REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL 20 OF 2018

NICHOLAS DHADHO......APPELLANT

VERSUS

REPUBLIC......................RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court *at Hola criminal case 316 of 2016, Hon. A. P. Ndege (PM) dated 8th May 2018)*

JUDGMENT

1. The Appellant was charged with one count of injuring animals contrary to section 338 of the Penal Code. The particulars of the offences were that on the 21st October 2016 at Vukoni village in Tana River Sub-County within Tana River County, the Appellant wilfully and unlawfully wounded animals capable of being stolen, five donkeys valued at Ksh. 75,000/-, the property of Eker Idhao.

2. The prosecution called four witnesses in support of their case. Ali Akari idhu (PW1) stated that on 21st October 2016 while herding goats and cattle at his farm in Wenje, he was informed by PW2 and PW3 that his donkeys had been cut. That at 6:00pm on his way home he bought drugs which he injected to the donkeys. He later went to report the matter at the police station at Wenje. He told the court that the police officers took photos of the donkeys and accused the Appellant of injuring the animals.

3. Farum Abdi Kedhe (PW2) was PW1's wife. She stated that that on 21st October 2016 at around 1:00pm she went to Kivukoni near the river with a friend where she saw someone cutting the donkeys with a panga. She stated that there were 10 donkeys but only three of them had been cut and were bleeding. That the person cutting the animals saw them and escaped. She called PW1 and informed him of the incident and took the donkeys home. That in the evening, PW1 injected the animals and went to Wenje police station. PW2 told the court that the Appellant was known to her as they had stayed in the same area for a long time. She identified him in the dock.

4. Amina Ali (PW3) stated that on the 21st October 2016 at around 1:00pm she was cutting grass for livestock at Mkotoni together with PW2 when they saw donkeys being cut with a panga at the river. That the person cutting them had a spear on the other hand and appeared ruthless. That when the person saw them he ran away. Together with PW2 they called PW1 and informed them of the incident. PW3 told the court that the person cutting the donkeys was the Appellant and that she knew him before as they lived in the same area and often met him.

5. PC Fanuel Abongo (PW4) from Wenje Police Station told the court that on 22nd October 2017 a complainant reported at Wenje police station that five of his donkeys were harmed at an attack near Vukoni village and that the suspect had been seen by two women. That PW4 together with sergeant Nderitu went to the home of the complainant and found three injured donkeys. One of the donkeys was injured on the leg, one had an injury on the left side of the thigh and the third was injured at its reproductive organs. He stated that two other donkeys were missing after the attack. He took photographs of the three donkeys.

6. PW6 stated that on 24th, he was informed that the two other donkeys were spotted injured. That he went to the scene and photographed the injured donkey and thereafter handed the photographs to **PW1**. He then took down the statements of PW2 and PW3 who stated that the attacker's name was Dhogoro in their dialect. In his investigations he found the Appellant who was a farmer and had a farm where the donkeys were injured. PW4 stated that the Appellant had planted bananas and eggplants at the place where the donkeys were attacked and he contended that it was the Appellant who attacked the donkeys. PW4 produced the photographs of the five donkeys (P.Exh1A-E) and the certificate of the scene of crime (P.Exh2).

7. In his defence, the Appellant gave an unsworn statement. He stated that from the 17th October 2016, he harvested maize and took them to the village to dry and to keep it safe from animals. He stated that while at the farm he also busied himself with horticulture and repairing the store. That on the 28th October 2016 he went to the farm at 9:00am and harvested tomatoes and sukuma (vegetables) and later went and hawked them to his customers. That he later saw two people whom he did not know and who introduced themselves as police officers. They

told him that he was an offender, arrested him and later issued him with a cash bail of Ksh. 3000/- and informed him that he should attend court. That the police officers did not tell him the reason for his arrest and that he only found out once he was arraigned.

8. At the end of the trial the learned trial magistrate found the Appellant guilty and sentenced him to a jail term of ten years.

9. Aggrieved by the conviction and sentence, the Appellant lodged his homemade petition of appeal on 15th May 2018. However, on the 5th November 2019 he filed an amended Petition of Appeal on two grounds which are to the effect that his conviction was unsafe because the prosecution case was full of material contradictions, and; that the magistrate did not consider his defence.

10. The Appellant filed his written submissions on the same date which were to the effect that the prosecution evidence had contradictions as PW4 contradicted PW1 when he stated that 10 donkeys were cut instead of three. He relied on the case of **David Ojeabu vs Federal Republic of Nigeria (2014) PERL 22555.** The Appellant also took issue with the fact that the complainant neither raised an alarm nor reported the Appellant yet he claimed to have seen the Appellant cutting the donkeys. He further claimed that there was no photographic evidence of him cutting the animals and submitted that the case was a fabrication.

11. Finally, the Appellant submitted that the he raised a strong alibi defence which created doubt in the prosecution evidence. He relied on the case of **Sebyala vs Rep (1969)** and; **Solomon Murukaria vs Rep (2014) eKLR.**

12. During the hearing, Mr. Mwangi, learned counsel for the Respondent, conceded the appeal on the grounds that the Appellant was convicted on the basis of photographs while what was required was a veterinary officer's report as a matter of evidence. In addition, counsel submitted that the judgment had no legal reasoning as there was a lack of analysis of the prosecution and defence case. On sentencing, it was learned counsel's submission that the court relied on section 278 of the Penal Code which was not in the charge sheet. He further submitted that an ass provided for in the said section was not a donkey but a type of horse.

13. Despite the Respondent conceding the appeal, it is trite that the court should examine the facts for itself in considering whether or not there was merit in the prosecution's concession. In **Odhiambo vs. Republic (2008) KLR 565** the Court held that:-

> **"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."**

14. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusion. See **Okeno v R (1972) EA 32; Eric Onyango Odeng' v R [2014] eKLR.**

15. I have considered the grounds of appeal, the record and submission of the parties. The only issue for determination is whether the prosecution proved its case to the required legal standard.

16. On whether the donkeys were injured, PW2 and PW3 both testified that they saw the Appellant cutting three donkeys with a panga at the river where the animals had gone to drink water. PW4 testified that he went to the complainant's home where he found three donkeys that had been injured. He stated that the donkeys were injured on the leg, the left thigh and on the reproductive organs. Later, on the 24th October 2016, he was informed that two other donkeys were found and that they were also injured. PW4 took photographs of the injured animals which he produced in court as P.Exh 1A-E.

17. There is no doubt in my mind that the animals were inured from the evidence adduced as there is photographic evidence of the same. The Respondent in conceding the appeal claimed that a veterinary officer's report was needed to prove injury to the animals. It is true that a veterinary officer's report would have given credence to the fact of the injury and extent of the injury to the animals as well as quantified the loss. However, that alone is not the only evidence against the Appellant. There was credible evidence by PW2 and PW3 who saw the Appellant cut the said donkeys and there was the photographic evidence of the injured animals.

18. The evidence however does not show that five donkeys were injured. It was the evidence of PW2 that she only witnessed three donkeys being cut and not five. The other two donkeys were found approximately three days later and could have been injured in different circumstances. In view of the foregoing I find that only three donkeys were injured.

19. I have considered the question whether or not it was the Appellant who cut the animals. From the evidence, it is clear that the Appellant was recognised by the witnesses. Recognition has been held to be the best evidence of identification. See **Francis Muchiri Joseph – V- Republic [2014] eKLR** and **Anjononi & Others vs. The Republic [1980] KLR 59.**

20. The court however must test evidence of recognition. This caution was emphasised in the case of **Peter Musau Mwanzia vs. Republic [2008] eKLR** where the Court of Appeal stated:-

> **"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."**

21. In the present case, it was the evidence of PW2 and PW3 that it was the Appellant whom they saw cutting the donkeys. They stated that

they knew the Appellant as they had lived in the same area for a long time. Further, PW4 formed the impression that the Appellant was well known to both PW2 and PW3 who referred to the Appellant as Dhogoro in their local dialect when giving statements. It was clear from their first report that they knew him.

22. The importance of a first report cannot be gainsaid as was held in the case of **Tekerali s/o Korongozi & 4 Others –vs- Rep (1952) 19 EACA 259** where the predecessor court of appeal held that:-

> **"Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."**

23. It is my conclusion from the totality of the evidence before the trial court, that the Appellant was positively identified. Indeed, he did not dispute the fact that he was well known to PW2 and PW3 who were also his neighbours.

24. It was the Appellant's contention that the trial magistrate failed to consider his alibi defence. An alibi defence was defined in **Karanja v Rep (1983)KLR 501** where the Court of Appeal stated that:-

> **"1. the word 'alibi' is a Latin verb meaning 'elsewhere' or 'at another place'. Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi….;**

25. The defence put forth by the Appellant was that from the 17th 18th and 19th October 2016 and subsequent days, he had been on his farm harvesting and storing crops, repairing the store and occasionally selling his crops. That on the 28th October 2016, he was arrested on his farm when selling his crops. PW4 testified that the Appellant's farm where he had planted eggplants and bananas was the scene of the offence.

26. From the evidence above its evident that the Appellant's farm and scene of the offence are one and the same place and therefore his defence does not constitute an alibi as defined in the precedent above. To the contrary, the Appellant's evidence confirms that he was present at the scene. It is also material that he did not account for his whereabouts specifically on 20th October, 2016. His defence therefore did not cast a shadow of doubt over the prosecution case, and instead placed him at the scene of the crime.

27. The Respondent in conceding the appeal took issue with the form of the judgment by the trial magistrate.

28. Section 169(1) of the CPC which provides that:-

> **Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it**.

29. I agree with the Respondent that the judgment did not conform to section 169(1) of the CPC as the trial magistrate did not set out the points of determination and did not set out the Appellants defence. However, it is trite that non-conformity to section 169(1) of the CPC does not lead to a miscarriage of justice and that a conviction cannot be overturned merely because of non-compliance.

30. In **Republic vs Edward Kirui [2014] eKLR** the Court of Appeal held: -

> **"Non-compliance with the requirements of section 169 does not automatically result in the trial process being vitiated. See the authority of HAWAGA JOSEPH ANSANGA ONDIASA V R Criminal Appeal no. 84 of 2001 where the appellant asked the court to set aside his conviction at the trial saying that that court had not complied with section 169 Criminal Procedure Code. This Court found that –**
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> **"It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare his judgment strictly in accordance with section 169 of the Criminal Procedure Code, this would not, of itself mean that the conviction of the appellant was wrong or is to be invalidated"**

31. On the issue of sentence, the Respondent has stated that the sentence was illegal and excessive as the magistrate erroneously considered a donkey to be an ass as defined in section 278 of the Penal Code and went on to sentence the Appellant to 10 years instead of 3 years as stipulated in section 338 of the Penal Code. A close look at the animals listed under Section 278 however shows that the animals in question being donkeys are covered in the definition of mule and ass which are descriptions that are used interchangeably. See The Concise Oxford English Dictionary (12th Edition).

32. It is my finding therefore that the sentence was lawful. However, I have considered the circumstances of the case. Firstly, I observe that the Appellant was wrongly convicted for injuring five donkeys instead of three donkeys as earlier pointed out in this judgment. Secondly, there was evidence which showed that the complainants' animals had repeatedly destroyed the Appellants' crops which provoked him. While the Appellant cannot be excused for taking the law into his hands, I find these to be mitigating circumstances and that the sentence meted was harsh and excessive.

33. In the final analysis, I uphold the conviction, set aside the sentence of 10 years and substitute therefor one of 3 years' imprisonment. It is apparent that the Appellant has by now served a substantial part of the 3-year prison sentence. I consider the period served sufficient.

34. The Appellant is set at liberty forthwith unless otherwise lawfully held.

35. Orders accordingly.

Judgment delivered, dated and signed at Garsen on this 30th day of April, 2020.

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R. LAGAT KORIR

JUDGE

This judgement has been delivered to the Appellant via video link to Malindi GK prison (due to COVID – 19 regulations), in the presence of T.Maro (Court Assistant), Ms.Sombo (holding brief for Mr. Mwangi for the Respondent) and the Appellant(virtually present).