



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 147 OF 2019

JEREMIAH M'ARITHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal and sentence of the Hon. G. Sogomo PM. made on 19/8/2019 in Tigania PMCr. Case No. 333 of 2017)

J U D G M E N T

1. **Jeremiah M'Aritho** (the appellant), was charged with the offence of negligent act causing harm contrary to **section 244 of the Penal Code**.
2. It was alleged that on 27/2/2019 at Old Kiare Scheme, Athwana Location in Tigania West sub-county within Meru County, jointly with others not before court, the appellant unlawfully grazed cattle in land **Parcel Nos. 1769, 1770 and 1446** all registered under Nyambene/Old Kiare scheme belonging to **Joshua Kobia Kiunga** and fed on black beans, green grams and maize all valued at Kshs. 242,000/- and with failing to prevent the said cattle from feeding on the said crops, caused harm to the said **Joshua Kobia Kiunga**.
3. He also faced a second count of illegal grazing upon private land contrary to **section 3 (1) as read with section 11 of the Trespass Act, Cap 294 Laws of Kenya**. The particulars were that on the same day, place and time, jointly with others not before court, he willfully allowed cattle to graze on the aforesaid land causing loss of Kshs. 242,000/- the property of **Joshua Kobia Kiunga**.
4. He was convicted on the first count but discharged on the second count. He was sentenced to a fine of Kshs. 50,000/- in default to serve six (6) months imprisonment.
5. Aggrieved by the said decision, the appellant preferred this appeal raising seven (7) grounds which may be collapsed into three (3): **that; the trial court failed to consider that the evidence tendered was at variance with the particulars of the charge; the trial court erred in relying on inadmissible evidence to convict the appellant; the trial court failed to find that the case against the appellant had not been proved.**
6. **Mr. Basilio Gitonga**, Learned Counsel for the appellant submitted that the charge sheet stated that the offence occurred on 27/02/2017 yet the evidence proffered indicated that the offence was committed on 18/2/2017. none of the prosecution witnesses alluded to the offence having been committed on 27/2/2017. In the premises, the evidence did not support the charge.
7. The trial court relied on photographs that were taken by the complainant yet no basis was laid to warrant their production and admission as evidence. This infringed **section 78 of the Evidence Act Cap 80**. There was no evidence to connect the appellant to the cattle in question and the trial court failed to consider the appellant's defence. The decision in **John Kibii Langat v Republic [2005] Eklr**, was relied on in support of those submissions.
8. The respondent did not file any submissions.
9. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Okeno vs. Republic [1972] E.A 32**.
10. The prosecution case was that on 19/2/2017 at about 11.00am, **Joshua Kobia (Pw1)** was informed by **Munene Joel Mwingirwa (Pw4)**, who was guarding his farm, that the latter had confiscated some livestock that had invaded his farm. That the herder had also been apprehended and was being escorted to the local assistant chief's camp.

11. **Pw1** went to the camp and found 96 herd of cattle and 2 donkeys which he photographed. The assistant chief and administration police escorted the animals to Ngundune Police Station. On the way, the appellant came forward and pleaded that the animals be released to him whereby he was arrested. At the Police Station, the appellant was placed in custody while the animals were released.

12. The following day, police officers witnessed the damage to his maize, black beans and green grams and took photographs of the same. He consulted **Pw2 Stephen Nkanda Richoro**, an agricultural officer who visited the scene and assessed the damage at Kshs. 242, 000/-.

13. **Japheth Kaithia (Pw3)** recalled that on 18/02/2017 at 10.00 am, **Pw1** had sent Joel Munene to keep watch over his farm. At around 11.00 am, he saw a herd of cattle invade the farm and graze upon the crops. They impounded 96 of them and 2 donkeys which they took to Limauru Administration Police Camp. On the way to Ngundune Police Station, the appellant came forward and pleaded that the animals be released to him.

14. **PW5 No. 11258 P.C. Festus Ng'eno** of Tigania Police Station took over the case from P.C Mutie who had been transferred. He testified that on 19/02/2017, a report of illegal grazing was made by **Pw1** to the effect that the appellant had let loose his cattle on his crops. The appellant was brought to the Station on the same day on suspicion of illegal grazing.

15. **P.C Mutie** and an agricultural officer visited the land and prepared a report of the crop damage. **Pw1** gave the officer a title deed, a confirmation of land ownership letter and an official search for the land. **Pw6 No. 61853 Corpl. Gabriel Kosgey** of DCI – Meru County HQ produced duly stamped and certified photographs of the scene which were prepared by PC Munyi and printed on 19/06/2017. He stated that he did not process the photographs which he came into possession of on that day neither did he know where the exhibit memo was.

16. The appellant gave sworn testimony and called one witness. He stated that on 19/02/2017, between 2.00 and 3.00 pm, he was in the company of **Cyprian Linguli (Dw2)** on the way to Limaoru. They met a group of people whereby **Pw1** stated that he be arrested. He was bound and put on a motor bike. He was taken to Ngundune Police Station where he was arrested for invading someone's land. During his arrest he did not see any livestock neither was he herding any cattle on that day.

17. **Cyprian Linguli (Dw2)** stated that on the material day, he was with the appellant when a crowd apprehended the appellant on an allegation that his cattle had invaded their farms. The crowd bound the appellant on a motorcycle and took him to the Police Station. He denied seeing the appellant with any cattle.

18. The first ground was that the trial court failed to consider that the evidence tendered was at variance with the particulars of the charge. The particulars of count I stated that the offence took place on 27/02/2017. However, the evidence by the prosecution was that the offence occurred on 19/02/2017. It is clear that the evidence adduced was at variance with the allegations in the charge sheet.

19. This mistake however, did not occasion any prejudice or miscarriage of justice on the part of the appellant. The appellant knew the case he was facing and was able to effectively prepare his defence. The errors on the dates cannot make the charge sheet defective or the conviction a nullity. See the Court of Appeal decision in **Obedi Kilonzo Kevevo v. Republic [2015] eKLR**. That ground therefore fails.

20. The second ground was that the trial court erred in relying on inadmissible evidence to convict the appellant. The offence related to an alleged invasion of cattle on the farm of **Pw1** and destroying farm produce thereon. The cattle were photographed by the complainant(**pw1**). Although it was alleged that the said cattle were driven to and received at Ngundune Police Station, they were never photographed by the police.

21. In the case relied on by the appellant of **John Kibii Langat v. Republic [2015] Eklr**, the court held: -

“In any event, the trial court erred in admitting the said photographic evidence since the said photographs were taken by a person who was not qualified in law to take photographs for the purposes of having the same produced in evidence. According to the evidence of Pw9, the photographs of the donkeys were taken by Pw10 a commercial photographer based at Molo township. The said photographer was not an officer appointed for the purpose by the Attorney General as envisaged by the provisions of Section 78 of the Evidence Act ...

The above section of the evidence Act gives conditions under which photographic evidence may be admitted in criminal cases. A condition to be satisfied is that the photographic prints or enlargement must have been prepared by an officer duly appointed by the order of the Attorney General. Such an officer shall prepare a certificate to the effect that he reproduced the photographic prints from the exact film which was exposed. The said certificate shall be produced in evidence together with the photographs”.

22. This court fully associates itself with the foregoing proposition of the law. In the present case, there was no exhibit memo or certificate accompanying the photographs that were produced in evidence. To the extent that the trial court relied on the said photographs as evidence of the alleged cattle that destroyed the subject produce, the trial court was in error. That ground succeeds.

23. The last ground was that the trial court failed to find that the case against the appellant had not been proved to the required standard. That the defence of the appellant was ignored as were the submissions made on his behalf.

24. **Pw1** was not on the farm when the cattle allegedly invaded it. He only met the appellant on the way when the animals were being escorted to Ngundune Police Station. **Pw3** and **PW4** who were at the scene, stated that they did not see the appellant herding the animals.

25. The question that therefore arises is, how did the alleged invasion of the cattle cause harm on **Pw1**. The particulars of the charge were to the effect that the cattle belonging to the appellant destroyed the farm produce belonging to the complainant thereby causing harm.

26. **Section 4 of the Penal Code** defines harm to mean *any bodily hurt, disease or disorder whether permanent or temporary*. There was no medical evidence that was produced to prove that the destruction of the farm produce on the complainant caused him any harm in terms of section of the penal code. Of course it caused him to suffer loss and damage to the amount of Kshs.242,000/-, but that is not harm as per the law and the charge sheet.

28. To the extent that the prosecution purported to charge the appellant under **section 244 of the Penal Code** on an alleged negligent act that did not cause any bodily harm in terms of **section 4 of the Penal Code**, that charge could not hold.

28. As regards the ownership of the alleged cattle, that fact was not proved. There was no evidence to show that the appellant was the owner of the cattle. The person who arrested the appellant, the area assistant chief and administration police were not called to testify. They would have made the nexus between the cattle, the appellant and his arrest.

29. Accordingly, I find that the trial court erred in convicting the appellant on a charge that was not proved. It follows that the appeal is successful and is allowed. The conviction is hereby quashed and the sentence set aside. The appellant must have by now served the sentence.

DATED and DELIVERED at Meru this 12th day of August, 2020.

A. MABEYA

JUDGE