



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 1 OF 2019

DAVID KALAWA.....1ST APPELLANT

JULIUS NJERU MUCHIRI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 418 of 2017

at Marimanti Law Court delivered by S.M NYAGA (RM) on 28/12/2018)

J U D G E M E N T

1. The Appellants herein **DAVID KALAWA** and **JULIUS NJERU** were both charged with another for the offence of stealing Stock contrary **Section 278** of the **Penal Code** vide **Marimanti Senior Principal Magistrate's Court Criminal Case No.418/2017**. The particulars were that there three on the night of 19th September 2017 at Ngariani village, Tharaka North within Tharaka Nithi County stole 8 cattle valued at Kshs. 200,000 belonging to Geoffrey Mutwiri Lukaria, the complainant in that case.

2. The proceedings from the trial court indicates that both the Appellant denied the charge and the prosecution called a total of 7 witnesses who testified and on the basis of evidence tendered, the trial court found them guilty, convicted them and sentenced them to serve 10 years each.

3. A brief summary of case at the trial court against the Appellants and another Co-accused (3rd accused) who was acquitted, indicates that one Geoffrey Mutwiri Lukaria (PW1), the complainant lost his 8 heads of cattle that were stolen at night in a place he had leased for purposes of grazing. The complainant had branded all his livestock and when they were stolen at night on the night of 19th September 2017, he was notified and the following day he rushed to Gatunga Market as it was a market day and he suspected that his stolen cattle might be taken there. It transpired that his suspicion was true because he found two of his branded cattle a bull and a cow. He found the cow with one Gerald Mutugi (PW3) who pointed at John Munyuaki – the 3rd accused at the trial who in turn pointed at Julius Njeru Muchiri the 2nd Appellant herein. The 3rd accused during trial defended himself that he was just a broker and Mutugi (PW3) concurred with him stating that infact he witnessed the 2nd Appellant being given the money he had just handed over to John Munyuaki (3rd Accused) .

4. In regard to the 1st Appellant, the complainant told this trial court he found his stolen branded bull with one Peter Munyuaki- a well known cattle trader who in turn pointed at David Kalawa (the 1st Appellant) and showed receipts to show that he bought the bull from him at Kshs. 17,000 and tendered a receipt to prove the same

5. The trial court evaluated the evidence and found that the doctrine of recent possession applied against the 1st and 2nd appellant both of whom were unable to explain to the trial court how they came into possession of the stolen cattle which were clearly branded with the initials of the owner. The 3rd accused at the trial John Munyuaki was acquitted as the trial court found his explanation on how he came into possession of the stolen satisfactory. The Appellants as observed above were convicted and sentenced to serve 10 years imprisonment.

6. The Appellants were both aggrieved and filed separate petition of appeals raising the following grounds.

(a) For the 1st Appellant (David Kalawa Mungathia) the following grounds have been raised.

i. That the learned trial Magistrate did not consider they saw him committing the offence.

- ii. That the learned magistrate erred when he failed to consider that the alleged cow exhibited in the photograph tendered in court was not the one sold to the buyer by the Appellant.*
- iii. That there was no witness who saw the Appellant sell the stolen cow.*
- iv. That no exhibit was recovered from him and the person found with the stolen cow left scot free.*
- v. That there was a 7 day delay yet the case was based on recognition there was doubt as whether he committed the offence.*
- vi. That the sentence was harsh as he had spent 2 years in custody during trial and had been held for 72 hrs before being arraigned.*
- vii. That he had no previous conviction and that was not considered.*
- viii. That the evidence tendered by prosecution had inconsistencies and contradictions.*
- ix. That he was not supplied with the statements.*
- x. That the prosecution's case was not proved to the required standard.*

7. (b) For the 2nd Appellant (James Njeru Muchiri) the following grounds have been raised.

- i. That no one witnessed him committing the offence*
- ii. That the learned trial magistrate erred by not considering the fact no written agreement was tendered by accused 3 showing that he had taken the cow from him and no one saw him handing the stolen cow to Accused 3.*
- iii. That accused 3 did not mention the 2nd Appellant at the police station which showed that he was innocent.*
- iv. That the trial magistrate never considered that the confession made at the police station by accused 3 contradicts the evidence given at the trial.*
- v. That the police breached his constitutional right by not taking him to court within 24 hours.*
- vi. That the sentence imposed was too harsh and excessive*
- vii. That the period of 2 years he spent in custody during trial should have been considered.*

8. The grounds raised by both the Appellants are almost similar and for the interest of judicial time this court will consider the common grounds raised by both the Appellants simultaneously and consider separately the dissimilar grounds raised by both Appellants.

9. The first appellant's grounds 1, 2, 3, 4, 8 and 9 relates to the weight of the prosecution's case and whether or not the prosecution's case against him was beyond doubt. The above grounds are similar to the 2nd Appellant's grounds (i), (ii), (iii), and (iv) as framed above. The grounds raises the first issue for determination in this appeal which is whether the prosecution's case was proved against the Appellant to the required standard.

10. The Appellants have submitted vide their respective written submissions that the prosecution at the trial failed to call what they consider crucial witnesses. They have both faulted the prosecution for not calling the night watchman who reportedly saw them driving the stolen cattle at night. They also point out that the complainant did not describe the cattle recovered or the persons found with the cows. It is also pointed out that there was contradiction on the date the cattle were alleged to have been stolen with PW1 saying they were stolen on 19th September 2017 while PW3 allegedly stated they were stolen on 20th September 2017.

11. On the question of crucial witnesses, it is trite that the prosecution are always at liberty to summon whoever witness they consider will help them prove their case. The law does not place any obligation to them on the number or type of witnesses to call save when an accused person can demonstrate presence of a relevant witness left out. In such instances an accused person can move the court to infer that relevant witness(s) not called were likely to give adverse evidence against the prosecution. In this instance the crime occurred at night. The watchmen of Ngariani School were said to have seen people with torches and because it was night they possibly did not recognize them and perhaps that could explain why they were not called as witnesses.

12. I have looked at the evidence of PW1 in regard to when his heads of cattle were stolen and he stated that they were stolen on the night of 19th September 2017. PW3 in his evidence stated that he bought one of the stolen cow on 20th September 2017 at Gatunga Market from the 3rd accused at the trial. There is therefore no contradiction or inconsistency between the two witnesses.

13. The Respondent in this appeal has submitted that the prosecution's case was proved beyond reasonable doubt and has supported the trial court for applying the doctrine of recent possession. It has further pointed out that the 1st Appellant elected to remain silent after being placed on his defence. It has cited a decision in the case of *Republic –vs- Jones Mutua Antony & 3 Others [2019]* where it was observed

that a *prima facie* case is established where evidence tendered by the prosecution is sufficient on its own to return a guilty verdict if no other explanation is offered by the accused in rebuttal.

14. This court being the first appellate court is mandated to re-evaluate and re-assess the evidence tendered before the trial court and come up with own conclusions. I have re-evaluated the evidence tendered by the prosecution. There is no doubt or contest that the complainant's cows were stolen and that the cattle were branded and easily recognizable because each had the initials of the owner imprinted on their skins. In regard to the 1st Appellant, Peter Munywoki (PW4) clearly described how he bought a bull from the 1st appellant which later turned out to have been stolen. He identified a receipt No.51803 tendered by PW6 (George Murithi Muthengi) a County Revenue Collector indicating that the transaction was *bona fide*. The complainant (PW1) duly identified his bull whose picture was tendered as P. Exhibit 2 (a) by PW6. The 1st Appellant was paid Kshs.17,000/- by PW4 for the stolen bull. The Appellant did not deny selling the stolen bull and receiving Kshs.17,000/- because he chose to remain silent because he had a right to do so. However this court finds that the evidence tendered by the prosecution established a *prima facie* case sufficient enough to place the 1st Appellant in his defence. His failure to give any rebuttal or explanation or exonerate himself inferred guilt and I find that the trial court was right to find that the case against him had been proved beyond doubt.

15. In regard to the 2nd Appellant (James Njeru Muchiri), I find that the prosecution's evidence against him was equally overwhelming. PW3 (Gerald Mutugi Iguna) gave the trial court a vivid account on how he purchased the stolen cow from the 3rd accused who happened to have been merely a broker used by the 2nd Appellant in disposing the stolen cow. Again the prosecution tendered the evidence of transaction between the 3rd accused and PW3 in form of a receipt No. 51394 P. Exhibit 2 (b) and photograph P. Exhibit 3(a) respectively tendered by PW6 and the investigating officer (Corporal C. Mosop) respectively.

When placed on his defence the 2nd Appellant denied committing the offence and raised *alibi* but the 3rd accused at the trial defended himself and told the trial court that he used to act as a middle man or a broker in the sale and purchase of cows at Gatunga Market and that he was well known as such. He explained how he was approached by the 2nd Appellant and how he eventually sold the cow to Mutugi (PW3) without knowing that it was a stolen cow. The explanation in my view exonerated him while at the same time adding weight on the prosecution's case against the 2nd Appellant as the 3rd accused defence corroborated the evidence of PW3.

16. The Appellants herein were charged with stealing stock as observed above. Stealing is defined in the Penal Code as :

"268. (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.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move."

Section 278 of the Penal Code states as follows:-

"278. If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, 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."

17. It is clear from the receipt exhibit 2b, that the 1st accused was the seller written therein who sold the bull marked exhibit 3 b to PW4. He cannot deny that his name and ID number appears as the seller on the receipt. He said nothing in his own defence that may have offered any other explanation other than he took part in the sale of the particular cow which was confirmed stolen by its owner, PW1, as well as its minder, PW2. It is therefore immaterial that he was not found with it at the market or that he was arrested days later. PW4 the named buyer confirmed the 1st appellant to be the one who sold it to him. The 2nd Appellant disowned any statement he signed saying that he did not know what he signed at the station. He also said he went to the station on request by Inspector Mbuvi but was arrested when he got there. However, Appellant 2 was placed at Gatune market by PW2 who said that when accused 3 was arrested, he claimed to be a livestock broker selling on behalf of Appellant 2. PW7 also told the court this version of events. PW6 said that the 3rd accused had mentioned he was a broker when requesting a receipt. The 3rd accused also told the IO, PW7, that he and the 2nd Appellant had worked together before. There is no visible reason as to why the 3rd accused would have manufactured the issue against the 2nd accused who claimed not to have been at the scene on the material day. The claims by the Appellants that the prosecution's case contained inconsistencies and contradictions are not well founded because the evidence tendered were consistent and clear.

18. On the doctrine of recent possession, it is clear from the evidence tendered at the trial that the cows were stolen on 19th September 2017 and the following day on 20th September 2017 at Gatunga Market, the Appellants were found in constructive possession because of the fact that the persons who had bought them were found within the market and when confronted produced evidence showing they had just purchased the stolen animals unknowingly from the 1st and 2nd Appellants. In my considered view the doctrine of recent possession applied against them despite the fact that they were not found with the actual possession of the stolen animals. In the case of Isaac Nganga Kahiga alias Peter Ng'ang'a Kahiga –vs- Republic (Uganda Criminal Case No. 272 of 2005) the court highlighted the necessary elements in the doctrine of recent possession as follows:-

- i. *The property was found with the suspect*
- ii. *That the property is positively the property of the complainant.*
- iii. *That the property was recently stolen from the complainant.*

19. In the instant case it is clear that the stolen animals belonged to the complainant as they were evidently marked with the initials of the complainant the owner of the stolen animals. The Appellants did not and have not claimed ownership of the animals though they received payments after selling them. The sale was done the same day and there were few hours between the transactions and the evidence (receipt from County Revenue Collector PW6) clearly pointed at the Appellants in this matter. The doctrine of recent possession applied which and weight to the prosecution's case. The conviction of the Appellant was proper and well supported by the evidence tendered.

20. On the question of infringements of their constitutional rights, though the Appellants have claimed that they were not produced in court within 24 hrs, I find that this is the wrong forum to ventilate the issue. The Appellant are at liberty to file a separate action to ventilate their claim of denial of their constitutional right if any. The same does not and cannot affect the conviction or sentence meted out because the case against them was stock theft and as I have found above, the evidence tendered against them sufficiently proved that they were guilty as charged.

Whether the sentence meted out were too harsh

21. The Appellants claim that they were 1st offenders and that they had spent 2 years in custody during trial which time should have been factored in as a mitigating factor in their sentencing.

22. Sentencing is a discretionary matter **Section 26(2)** of the **Penal Code**. In ***Arthur Muya Muriuki –vs- Republic [2015] eKLR*** the Court of Appeal highlighted the following principles in sentencing;

“Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred.”

23. It is also true that a period as accused person spends in custody during trial should be taken into consideration in sentencing. Section 333(2) of the Penal Code states as follows:-

“(2) Subject to the provisions of Section 38 of the Penal Code (Cap.63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under Subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

24. The Judiciary Sentencing Policy Guidelines further provides:-

"7.10 The proviso to Section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed.

7.11 In determining the period of imprisonment that should be served by an offender, the court must taken into account the period in which the offender was held in custody during the trial."

25. In view of the above policy guidelines and the law, this court finds that though the trial court meted out lawful sentence (**Section 278** prescribes a sanction of not more than 14 years imprisonment) but the 2 years period the accused spent in custody appears not to have been taken into consideration. The sentence also appears a little bit harsh considering that they were first offenders. In the premises the sentence of 10 years is reduced to 6 years and the period of 2 years in custody is factored in to mean that the appellants are sentenced to serve 4 years in prison. In the end this appeal on conviction is disallowed. The conviction is upheld. The sentence of 10 years is hereby set aside and a sentence of 4 years imprisonment is hereby imposed on each Appellant. Right of appeal 14 days

Dated, signed and delivered at Chuka this 24th day of February 2020.

R. K. LIMO

JUDGE

24/2/2020

Judgment signed, dated and delivered in the presence of Momanyi for the Respondent and in presence of 1st and 2nd Appellant in person.

R.K. LIMO

JUDGE

24/2/2020