



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 46 OF 2014

(FORMERLY KISII HCCRA NO. 97 OF 2012)

BETWEEN

DAN NYAMOGENYI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 503 of 2011 at Senior Resident Magistrate’s Court at Kehancha, Hon. T.A Sitati, RM dated on 3rd April 2012)

JUDGMENT

1. In the subordinate court the appellant, **DAN NYAMOGENYI**, together with three other accused were charged and convicted of the offence of stealing stock contrary to **section 278** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars were that on the night on 13th October 2011 at Gwikonge Village in Kuria West District they jointly stole one bull and a cow valued at Kshs 120,000.00 the property of Sam Mwita Marwa. The appellant was sentenced to 7 years imprisonment and he now appeals against conviction and sentence.
2. The appellant complains that he convicted on the basis of hearsay evidence which was full of contradictions and discrepancies hence his conviction ought to be quashed. The State, represented by Ms Owenga, supported the conviction on the ground that the prosecution proved all the elements of the offence.
3. As this is the first appeal, the court is called upon to examine and assess the evidence and reach an independent conclusion making an allowance for the fact that it never saw or heard the witnesses testify. In order to act in accordance with this instruction it is necessary to outline the evidence of the 4 witnesses touching on the appellant as it emerged from the subordinate court.
4. At about 6.30 pm on 13th October 2011, PW 1, locked up his 20 head of cattle. When he went to check on them at 6.00 am the next morning, he found a cow and a bull missing whereupon he raised alarm. Several neighbours responded and assisted him to track the animals by following the animal hoof tracks which led to Igena Primary School. He received information that a grey bull had been spotted and detained by the Assistant Chief at Nyamerama. He immediately went there and identified the bull as his. When cross-examined, he stated that the Assistant Chief told him that the thief abandoned the bull and was later arrested by villagers.

5. PW 2, an Administration Police Officer from Maeta AP Camp, testified that at about midnight of 13th October 2011, he received a report from Assistant Chief Tabitha that two animals, a cow and a bull, had been stolen. He patrolled the area with 2 other officers and tracked down the animals at the home of the appellant by following hoof marks. When they reached his home at about 10.00 am, they found the appellant holding an animal with a rope grazing it. When he saw them, he sped off towards a thicket. They took the animal to the AP Camp where the appellant was called by the Assistant Chief called to come and identify it.
6. PW 4, the Assistant Chief of Nyaitara Sub-location, recalled that on 14th October 2011 she received a call at about 6.30 am from a villager informing her that there were animal hoof marks from stolen animals leading to her sub-location. A second villager also made a report of the theft. She called officers from Maeta AP camp who helped her follow the animal hoof marks which led to the appellant's home where she saw him tethering a spotted grey bull. When he saw them he ran away. The bull was taken while a search commenced for the appellant. He was arrested on 18th October 2010 when he came to her home following threats to his life by villagers.
7. When put on his defence, the appellant gave sworn testimony. He denied that he committed the offence. He stated that on 14th October 2011 at about 9.00 am he heard the villagers raise alarm. He joined villagers in a search party trying to track down two animals. He stated that the chief later called him and arrested him.
8. The learned magistrate relied on the doctrine of recent possession to find the appellant guilty of stealing PW 1's bull. In several cases among them ***Andrea Obonyo v Republic [1962] EA 542 and Arum v Republic [2006] 1 KLR 233***, the **Court of Appeal** had held that the doctrine of recent possession is applicable where the court is satisfied that the prosecution have proved the following basic facts:
 - a. that the property was found with the suspect;
 - b. that the property was positively identified by the complainant;
 - c. that the property was stolen from the complainant;
 - d. that the property was recently stolen from the complainant.
9. I accept PW 1's testimony that his bull was stolen. PW 1 relayed the report of the theft to PW 4 who with the assistance of PW 2 recovered it at the home of PW 1 on 14th October 2011 at 10.00 am. The appellant fled when he saw PW 4 and PW 1. The facts as I have outlined satisfy the doctrine of recent possession as the bull was found with the appellant and was positively identified by PW 1 as his and was indeed found the within 24 hours of the report of the theft. The appellant's defence that he was part of the search party does not hold any water in light of the prosecution evidence. As part of the search party he would have returned the bull. The appellant did not furnish any reasonable explanation why the stolen bull was found in his home.
10. The appellant complained that there were contradictions in the testimony of the PW 1, PW 2 and PW 4 regarding the time the report was made. PW 1 testified that he made the report at about 6.00 am on 14th October 2010. PW 2 stated he received the report of the theft at about midnight while PW 4 stated she received information at about 6.30 am. Taking the evidence as I whole, I do not consider the contradictions material as both PW 2 and PW 4 were together when they went on the search to recover the stolen animal.
11. When PW 1 testified, the prosecutor did not put to him the photographs of the bull that was recovered from the appellant's home. In my view, this was not fatal as PW 1 testified that he

identified the bull that was stolen. PW 2 and PW 4 also confirmed that it is the bull identified by PW 1 that was photographed. The appellant did not lay any claim to the bull hence there is no doubt that it belonged to PW 1.

12. Having considered the entire evidence, I am satisfied that the prosecution proved its case beyond reasonable doubt and I therefore affirm the conviction.

13. The first appellate court will only interfere with sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see **Wanjema v Republic [1971] EA 493**). In this case the learned magistrate misconstrued the provision of **section 278** of the **Penal Code** which only provides for a maximum sentence of 14 years imprisonment for the offence of stock theft. The statute does not prescribe a minimum term of 7 years imprisonment which the learned magistrate imposed. The appellate court is therefore entitled to interfere with the sentence as there was an error in principle as there was no minimum sentence applicable.

14. As the appellant was a first offender and the animal was recovered. I reduce the sentence to time served. The appellant is therefore released unless otherwise lawfully held in custody.

DATED and DELIVERED at MIGORI this 8th day of December 2014.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Principal Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.



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