



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL APPEAL NO. 27 OF 2019

MOSE MUTEMBEI MBAE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Criminal Case No. 896 of 2018 in the Senior Resident Magistrate's Court at Chuka delivered by Hon. Njoki Kahara (S.R.M) on 19th August 2019)

J U D G M E N T

Introduction

1. On 19th August 2019, **Moses Mutembei Mbae** (the Appellant herein) was convicted in *Criminal Case No. 896 of 2018 (Chuka)* of the offence of **stealing stock** contrary to **Section 278** of the Penal Code (Chapter 63 of the Laws of Kenya) and was sentenced to pay a fine of Kshs. 50,000/= and in default to serve imprisonment for three (3) years.

2. In the main charge, the Appellant was charged with stock theft contrary to Section 278 of the Penal Code. The particulars of the main charge were that on the night of 14/07/2018 – 15/07/2018 at Magundu village in Karimba location in Tharaka Nithi county, the Appellant jointly with **Basco Nyaga M'Takaa alias Bascwari** stole three goats valued at Ksh. 35,000/= the property of **Joyline Karemi Nyaga**.

3. The Appellant was alternatively charged with the offence of handling suspected stolen property contrary to **Section 322(2)** of the **Penal Code**. The particulars of the alternative charge were that on 16/07/2018 at Kerian village in Kariani location in Tharaka Nithi county, otherwise in the course of stealing, jointly with **Basco Nyaga M'Takaa alias Bascwari**, were found in possession of three goats knowing or having reason to believe them to be stolen property. He was however convicted and sentenced on the main charge only.

4. The appellant has now filed this appeal challenging both the conviction and sentence.

5. The Appellant filed an undated Petition of Appeal on 23/10/2019 raising four grounds of appeal. He however abandoned these grounds and chose to rely on the grounds raised in his Amended Supplementary Grounds of Appeal filed on 06/10/2020. Accordingly, this appeal is based on the following grounds:

- THAT the learned trial magistrate erred in both law and fact by sentencing the Appellant to serve 3 years without considering the facts adduced before the court.
- THAT the learned magistrate erred in both law and fact by failing to note that the investigation was shoddy since I.O. did not seek to confirm some allegations made by the prosecution witnesses.
- THAT the learned magistrate failed to note that this case (No. 896 of 2018) was a duplicate of case No. 771 of 2018.
- THAT the learned trial magistrate erred in both law and fact by rejecting the Appellant's defence and that of defence witness without giving cogent reasons.

6. The Appellant thus prays for the conviction to be quashed and the sentence set aside. The court ordered that the appeal be disposed of by way of written submissions and the Appellant filed his written submissions on 06/10/2020 while the Respondent filed his written submissions on the 17/11/2020.

Submissions

7. The Appellant submitted that the evidence tendered by the prosecution was not enough to sustain a conviction. He stated that his co-accused implicated him. The Appellant further questions the investigations done by the I.O. stating that no photos were taken of the dead goat despite the policemen being shown the carcass. He also faulted the policemen who took photographs of the goats recovered for not including the accused persons in the photograph to prove that they were really found with the said goats. The appellant alleges that PW2 gave contradictory evidence which raised doubt as to where the goats were recovered from.

8. The Appellant further faulted the trial magistrate for failing to note that the trial case, being Criminal Case no. 896 of 2018 (Chuka), was a duplicate of Criminal Case no. 771 of 2018 (Chuka). Finally, the Appellant faults the Learned Trial Magistrate for rejecting his defence which he alleges contained weighty facts to support his acquittal.

9. The appeal was opposed by Mr. Momanyi, the prosecution counsel. Learned Counsel submitted that the investigation was properly conducted and that the evidence that was adduced by the prosecution was clear, consistent, and well corroborated and hence sufficient to find the accused person guilty as charged. The Learned Counsel further submitted that the trial magistrate correctly applied the doctrine of recent possession in convicting the Appellant.

10. On the issue of the trial case (Criminal case no. 896 of 2018) being a duplicate of case no. 771 of 2018, the Respondent submitted that the two cases were not duplicate as alleged by the Appellant because they had different complainants and the facts forming the charges in the two cases were not part of the same transaction. In any case, the Learned Counsel submitted that the separation of the charges did not occasion any prejudice on the Appellant. In the end, Learned Counsel submitted that the prosecution had proved its case to the required standard.

Issues Arising for Determination

11. It is my view that the issues that arise from the grounds of appeal and submission of the parties can be summarized as follows:

- Whether the prosecution proved the case of stealing to the required standard;
- Whether the Appellant was rightly sentenced; and
- Whether the trial case [being Criminal case no. 896 of 2018 (Chuka)] was a duplicate of Criminal case no. 771 of 2018 (Chuka)

Analysis of Issues

A. Whether the prosecution proved its case to the required standard

12. Grounds of Appeal Nos. 1, 2, and 4 are dealt with under this head.

13. The Court of Appeal in the case of **DAVID NJUGUNA WAIRIMU V – REPUBLIC [2010] eKLR**, cited with approval the decision in **Okeno v. R [1972] EA. 32** in which the Court of Appeal for East Africa laid down what the duty of the first appellate court is and set out the principles that should guide the first appellate court as follows:

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

14. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour.”

15. In **Okeno v. R** (Supra) the Court said:-

“It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions.”

Proof of Stock Theft

16. Stealing is defined in the Black’s Law dictionary 8th Edition as:

“To take (personal property) illegally with the intent to keep it unlawfully”.

17. The definition of stealing as found in Section 268 of the Penal Code is:

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

18. The prosecution called 5 witnesses in support of its case against the Appellant herein. The complainant, **Joyline Karimi Nyaga** (PW1), testified that on the evening of 14/07/2018, she securely locked her three goats and retired for the night. In the morning of 15/07/2018, she woke up and found her three goats missing from the shed. She then reported the matter to the area chief. She called someone who she knew slaughters goats for meat and he told her that someone had been found with goats going to Chuka. She started looking for the goats. On her way to Chuka when she met the Appellant's co-accused, who was known to her. It is her testimony that he denied having seen the goats. She however reported to the Assistant Chief of Magundu, Mr. Gitonga, that she suspected that the Appellant's co-accused had stolen her goats. The Assistant chief then called the Chief of Chuka region and told him that the Appellant's co-accused was suspected of having stolen goats. In the company of the two assistant chiefs (PW3 and PW4) and PW2, they recovered the three goats at the home of the Appellant's co-accused. The Appellant's co-accused told them that the Appellant had come to visit him with the goats. The two were then arrested. The goats were later photographed by the police and PW1 identified a photograph of the goats as MF1.

19. Joblat Mbae (PW2) is PW1's neighbour and he corroborated PW1's testimony stating that on 15/07/2018, PW1 told him that her goats had been stolen and they informed Mr. Gitonga, the assistant chief, who later told them that the goats had been found in Chuka area. They then proceeded to the homestead of the Appellant's accused where they recovered the stolen goats. PW2 identified MF1, a photograph of the goats. The Appellant was also found in the homestead and he was arrested together with his co-accused. On cross examination by the Appellant, PW2 stated that they found 6 goats at the home of the Appellant's co-accused and that one goat had died. He testified that the Appellant showed them where the goat had died.

20. John Mbae (PW 3) is the assistant chief Njaina location. He testified that he received a call from Edward Gitonga (PW4) on 16/07/2018 who told him that some goats had been stolen in Karimba sub-location. The Appellant's co-accused was a suspect and PW3 together with PW1, PW2 and PW4 found the Appellant and the goats in the home of the Appellant's co-accused. He then called Edward who came with the owners of the goats called Karimi and Mbae. PW3 was shown MF1 which he identified as a photo of the goats they recovered and which PW1 identified as her missing goats.

21. Edward Gitonga (PW4) is the assistant chief Karimba sub-location. He testified that on 15/07/2018, he heard from one Njeru (the area manager) that 3 goats had been stolen from PW1 and that on 16/07/2018, PW1 told him that she suspected the thief was in the Appellant's co-accused in Njaina sub-location. PW4 told PW3 to investigate whether the goats were in the home of the Appellant's co-accused and PW3 reported back to him stating that they he had found the goat at the home of the Appellant's co-accused. He then called PW1 and PW2 and together they went to Njaina sub-location where they met with PW3 and proceeded to the home of the Appellant's co-accused where they found the Appellant, his co-accused and the wife to the co-accused. The Appellant's co-accused took them to the sheep shed where PW1 identified her 3 goats. PW4 identified photograph MFI 1 and stated that he then took the Appellant and his co-accused to Marina Patrol Base.

22. Senior Sergeant Cleophas Okemasisi (PW5) testified on behalf of corporal Busenei, the investigating officer in the case and who was on leave at the time. PW5 testified that corporal Busenei informed him that PW4 called the corporal and told him that he had arrested two suspects in connection with stock theft and that they had recovered 3 goats from the suspects. The suspects were taken to the station (Marima Patrol Base) and on 17/07/2018, PW5 found them in custody. PW5 states that they took photographs of the goats and recorded the statement of PW1, the complainant. He produced photographs as P Exhibit 1(a) and (b) and a Certificate as P Exhibit 2.

23. The court found that the two accused persons had a case to answer and were put on their defence. The Appellant's co-accused was DW1. He testified that he had a graduation ceremony for his son and the Appellant, who was in the committee planning for the said ceremony, said that he would bring some goats for DW1 to buy since he is a businessman who sells goats. It was the evidence of DW1 that on 16/07/2018, the Appellant came to his house at around 5.30p.m. with 6 goats and asked him to choose the goat he wanted to buy. Since it was around 6.00 p.m., DW1 allowed the Appellant to spend the night at his home rather than leave with the goats at night. It is DW1's testimony that at around 7.00 p.m. that day, PW4 and other people came to his home and two of the people identified the goats as their own. DW1 stated that he did not know that the goats were stolen but he was arrested together with the Appellant and taken to Marima Patrol Base to record their statements.

24. Lucy Mukwanjeru (DW2) is the wife to the Appellant's co-accused. She testified that his son was graduating and there was a committee which arranged to slaughter an animal. The Appellant is DW2's brother-in-law given that he is married to DW2's sister. DW2 corroborated the testimony of DW1 that since the Appellant is a businessman who sells goats, he offered to bring the goats for them to buy from him instead of buying meat from elsewhere. It was DW2's testimony that the Appellant came the following day with 6 goats and when DW1 got home, he chose one goat out of the ones the Appellant had and DW2 left the Appellant and DW2 negotiating on the price of the goats. DW2 also corroborated DW1's evidence that DW1 agreed to let the Appellant stay at their home for that night since it was late and that later on, PW3 came with other people including PW1 who identified her 3 goats that were in the DW1's home.

25. The Appellant herein testified as DW3 stating that he is a businessman who buys and sells goats and that on 14/07/2018, he went to Kathwana and bought 6 goats. He corroborated DW1's and DW2's testimonies that he was involved in the graduation ceremony meetings that were taking place at DW1's home and that he had offered to sell them a goat for the graduation. It was his testimony that DW1 asked him to bring the goats on 16/07/2018 so that he could choose which one to buy and that on the said 16/07/2018, he brought the goats and DW1 chose one goat which he bought. He further corroborated DW1's and DW2's evidence that later on that day, the chief came with other people who identified the goats as theirs and the Appellant was then arrested together with DW1 and taken to Marima Patrol Base. The Appellant stated that he gave DW1 a receipt for the goat he bought and remained with 5 receipts for the other goats, which receipts he gave the assistant chief. He further stated that he only had goats and denied that he was found with any sheep. On cross-examination, the Appellant stated that the photographs of animals that were produced in court were not of the goats that he was found with.

26. The Appellant questioned why he was not photographed with the animals that Pw1 alleged to have recovered from the Appellant in the

home of his co-accused. This claim, in my view, aims to attack the evidence that he was found with the alleged animals. PW2's testimony corroborated the PW1's testimony that the photographed animals were found in the home of the Appellant's co-accused. On cross examination by the Appellant, PW1 stated that they found the animals with Appellant. That notwithstanding, it is my view, that the issue of whether the Appellant was found in possession of the animals does not arise as it was the Appellant's own admission that he came in possession of animals after purchasing them.

27. The Appellant explained that he bought 6 goats from the market at Kathwana. However, the Appellant did not produce any receipts to show that he bought the recovered goats. Furthermore, the animals recovered included sheep and the Appellant did not give any believable explanation as to how he came to be in possession of those animals. As stated by the trial court, the Appellant's allegation of buying the goats on 14/07/2018 (during the day) is not plausible as the same were stolen on the night of 14th July-15th July 2018.

28. The doctrine of *recent possession* entitles the court to draw an inference of guilt where the accused is found in *possession* of recently *stolen property* in unexplained circumstances. In reaching its finding, the trial court placed reliance on the doctrine of recent possession properly citing the case of *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v. Republic, Criminal Appeal No. 82 of 2004* where the court stated as follows:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.

In other words, there must be positive proof:

- i). that the property was found with the suspect;**
- ii). that the property is positively the property of the complainant;**
- iii). that the property was stolen from the complainant;**
- iv). that the property was recently stolen from the complainant.**

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.”

29. The Canadian Supreme court's case of *Republic v. Kowkyk (1988)2 SCR 59*, which was cited as an authority by the Court of Appeal in *David Mugo Kimunge v Republic [2015] eKLR*, accepted the following summary of the doctrine of recent possession: -

“Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.”

30. I agree with the above reasoning and its application by the trial court and opine that all the elements necessary to establish recent possession were proved by the prosecution and the defence of the Appellant was not plausible. The ingredients of the offence of stock theft had been sufficiently proved in that PW1 owned goats that went missing and the Appellant was found in possession of the said animals at the home of the Appellant's co-accused one day after they had been stolen. It is also my view that the Appellant did not give a reasonable or believable explanation of how he came to be in possession of the said animals.

31. The prosecution is mandated to prove its case beyond reasonable doubt. Denning J explained what reasonable doubt is in the case of *Millier – V- Minister of Pensions [1947]* by stating as follows:

“It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is as strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable.” the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

32. Bearing the above in mind, it is my view that the prosecution proved its case beyond reasonable doubt. It has produced convincing and credible evidence of stock theft perpetrated by Appellant. It is therefore my view that on the basis of the applicable law, the trial court was entitled to arrive at the conclusion of Appellant's guilt of the offence stock theft, as it did.

Sentencing

33. On sentence, the Appellant was sentenced to serve 3 years imprisonment out of the maximum 14 years for the offence of stock theft.

34. **Section 354(3)(b)** of the **Criminal Procedure Code** (Chapter 75 of the Laws of Kenya) gives the High Court powers to increase or reduce the sentence or alter the nature of the sentence in an appeal against sentence by a subordinate court.

35. The case of **Wanjema v. Republic (1971) EA 493** dealt with principles upon which a first appellate Court may act on in dealing with an appeal on sentence. An appellate Court can only interfere with the 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 fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

36. The sentence which was imposed by the trial magistrate reads as follows:-

“ I hereby sentence him to pay a fine of Kshs.50,000/- in default to serve three years imprisonment.”

The appellant was charged under **Section 278 of the Penal Code**, Cap 63 Laws of Kenya. The Section provides:-

“ If the thing stolen is any of the following things that is to say, a horse, camel, ostrich, bull, cow , ox, ram, ewe, whether, goat or pig or the young thereof, the offender is liable to imprisonment for a period not exceeding fourteen years.”

The section does not provide for an option of a fine but where provision states that a person is **“liable”** to imprisonment, the trial magistrate has discretion to give the option of a fine apart from where a minimum sentence of imprisonment is provided.

37. **Section 26 (3) of the Penal Code** provides as follows:-

“ A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment provided that-

“Where the law concerned provides for minimum sentence of imprisonment, a fine shall not be substituted for imprisonment.”

38. In this case, there was no minimum sentence provided under **Section 278 of the Penal Code** (Supra) and the magistrate could impose a fine. It then follows that once the trial magistrate opted to give the option of a fine, the default clause had to be within the confines of **Section 28(2) of the Penal Code** which sets the parameters for the default clauses based on the fine imposed. The Section provides:

“ In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale- Amount Maximum period

Not exceeding Sh. 500 14 days

Exceeding Sh. 500 but not exceeding Sh. 2,500 1 month .

Exceeding Sh. 2,500 but not exceeding Sh. 15,000 3 months.

Exceeding Sh. 15,000 but not exceeding Sh.50,000 6 months.

Exceeding Sh. 50,000. 12 months

39. The default clause must therefore be as provided under this section unless the law applied provides specifically for the fine and the default sentence

40. In view of the above provisions the sentence imposed by the trial magistrate was wrong as the default sentence exceeded the sentence provided under **Section 28(2) of the Penal Code**. The fine imposed ought to have attracted a term of imprisonment which was not exceeding twelve (12) months- **Section 28 (2) of the Penal Code** is couched in mandatory terms. My view is that the rationale for this provision is that where the court has opted to impose a fine which is essentially a none custodial sentence a person should not languish in jail for exceedingly long period if he cannot afford the fine.

41. In this case the trial magistrate failed to take into account a relevant fact as it imposed a default clause which is not provided under the law. I therefore have reason to interfere with the discretion of the trial magistrate in sentencing.

42. The powers of this court on appeal are provided under **Section 354 (3) (b) Criminal Procedure Code**, (Supra) that, the court in an appeal against sentence, it may increase or reduce the sentence or alter the nature of the sentence.

43. The sentence was passed on 19th August 2019. The default clause ought to have been one year. The appellant has been in prison for over one year. Furthermore, the appellant had served one year in remand. Taking all these facts into consideration, I am of the view that

appellant has served adequate term in prison.

I therefore order that the sentence imposed by the trial magistrate is set aside and substituted with term of imprisonment which the appellant has already served. He will therefore be set at liberty unless he is otherwise lawfully held.

Dated, signed and delivered at Chuka this 25th day of February 2021.

L.W. GITARI

JUDGE

25/2/2021

The ruling has been delivered in open court.

L.W. GITARI

JUDGE

25/2/2021