



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 83 OF 2019

VINCENT OTIENO OKWIRI.....1ST APPELLANT

MAURICE OYATTA OSAKA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment, Conviction and Sentence in Bondo PM's Court Cr Case No. 54 of 2019 delivered on 29/11/2019 by Hon E.N.Wasike, SRM)

JUDGMENT

Introduction

1. The Appellants herein Vincent Otieno Okwiri and Maurice Oyatta Osaka were jointly charged before the Principal Magistrate's Court at Bondo in Criminal Case No. 54 of 2019 with the offence of stealing contrary to section 268 as read with section 275 of the penal code the particulars of the offence being that on the 18.1.2019 at around 15.30 hours at Barkowino Sub-Location in Bondo Sub-County within Siaya County, the appellants with others not before the court stole 11 tonnes of Kokoto, twenty tonnes of building stones and twenty one tonnes of sand all valued at KShs.150,000 the property of Millicent Adhiambo Omondi.

2. The appellants also faced a second count of trespass upon private property contrary to section 3(1) of the Trespass act the particulars of the offence being that on the 18.1.2019 at around 1530 hours at Barkowino Sub-Location in Bondo Sub-County within Siaya County the arrested persons trespassed upon private land parcel number North Sakwa/Barkowino/4711 belonging to one Millicent Adhiambo Omondi.

3. The appellants pleaded not guilty to both charges and the matter proceeded for hearing.

4. The trial magistrate, Hon. E.N. Wasike after hearing two prosecution witnesses and four defense witnesses and mitigation, found the appellants guilty on both counts and convicted them under section 215 of the Criminal Procedure Code. On Count 1, the trial magistrate sentenced the appellants to compensate the complainant a sum of Kshs. 50,000 or in default to serve 12 months' imprisonment. On Count 2, the appellants were sentenced to pay a fine of Kshs. 1,500 or in default serve 20 days' imprisonment.

5. Aggrieved by the said conviction and sentence, the appellant filed his petition of appeal based on the following grounds:

a) *That the Learned trial Magistrate imposed illegal sentence upon the Appellants for the second count of Trespass upon private property contrary to Section 3(1) of the Trespass Act.*

b) *That the Learned trial magistrate erred in law and in fact and misdirected himself by sentencing and convicting the Appellants based on evidence that had glaring omissions and gaps.*

c) *That the Learned trial Magistrate erred in both Law and fact in disparaging the defence offered by the Appellants hence shifting and burden of proof to the Appellants.*

d) *That the sentences meted on the Appellants were excessive in the circumstances.*

Appellants' Submissions

6. The appellants' counsel, Mr Okello submitted that the sentence passed by the magistrate in Count 2 was illegal as the penalty section provided for a fine of Kshs. 500 or in default serve a 2 months' imprisonment sentence or both the sentence and the fine. On Count 1, it was submitted that the sentence was improper as the trial magistrate failed to expound on whose evidence he based the decision of compensation.

7. The appellants further submitted that the trial magistrate failed to consider their evidence and disregarded it as an afterthought. Further it was submitted that the conclusion of the trial court in its judgement was not in conformity with the evidence presented which evidence absolved the appellants of the charges brought against them.

Analysis & Determination

8. I have considered the Appellant's grounds of appeal, submissions by the appellant's counsel and the authorities cited. This is a first appeal and the duty of the first Appellate court was succinctly stated in **Okeno v Republic (1972) EA 32** and restated in the case of **Kennedy Harold Ouma v Republic [2020] eKLR**. Briefly put, this court must reconsider the evidence before the trial court, evaluate it itself and draw its own conclusion though it should always bear in mind that it neither saw nor heard the witnesses and should make due allowance in that respect.

9. The issues for determination in this case are as follows:

a) ***Whether the prosecution proved its case beyond reasonable doubt***

b) ***Whether the sentence meted out on the appellants was excessive and harsh.***

10. The prosecution evidence as laid out in the trial Court was as follows: PW1 Millicent Adhiambo Omondi the complainant herein testified that on the 18.1.2019 at about 1530 hours, she went to visit her construction site and on reaching at the site, she found three people with wheelbarrows who were loading her building materials being sand, gravel and hardcore into the wheelbarrows and transporting them into a neighboring site which was also under construction.

11. It was her evidence that she then confronted the people about their actions but they just kept quiet. She then proceeded to Bondo Police Station and made a report and they returned to the scene with Police Officers who managed to arrest the appellants but the lady on whose plot the material was being taken went at large. The complainant stated that she had bought two tonnes of sand and the accused took away an equivalent of 1 lorry of sand a total of 1.2 tons of gravel and an equivalent of one lorry of gravel. The complainant reiterated her testimony under cross-examination.

12. PW2 Police Constable Omari Mazeris of Bondo Police Station testified that on the 18.1.2019 at about 1540 hours, PW1 went to the station and reported a case of stealing whereupon her sand, hardcore, gravel and some building materials were being stolen from her construction site. The officer then said that they proceeded to the scene at Guba area and found the appellants at PW1's construction site with wheelbarrows and building materials and it was apparent that PW1's building materials was being transported to a neighbouring site as there were wheelbarrow skid marks on the ground. He then said that they arrested the accused and escorted them at the station where they were charged accordingly.

13. In cross examination, PW2 stated that he was the arresting officer and went on to reaffirm his testimony further stating that at the time when they arrived at the scene he did not see the appellants ferrying the materials.

14. PW3 Sergeant Joseph Kiboi of Bondo Police Station and the Investigating Officer herein testified that on 18.1.2019 at about 1540 hours he was at the Station when the complainant went and reported that the appellants and others not before court went into her construction site and stole her building materials. The officer then said that together with other officers they proceeded to the scene where they found the appellants and upon interrogating them as to what they were doing at the complainant's site they could not give a satisfactory answer and so they arrested the appellants and escorted them to Bondo Police Station and charged them accordingly. The Officer then produced the complainant's title deed (p. exhibit 1) as an exhibit.

15. In cross examination he stated that when they arrived at the scene part of the complainant's materials had been taken away. He further stated that he did not get the appellants with the materials but found them at the scene and that the stolen materials had already been used in the perimeter wall of the neighbour's construction site.

16. At the close of the prosecution's case, the appellants gave sworn statements and called 2 witnesses.

17. In his sworn defence, the 1st appellant stated that on the 18.1.2019 one Thaddeus Owiti called him and informed him that they were to proceed to some construction site within Guba area for some curing process. He then said that on arrival at the site they began some work and after sometime some police officers arrived and arrested him together with the 2nd appellant and escorted them to the police station where they were told that they had been caught stealing some construction materials. He denied ever committing the offence.

18. In cross examination, the 1st appellant stated that Thaddeus had informed him that he was the owner of the site. He further stated that he had not worked on the site before.

19. The 2nd appellant testified on oath that on the 18.1.2019 at about 3.30 p.m. one Thaddeus Owiti called him with the 1st appellant and informed them to proceed on some construction site for some work. He then said that they proceeded to the site and began work and after about one hour some police officers arrived and arrested them and escorted them to the police station and on the following day they were charged accordingly.

20. DW3 Tobias Ayoki Dumba who alleged to be a quantity surveyor gave evidence in relation to a Quantity Surveyor's Report (D. exhibit 1) in respect of the costing of some building materials that was used to construct a certain wall in plot numbers 3339 and 6001. He also produced some search certificates (D. exhibit 2) of the neighbouring plots. In cross –examination DW3 stated that the practicing certificate he had produced belonged to one Luke Okeyo Madende whom he worked under. He stated that there were no boundary disputes between the complainant and Thaddeus and further that there were two plots separating the two.

21. DW4 Dr. Thaddeus Owiti (DW4) stated that he had instructed the accused persons to cure some wall fence that had been plastered on a land that he beneficially owned but which was registered in his mother's name. He refuted claims that the accused had stolen some construction materials and further stated that the complainant's and his plot were a distance from each other as they are separated by two parcels.

DETERMINATION

22. Section 268 of the Penal Code defines stealing as follows:

“(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.”

23. Pw1 testified that she visited the scene and found the appellants herein transporting her building materials to another site that was a neighboring site and when she inquired from the appellants as to why they were doing so they gave no response. This was corroborated by both PW2 and PW3 who were the police officers who arrived at the neighboring construction site and found the appellants therein. PW2 testified that there were wheelbarrow skid marks evidencing that material had been moved from the complainant's site to the site where the appellants were found working. PW3 stated that they arrived at the scene and found the appellants who could not offer any explanation as to what they were doing there. He further added that it was evident that material had been moved from the complainant's site to the site where the appellants were.

24. In their defence, the appellants denied committing the offences and testified that the appellant's stated that one Thaddeus Owiti had given them work to cure a wall which they set out to do. When the aforementioned Thaddeus gave his testimony, he confirmed that indeed he had given the appellants work to cure the wall. He also mentioned that his property and that of the complainant were quite a distance from each other as they were separated by two parcels, a point which was reiterated by DW3 who alleged to be a quantity surveyor.

25. It is evident that the complainant's building materials were found to have been transported on wheelbarrows to the site neighboring the complainant. The appellants herein were found by the complainant in the act of stealing the said materials as they did not claim that they owned the said materials or plot where the materials were stolen from. The skid marks left by the wheelbarrows clearly show the movement of the materials from the complainant's site to the site of where the appellants had transported the materials. The offences took place in broad daylight. The appellants were found at the construction site of the complainant taking away her building materials and they could not explain why they were there. In my humble view, the evidence adduced by the [prosecution witnesses sufficiently proved beyond reasonable doubt that the appellants and no other person was responsible for the theft of the complainant's materials from her land and site and further, that the appellants trespassed into her plot which was separated from the site they were supposed to be working on by two parcels, .without her consent.

26. Section 3 (1) of the Trespass Act, Cap 294 provides that:

"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

27. Trespass is an intrusion by a person into the land of another who is in possession and ownership. The prosecution produced in evidence a title Deed for land Parcel No. South Sakwa/Barkowino/4711 registered in the name of the complainant Millicent Adhiambo Omondi. The appellants defence in my humble view was a mere denial as and the evidence of DW3 and DW4 was not useful at all to the defence as it never dislodged the watertight evidence by PW1 that she found the appellants stealing her materials from her plot and construction site. There was no evidence that the complainant had any disagreement with DW4 the owner of the plot where the materials were found to have been transported upon being stolen from the complainant's plot. The trial magistrate considered the defences by the appellants and dismissed it correctly so and I find no fault in his factual findings which I hereby uphold. In addition, I find no evidence of the trial magistrate shifting the burden of proof on the appellants who were found ready handed stealing the materials on site by the owner thereof, and the appellant have not claimed that the said material or property belonged to them. I find the appellants to have been very daring thieves.

28. Accordingly, I am satisfied that the prosecution proved its case against the appellants on both counts of stealing and trespass. I uphold the conviction of the appellants by the trial magistrate on the two counts.

29. On sentence, Section 275 of the Penal Code sets out the penalty for stealing as follows:

“Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.”

30. The appellants herein were sentenced on count 1 of stealing to compensate the complainant a sum of Kshs. 50,000 or in default serve 12 months' imprisonment. In my opinion the learned trial magistrate was within her jurisdiction in sentencing the appellants as so.

31. On Count 2, it is worth noting that the penalty for the offence of trespass is provided for under section 11 of the Trespass Act which states thus:

“Any person guilty of an offence under this Act for which no penalty is expressly provided shall be liable to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding two months, or to both such fine and imprisonment.”

32. The appellants were convicted on count two and sentenced to pay a fine of Kshs. 1,500 in default of which face 20 days’ imprisonment. The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is was restated in the case of **Daniel Maina Wambugu v Republic [2018] eKLR**. It is was stated:

“The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is well stated in the case of Ogalo s/o Owuora 1954 24 EACA 70. It is well set out that: “This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice.”

33. In the circumstances, I find no reason for this court to interfere with the trial court’s sentence on count 1. However, in Count two, the sentence imposed was illegal. I hereby set it aside and make the following order in its place: **Each accused person to pay a fine of Kshs. 500 or in default serve 20 days’ imprisonment.**

34. The upshot of the above is that the instant appeal is partially successful with regard to the amendment on the sentence meted out in count 2. The sentence in count one remains undisturbed as the complainant lost her construction materials whose value was quite substantial.

35. In the end, the appeal against conviction fails and is dismissed. The appeal against sentence in count one is hereby dismissed. The appeal against sentence in count two is allowed and set aside and substituted with an order that the appellants are each fined a sum of five hundred Kenya shillings (Kshs 500) in default to serve 20 days imprisonment. The custodial sentences to run concurrently if the compensation and fine imposed are not paid.

36. Orders accordingly

Dated, Signed and Delivered at Siaya this 25th Day of January 2021

R.E.ABURILI

JUDGE

In the presence of:

Mr. Okello Advocate for the Appellants

Mr. Kakoi Principal Prosecution Counsel for the State

CA: Ms Modestar and Mr. Mboya