of Annah Nyaboke Matagaro (Annah) who testified as PW2. Annah is the one who had given the cow to Rachael. At Annah's home, Rachael was informed that the appellants had also taken another cow from Rachael's neighbour, and that the matter had been reported to Ibacho police patrol base. The police went to Annah's home and Annah accompanied them to police station. Rachael was assured by the police that the cows

would be returned in the morning, but on the next day, Rachael's cow was not returned as promised. Because the stolen cow belonged to Annah, Annah went to ask for the cow from Ibacho police patrol Base but the cow was never recovered.

4. During cross examination, Rachael stated that when she met the two appellants driving away her cow, she was in the company of her 6 year old daughter Emily Barongo (Emily) who testified as PW4. Emily told the court that as she and her mother returned from school on the material day, they met two people who were driving away her mother's cow. She said she knew the two people by facial appearance only. Emily also testified that when she and her mother met the two people, the people asked her and her mother to let them pass.

5. Rachael testified further during cross examination that she had had the cow for about 3 months before the theft. She also testified that the appellants herein told her they had taken the cow because of the involvement of Rachael's husband in the death of the appellants' brother. She also stated that when she met the appellants driving away the cow, they were about 300 metres away from her home.

6. PW3 was Number 54452 Police Constable Henry Kanyi of Ibacho police Patrol Base under Ramasha Police Station. He was the Investigating Officer of this case. He testified that on 3<sup>rd</sup> June 2009 at about 2 p.m. he was on duty at the patrol base when he received a report from one Abel Moseti, a village elder of Ekerubo village to the effect that two cows, one belonging to the reportee and one to Rachael had been stolen from their compounds by two known male adults.

7. Later, PC Kanyi came across the two appellants at a funeral ceremony. He also interrogated the appellants' father. PC Kanyi stated that though Mosoti's cow was returned Rachael's cow was never returned because by 4<sup>th</sup> June 2009, Rachael's cow had already been sold. PC Kanyi recorded Rachael's statement and subsequent thereto, he arrested the two appellants at Keroka law courts where they had gone to answer charges of stealing stock in another case on 7<sup>th</sup> September 2009. PC Kanyi also testified that during investigations into the case, he learnt that Rachael's and Mosoti's cows had been taken because Rachael's husband and Mosoti (who were brothers) were implicated in the death of the appellants' brother. He also said that the appellants did not tell him why they had taken Rachael's cow. During cross-examination, PC Kanyi testified that though he received the report about the theft of the cow on 3<sup>rd</sup> June 2009, he did not commence investigations until 7<sup>th</sup> September 2009 when he arrested the appellants.

8. At the close of the prosecution case, the appellants were put on their defence. In his unsworn statement, the first appellant, Nicodemus Makori Manwa testified that on the day of the alleged theft of Rachael's cow, he had gone to Gucha Mortuary to collect the body of his cousin one Kefa Makori. That he was arrested while he was at Keroka law courts.

9. The second appellant, Geoffrey Mokaya Mageto stated that on the material day, he had gone to Gucha Hospital mortuary to collect the body of a relative. He stated that he was arrested while attending a case at Keroka Law Courts.

10. In essence therefore the appellants have each raised the alibi defence:- that they were not near the scene of crime at the time of the alleged offence.

11. After carefully analyzing all the evidence that was placed before him, the learned trial magistrate reached the conclusion that the prosecution had proved its case against the two appellants beyond any reasonable doubt. He therefore proceeded to find each guilty as charged, convicted them and sentenced each to serve three (3) years in jail.

12. The appellants were aggrieved by both the conviction and the sentence and filed their separate appeals which were consolidated for ease of disposal under file Number 259 of 2010. The common grounds of appeal as per the Petition of Appeal are the following:-

1. *The learned trial magistrate erred in law and fact in convicting the appellant without sufficient evidence.*

2. *The learned trial magistrate erred in law and fact when he did not consider the cause of theft which was linked to murder of the relative of the appellant (brother) and the appellant were witnesses in inquest No. 16 of 2009 whereby the complainant's husband was a suspect and this case intended to disorient the appellant from following their case.*

3. *That the trial magistrate erred in law and fact in dismissing the appellant evidence and putting the appellant to prove an alibi which is against the law.*

4. *That the court intention of the appellant is unlawful and/or improper and the same be set aside. (sic)*

5. *The sentence imposed of 3 years[is] manifestly excessive in the circumstances.*

13. The appellants therefore pray that the appeal be allowed, the conviction quashed and the sentence set aside.

14. This appeal is before me as a first appeal. In this regard, I am under a duty to reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in the matter. In other words, I am expected to rehear the case, only bearing in mind the fact that as an appellate court, I do not have the privilege of seeing and hearing the witnesses who testified in the lower court. In my capacity as the first appellate court, I am also under a duty to consider and weigh the judgment of the lower court and to remember that I must act with circumspection in exercising the jurisdiction of rehearing this case. See generally **Pandya –vs- R. [1957] EA 336** as applied in **Okeno –vs- Republic [1972] EA 32**.

15. I have carefully reconsidered and evaluated the evidence on record, but mindful of the principles enunciated in the above cited cases for rehearing cases on appeal. I have also heard submissions from counsel for the appellant, Mr. Anyona Mbunde and counsel for the respondent, Mr. Jacob Mutai. In his submissions, counsel for the appellants contended that the trial court fell into error when it failed to consider the facts leading to the commission of the offence, namely customary law which required the appellants to descend upon the property of those neighbours who were suspected to be involved in the death of the appellants' brother. Counsel submitted further that it was not the appellants' intention to steal the cow but their intention was to pay for their brother's blood. Counsel conceded that the approach adopted by the appellants in avenging their brother's blood was crude and unlawful but he submitted that the appellants asked for forgiveness on the day of the incident. Counsel also submitted that the offence was committed out of intense emotion without any recognition by the appellants that they were committing an offence. Counsel pleaded with the court to substitute the 3 year jail term with a non-custodial sentence.

16. The appeal on sentence was opposed. Counsel submitted that the 3 year jail term imposed upon the appellants was extremely lenient when viewed against the backdrop of a maximum sentence of 14 years imprisonment. Secondly, counsel submitted that the stolen cow was never recovered, so that the complainant, Rachael was permanently deprived of her property, and that as no restitution was made, and no efforts made in that direction, the appellants should not be shown any mercy. Counsel also submitted that a close look at the evidence as a whole, gives one the clear impression that the appellants acted brazenly when they stole Rachael's cow and also shows that the 3 year prison term was inordinately inadequate in the circumstances. Counsel urged this court to dismiss the appeal.

17. From an analysis of the above submissions, the only issue that arises for determination is whether this court should interfere with the 3 year jail term imposed upon the appellants. I say so because there seems to be no contest at this stage on conviction. Before deciding that issue, it is imperative that I make some observations on this case as a whole. During the submissions at the hearing of this appeal, counsel for the appellants urged this court to find that the appellants took Rachael's cow in what he called a customary practice of avenging the death of their brother, because it was suspected that Rachael's

husband had had a hand in the death of the appellant's brother. As interesting as it may sound, this defence came up only during submissions in the lower court and before this court during the hearing of the appeal. The appellant's attempt to take refuge under customary practice and ignorance of the law cannot provide a defence to the charge. Though it was not for the appellants to prove their innocence, it would have been useful for expert evidence to be called on the customary practice alluded to by counsel in order to assist the court in appreciating what the practice was all about. As it were, these submissions remain suspended on nothing and as LORD Denning MR said in the case of **Macfoy –vs- United Africa Co. Ltd.[1961] All ER 1169**, you cannot put something on nothing and expect it to stand. It must fall. The appellants' theory that they took Rachael's cow in fulfillment of a custom that required them to avenge their brother's death is therefore dismissed, as it is not supported by evidence.

18. Secondly, in their defence, all that the appellants said was that they were not at home when the alleged theft took place. From the record, this alibi defence only popped up when the appellants were giving evidence in their defence. No questions were put to witnesses during cross examination to suggest that either one or both appellants were in a different place at the time of the alleged offence. In this regard therefore, I find and hold that the alibi defence was a mere afterthought which is not even supported by learned counsel's submission on behalf of the appellants. I am satisfied that from the evidence on record, the prosecution displaced the alibi defence, thereby discharging the onus cast upon it of rebutting the alibi defence. See generally **Msembe & another –vs- Republic [2003] KLR 521**.

19. Now turning back to the issue for determination: should this court interfere with the sentence of 3 years imprisonment imposed upon the appellants in this case? I think not. The parameters to be taken into account, by an appellate court which is asked to interfere with the sentence imposed by a trial court were set out in the cases of **Diego –vs- Republic [1985] KLR 621** and **Dismas –vs- Republic[1984] KLR 634**. An appellate court will thus interfere with sentence only where it is clear to the appellate court that in assessing the sentence, the trial court acted on some wrong principle or has imposed a sentence which is excessive or inordinately low in the circumstances of the case. There is no demonstration in the instant case that the trial court erred on either of the two principles if anything, the 3 year sentence in jail was extremely lenient.

20. Accordingly, I find no merit in the appeal on both conviction and sentence and the same is accordingly dismissed. R/A within 14 days.

21. It is so ordered.

**Dated and delivered at Kisii this 11<sup>th</sup> day of October, 2012.**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Okenye for A. Mbunde (present) for Appellant

Mr. Mutuku (present) for Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**