

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 119 OF 1999

(From Original conviction and sentence of the Chief Magistrate's Court at Kisii in Criminal Case No.1147 of 1997 – G. K. MWAURA ESQ S.R.M)

ERICKS MOGIRE NYAKUNDI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The appellant was convicted on the charge of stealing stock contrary to S. 278 of the Penal Code. He was sentenced to serve 5 years imprisonment with one stroke of cane. He appealed to this court against the conviction and sentence.

The Prosecution case was that on the 25th April 1997 Makoro (PW4) discovered his one bull missing. He reported that fact to the relevant police station. On the next day he and other members of public carried out inquiries. They discovered the said bull (which he duly identified as his) in the home of the appellant. The aspect in the prosecution case which has crucial relevance is the evidence of PW5 who deposed that on the date when the bull was stolen he met the appellant (together with another) while (they) were in possession of a bull whose description tallied with the one stolen from the home of the (PW4). When PW5 was cross examined by the appellant he stated as follows:-

“The first time I saw you were holding the tether of the complainant’s animal. It was a market day and I thought that you had bought the animals at the market.” PW1 was the assistant chief of the area of the appellant’s place of residence. He said that the appellant was in fact his neighbour. In his defence the accused made an unsworn statement in which he confined himself to the circumstances in which he was arrested. He said a policeman (PW2) found him taking tea in a hotel and proceeded to arrest him.

But he was totally silent on the specific accusations, which were leveled at him by (PW5) to the effect that the stolen animal was in fact recovered from his home. He was certainly found in possession, and he was bound to tender to court some exculpatory material in order to rebut the presumption that by virtue of having been in possession of the recently stolen animal he must, ipso facto, be either the thief in regard to the said animal or a dishonest handler of the same. In view of the fact that PW5 met with the appellant whilst he was in possession of the stolen animal (and the animal having been stolen on that very same day) there can be no scintilla of doubt that the accused had stolen the animal.

The trial magistrate therefore properly convicted him on the charge against him. I accordingly affirm the conviction. The appellant is a daring thief: otherwise he would not have committed the offence in such broad daylight. Livestock farmers must therefore be protected against him and those of his ilk. In these circumstances I find the sentence of 5 years well deserved and not manifestly excessive. Accordingly I dismiss this appeal in its entirety.

Dated and delivered on the 25th day of May 2001

I.C.C WAMBILYANGAH

JUDGE