



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CHERERE-J)

CRIMINAL APPEAL NO. 34 OF 2019

BETWEEN

AMOS KIPKOGE KORIR.....1ST APPELLANT

ROMAN KIPLIMO BOSONG2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 61 of 2016 in the Principal Magistrate's Court at Winam by Hon. B.Kasavuli (RM) on 18.06.19)

JUDGMENT

1. On 18.06.19, Appellants were convicted of alternative counts of handling stolen property contrary to section 322(2) of the Penal Code and was sentenced to serve 7 years each.

Prosecution case

2. The prosecution called 3 witnesses in support of its case. **PW1, Henry Kumba**, the complainant stated that his three cows were stolen on the night of 15th and 16th January, 2016. It was his evidence that he later went to Kondele Police station and was shown a black bull and a white cow which he was informed were recovered one from each Appellant who were unknown to him.

3. PW2 Sgt David Kiptoo and PW3 John Kipkemboi Keter testified that on 24.01.16, a white cow was recovered from 1st Appellant's home and the bull from 2nd Appellant's home and that both cows were identified by the complainant as his.

4. At the close of the prosecution case, Appellants were ruled to have a case to answer and were placed on their defence.

5. In their sworn defences, Appellants denied the charges and stated that they saw the cows at Kabuji Police Station after their arrest.

6. On 18.06.19; the learned trial magistrate delivered a judgment in which he acquitted Appellants of stock theft but convicted them of the alternative counts of handling stolen property contrary to section 322(2) of the Penal Code and sentenced each to serve 7 years.

The appeal

7. Being dissatisfied with the conviction and sentence, Appellants lodged the instant appeal. In their supplementary grounds of appeal filed on 20th November, 2019, Appellant raised 6 grounds which I have summarized into 4 grounds of appeal **THAT:**

- 1) Their rights under Article 50(2) (j) were violated**
- 2) Appellants were not accorded legal representation**
- 3) Inventory of the recovered cows was not produced**
- 4) Investigating officer did not testify**

Analysis

8. As this is a first appeal, this court is enjoined to consider all the evidence afresh, evaluate it independently and reach its own conclusions having regard to the fact that it neither heard nor saw the witnesses (See Okeno v Republic [1972] EA 32).

9. I have carefully considered the evidence on record, the supplementary grounds of appeal and written submissions on behalf of the Appellants.

10. There is no dispute that no one saw Appellants or anyone else steal the complainant's cows and the trial court rightfully acquitted the Appellant of the charge of stock theft.

11. I have perused the record of the trial court and the Appellants did not raise the issue of non-availability of statements during the trial. Had it been raised; I have no doubt that the learned trial magistrate would have given such orders and directions as are necessary to give effect to Appellants' right under Article 50 (2) (j) of the Constitution. I therefore find no merit in this ground of appeal.

12. *Appellants argue that they were not afforded legal representation at the expense of the state and were therefore denied a constitutional right.* This issue first came up for interpretation before the Court of Appeal in the case of David Njoroge Macharia v Republic [2011] eKLR. The Court after reviewing the past and current law stated that as follows: -

“Article 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”

13. The Court was of the opinion that where the accused faced a capital offence, then the State ought to consider providing legal representation. In other instances, it would have to be through a case by case examination, such as where there are complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided.

14. In my view, this is not a case that ideally, legal representation ought to have been provided at State expense. There is also no evidence that the Appellants could not afford counsel.

15. Further to the foregoing, the provisions of Article 50, part of which relate to the right to be provided with legal representation at State expense, are yet to be fully operationalized. This was indeed the basis of the decision in the case of John Swaka V DPP & 2 Others, Nairobi High Court, Constitutional Petition No. 318 OF 2011, [2013] eKLR. I am therefore not convinced that there is any violation of the Constitutional rights of the Appellants in not having been accorded legal representation at State expense given the foregoing reasons.

16. The third issue raised by the Appellants is that there was the inventory of the recovered goods was not produced. The preparation of an inventory is a procedural issue hence in Leonard Odhiambo Ouma & Another v Republic CA NKU Criminal Appeal No. 176 of 2009 (UR), the Court of Appeal held that failure to compile an inventory is a procedural step which in the circumstances, whose omission does not vitiate the trial.

17. The final issue is whether the prosecution proved the alternative counts of handling stolen property.

18. There is evidence that on 02.02.16 when plea was taken, the Prosecutor invited the court to see one white and one black cow which were outside the court and that information was recorded in the court file. On the 28.07.16 when the matter came up for hearing, the prosecutor applied for an adjournment on the ground that the photographs of the cows were not ready.

19. It is on record that when the three prosecution witnesses testified, neither the cows nor their photographs were before the court and hence, the complainant did not identify the cows that were allegedly stolen from him nor did PW2 and PW3 identify the cows allegedly recovered from the Appellants.

20. The doctrine of recent possession was discussed in the case of MAHINGI V REPUBLIC (1989) KLR 225, as follows:

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn, that he either stole or was a guilty receiver”.

21. In the absence of evidence that there existed cows which were stolen and later recovered, the court erred in calling upon the Appellants to disapprove what had not been proved and in drawing an inference that Appellants were guilty receivers.

Orders

22. From what is stated herein above, the appeal is allowed. The convictions are quashed and the sentences set aside. Unless otherwise lawfully held, both Appellant shall be set at liberty forthwith. It is so ordered.

DELIVERED AND SIGNED IN KISUMU THIS 05th DAY OF March 2020

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Mr. Kipchumba

1st Appellant -Present

2nd Appellant - Present

For the Appellant -N/A

For the State - Ms. Gathu