



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL 201 OF 2019

JULIUS EKIRU LOKICHAL.....1ST APPELLANT

ALBINO ESINYIN ESIRANI2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The two appellants were jointly charged, with two other who were acquitted by the trial court, with two substantive offences of robbery with violence which charges sheet read as follows:-

Count I:

On the 2nd day of September, 2017 at Lanyiru sub-location, Buuri location in Tigania East Sub County within Meru County, while armed with dangerous weapons namely riffles, jointly with others not before court did rob Daniel Mugongo of his 87 goats and 159 sheep all valued at kshs. 795,000 and immediately after the time of such robbery shot dead one Daniel Mugongo.

Count II:

On the 2nd day of September, 2017 at Mlima Rasta area, Mula location in Tigania East sub-county within Meru County, jointly with others not before court stole twenty (20) goats and (40) forty sheep all valued at Kshs. 300,000/= the property of Abdifata Shariff.

2. The accused persons, of course, denied the offences as charged and the trial then ensued during which the prosecution called a total of seven witnesses. The 1st and 2nd appellants gave sworn and unsworn statements respectively without opting to call any other witnesses. Upon conclusion of production of evidence and in a reserved judgment, the trial court held that the prosecution had proved beyond reasonable doubt the offences charged against the appellants. The 1st appellant was sentenced to an imprisonment for a term of 20 years for count 1 and 7 years for count 2. The 2nd appellant was sentenced to an imprisonment for a term of 10 years for count 1 and 7 years for count 2. The conviction and sentences dissatisfied and aggrieved the appellants who then filed their respective appeals from which I isolate the common grounds as follows:-

1. The trial court erred in law and facts by failing to note that the prosecution did not prove their case to the required standards of law.
2. The trial court erred in law by improperly admitting and acting on inadmissible confessions.
3. The trial court erred in law and facts by failing to note that the 1st appellant was not found in possession of the stolen animals.
4. The trial court erred in law and facts by relying on contradicting, inconsistent, and paradox evidence to convict the appellants.
5. The trial court erred in law and facts by failing to note that the evidence tendered by the prosecution was not enough to sustain a secure conviction.
6. The trial court erred in law and facts by rejecting the appellants' defenses without any articulate reason.

3. The evidence at trial was in summary, according to the testimony of **PW1, Abdi Abdul Ali** that, on 2/9/2017 he was home when he received a telephone call to the effect that his livestock, being 159 sheep and 87 goats, had been stolen, and the herdsman one Daniel Mgongo killed during the robbery. Because it was late, he waited till the next day when, in the company of police, they followed the hoof prints to Lanyiru area, where the area chief assured them that the culprits would be arrested. On the day they arrived, 17 sheep and 4 goats had been recovered while another 4 sheep and 4 goats were recovered the next day. He was not present during the recovery but found the animals at Tigania Police station. He said that his animals had marks on the right front legs (sheep) and on the neck (goats). The unique ear notching on his goats and sheep helped him to identify his animals from a herd at the police station. In cross examination, he said that the appellants had been arrested in possession of PW2's livestock.

4. **PW2, Abdifatah Sharrif**, gave evidence that on 2/9/2017, he was at isiolo when he was informed through the phone that his livestock had been stolen at about 5.00 p.m. The next day, he started tracking the hoof prints on board of a motor cycle, which took him to Gambela area. He identified the 1st appellant, as his herdsman, who disappeared from the livestock Boma till 4/9/2017 when he resurfaced. The 1st appellant was apprehended and taken to the police station on 5/9/2017. He said that he lost a total of 60 animals being 40 sheep and 20 goats.

5. He then proceeded to Muthara police station where there were animals, but he only found one of his sheep on 7/10/202017 in possession of 3rd accused at Kirisia area. On cross examination, he identified 1st appellant as his herdsman, for one year before his arrest.

6. **PW3 Dowood Shariff**, a wildlife ranger at Leaparua community wildlife conservancy, told the court that he was at the camp on 2/9/2017, when PW2 called him with the report of his stolen animals. On 4/9/2017 he found the 1st appellant having been arrested by police from Gambela Camp. He said that the 1st appellant accompanied them to Kirisia area in search of the animals and in the course gave them cellphone numbers of 3rd accused. The 1st appellant then admitted to being involved in the theft and sale of the animals belonging to PW2. The team then managed to track down the 3rd accused and found him in possession of one animal belonging to PW2. The 3rd accused alleged to have bought it but he could not produce the receipt for purchase. Upon cross examination, the witness confirmed that the 1st appellant had been a herdsman for PW2.

7. **Yussuf Mwenda, PW4** learnt of the theft of the animals on 2/9/2017. The next day, they embarked on a search mission which led to the recovery of 17 sheep and 4 goats and identified them in the photographs marked for identification. In cross examination, the witness confirmed that he did not know from whom the animals were recovered.

8. **PW5, Dr. Kenneth Muthuri** of Meru Level 5 hospital, produced the post mortem and death certificate of Daniel Mgongo, on behalf of Dr. Koome Guantai. On examination, the body was in early stages of decomposition and had visible bullet entry wound on the right shoulder and an exit one on the lateral surface of the right chest, with multiple lacerations on both lungs. He formed the opinion that death was caused by cardiac respiratory failure due to gun shot. None of the appellants sought to cross examine the good doctor.

9. **PW6, Samson Nguraturei**, a Police Officer at Mulika Police station, recalled being in a contingent of 8 police officers, drawn from different stations on 5/9/2017. They went on patrol in search of some 159 goats and sheep stolen from Lanyiru area belonging to the complainant. They successfully recovered one white goat from the homestead of Reuben Nturi while 10 other goats and sheep were recovered from the home of the 5th accused. After PW2 positively identified the recovered animals as his, they arrested 5th accused and Kirinya. Nothing of substance emerged from his cross examination.

10. **PW7 P.C Kennedy Karanja**, D.C.I Tigania and the investigating officer, testified that following the report of loss of animals, the police from Tigania first recovered 17 of the animals, worth Ksh.105,000 from Antuanduru sub – location and arrested one Peter Munjura (the 4th accused) in possession thereof. He then produced the photographs of the recovered animals, earlier on marked as MFI 1 (I) – (VII) as exhibits P exh 1 (i) – (vii). Again on 5/9/2017, the police recovered 4 goats and 4 sheep from Isiolo sub location worth Kshs. 45,000 in the home of 5th accused. All animals were photographed and handed over to the owners. He said that the 1st appellant was arrested on 6/9/2017 because his disappearance as the herdsman had coincided with the theft. Upon his arrest, the 1st appellant implicated the 2nd appellant and 3rd accused as his accomplices who were tracked and arrested. During cross examination, the witness while denying that the animals got lost, insisted that the 1st appellant had conspired to steal them, and the 2nd appellant was found in possession of a sheep.

11. For their defenses, the 1st appellant told the court that as a herdsman, the goats got lost in the bush but PW2 insisted that he had given them away. He reiterated that the goats went missing while he was herding and that among them were 6 of his own. Upon cross examination, he said that of the 100 goats he was herding, only 10 got lost. He further confirmed that none of his goats went missing.

12. The 2nd appellant in his unsworn testimony denied any involvement in the offence. He stated that he had been implicated by the 1st appellant and the sheep recovered from him was his, despite the fact that he did not have any receipt.

13. In its analysis and conclusion, the trial court convicted the appellants on the basis that, there was circumstantial evidence pointing to their guilt, rather than innocence which then required an explanation from them, the explanation been unsatisfactory. The court then took guidance on the quality of circumstantial evidence that would invite the inference of guilt, and when the court can rely upon the doctrine of recent possession to convict.

14. Having analyzed the evidence and expressly reached the conclusion to convict the 1st, 2nd and 4th while acquitting the 3rd and 5th accused persons, the trial court then rendered itself as follows-;

“Turning to the evidence of the various accused, the 1st accused rendered no plausible explanation as to why he failed to report the loss of the livestock belonging to his employer either to 2nd complainant or the authorities if indeed the animals wandered off into the wilderness as he suggested. Against the veritable evidence on identification the assertion by the 2nd accused that the

recovered goat belonged to him pales into the shadows.”

15. That is the only reason I find to lead to the conviction of the appellants herein. It asserts there having been veritable evidence which I have failed to identify in the record.

16. While it is true that the persons who committed the robbery also killed Daniel Mgongo, there was never an iota of evidence on identification of the attackers. On that basis alone, I do find that the appellants were never identified to have been the attackers, or part of the attacking gang that, violently robbed the deceased of the goats and fatally wounded him. Even if the conduct of the 1st appellant of disappearing from duty was to be the basis of inferring guilt, he was not the employee of PW1, whose herdsman was killed and animals stolen. His disappearance to that extent cannot be the basis of his conviction. It remains the law that suspicion however strong is never a basis to infer guilt. See *Sawe v Republic (2003) eKLR 354*.

17. Even on circumstantial evidence, I am not satisfied that the disappearance of the 1st appellant is capable of accurately proving a proposition that he was the thief who used violence upon Daniel Mgongo leading to his death.

18. The 2nd appellant was arrested because he had been implicated by the 1st appellant. The courts have repeatedly held that such evidence ought to be sufficiently corroborated by independent evidence. What I perceive to be independent evidence here is the fact that, the 2nd appellant was allegedly found in possession of a goat, belonging to the complainant. PW3 testified that the stolen goat was recovered from the 3rd accused. PW6 stated that, *‘we were successful in recovering a white goat at the home of Reuben Ntururi Shadrack Kirinya and Shadrack Kamenchu who resided in the same homestead. The suspects we arrested are before court. They are Rael Kamenchu and Kirinya.’* I see nothing to connect the 2nd accused with the recovery of the stolen animal

19. In this case, it was also important for the trial court to satisfy itself that there were no intervening circumstances which could weaken or destroy the inference. And it must always be remembered that in every trial an accused has the right, to keep quiet and say nothing because he has no burden to prove anything. It is clearly factual that the appellants were not found in possession of recently stolen property, after all.

20. I have critically internalized the entire recorded evidence by the prosecution, and I do not find any either direct or circumstantial evidence to ground the conviction by the trial court. I find that the conviction on both count 1 and 2 against the appellants was wholly unsafe, with the consequence that I quash the same and set aside the sentences. The appellants shall be released from custody forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU VIRTUALLY VIA MICROSOFT TEAMS THIS 30TH DAY OF SEPTEMBER, 2021.

PATRICK J.O OTIENO

JUDGE

In presence of

MR. MAINA FOR THE STATE

ACCUSED PRESENT IN PERSON.

PATRICK J.O OTIENO

JUDGE