



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 85 OF 2010

(Appeal from conviction and sentence of the Chief Magistrate's Court

at Kakamega in Criminal Case No. 740 of 2009 [P. O. OOKO ESQ., RM])

ALEX MBOYIAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

1. The Appellant herein, **Alex Imboyi**, was charged with the offence of Stock theft contrary to S.278 of the Penal. It was alleged that on the nights of 2nd and 3rd April 2009 at Shikoye village in Kakamega Central District within Western Province, jointly with others not before the court, he stole one cow valued at Kshs.16,000/= the property of **Fredrick Mmasi Serenge**. He had been jointly charged with three other persons who were later acquitted but the Appellant, was sentenced to serve four (4) years' imprisonment.
2. In the Appeal, he has complained that the evidence tendered was inconsistent, irrelevant, far-fetched and uncorroborated and was based on hearsay, rumours and ill-intended motive by the complainant. Lastly, that his defence which created reasonable doubt as regards his role in the alleged offence was ignored without lawful cause.
3. The evidence that led to the Appellant's conviction was that according to PW1, Fredrick Serenge, when he went to bed on the night of 2-4-2009, all his cows were at their shed but the next day he found that one cow was missing and so he made a report at Kakamega Police Station. On 4.4.2009, he was called by the area Assistant Chief who told him that the cow had been recovered and he produced the cow as an exhibit (P.Exh.1).

4. **PW2, Caleb Lumiti**, woke up on the morning of 3.4.2009 and left his house at 6 a.m. and when he returned at noon he found a cow tethered in his homestead. He did not know who had brought it there and so he reported to the village elder who told him not to release it to anyone but at 9 p.m. the Appellant, whom he had known before, came and demanded the release of the cow. He added that the Appellant was with one, Julius, and when he refused to comply with that demand, the Appellant offered him Kshs.2,000/= as an inducement to do so. The two left after failing in their mission and so PW2 returned to the village elder who called the Assistant Chief who advised that the cow should be taken to his home. Thereafter, the Appellant was arrested but Julius disappeared.

5. **PW3, Andrew Ingoki**, was the village elder referred to by PW2 and he confirmed the latter's evidence and added that he was present when the Appellant was arrested.

6. **PW4, P.C. Bernard Amboko**, received the report of theft of the cow on 3.4.2009 at 8.00 a.m. from PW1 and later on 4.4.2009, he received a report that the cow had been recovered and on the same day, he re-arrested the Appellant at Murhanda Chief's camp. After investigations, he charged the Appellant with the offence of stealing stock.

7. When put to his defence, the Appellant stated that he did not know PW1 and that on the night the cow was stolen, he was asleep in his house. He was therefore arrested and charged for no reason at all.

8. I have read the judgment of the trial court and in my own understanding of the evidence on record, there is no doubt that PW1's cow was stolen on the night of 2nd and 3rd April, 2009. The evidence of recovery is also consistent because PW2 upon finding it at his home proceeded to inform the "village elder", PW3, about his discovery. He was ordered not to release it to anyone and he did not do so. The only question to ask is whether PW2 was a believable witness and whether he deliberately made up his evidence. Sadly for the Appellant, I find no reason whatsoever, why that evidence can be faulted. Twice PW2 made the commendable effort to inform PW3 what was happening at his home and on the second report, he was advised to drive the cow to the Assistant Chief's home which he did.

9. Can his evidence about the conduct of the Appellant be faulted? Again, I find no reason to do so because he had known the Appellant for a long time and there is no evidence that at 9.00 p.m. when the Appellant went to claim the cow, PW2 was unable to identify him.

10. The Appellant by claiming that the cow belonged to him, evidence that I find credible, proved that either he was the thief or knew it to be stolen. Since it was proved beyond reasonable doubt that the cow did not belong to him, then he could only but be believed to have been the thief.

11. His defence cannot shake the strong and credible evidence tendered against him and so the Appeal has no merit and is dismissed.

12. Orders accordingly.

Delivered, dated and signed at Kakamega this 3rd day of March, 2011.

ISAAC LENAOLA

J U D G E