



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 110 OF 2016

JOHN WANYONYI WEKESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(an appeal from the conviction and sentence in original webuye court cr.case no.1107 of 2015

delivered on 22.4.2016 by HON. C.N ORUO Resident Magistrate)

JUDGMENT.

The Appellant John Wanyonyi Wekesa was charged with conveying suspected stolen property Contrary to Section 323 of the Penal Code. The particulars were that on the 5th day of November 2015 at Webuye Railway Yard in Bungoma East sub county within Bungoma County was found by No.52139 P.C Vincent Mokoit as a result of the exercise of the powers conferred by section 26 of the criminal procedure code, was conveying a brown oxen reasonably suspected to have been stolen or unlawfully obtained.

After full trial the learned Trial Magistrate found the appellant guilty of conveying suspected stolen property Contrary to Section 323 of the Penal Code of robbery with violence Contrary to Section 296(2) of the Penal Code. Dissatisfied with the conviction and sentence the appellant preferred this appeal on the following grounds;

(1) THAT I pleaded not guilty to the charge.

(2) That the the trial court erred in both law and facts in failing to supply me with all the prosecution witness statements.

(3) THAT the learned trial magistrate erred both in law and facts by failing to give a chance to mitigate and make my defence before delivering his judgement.

(4) THAT the learned trial magistrate erred both in law and facts by failing to consider that the arresting officer was not availed in court as one of the prosecution witness.

Briefly the evidence before the trial court was follows; P.C Vincent Mokoyit testified that him together with P.C. Charles Ruto took over the case from P.C Atte were called by members of the public that they had seen appellant in the area with a cow and appellant looked suspicious.

PW1 stated that they visited the scene and found the accused and when the he was stopped he ran away leaving the cow but he was chased by the police and they got hold of him. Upon interrogation the accused admitted to have stolen the cow at Kibingei within Kimilili and was going to sale it at a slaughter house and accused was arrested and charged in court. The red bull was produced as exhibit 1 in court.

In his defence the appellant opted to remain silent and wait for the court's decision.

Ms. Njeru for the state opposed the appeal. In his submissions in court he stated that appellant under page 3 of the proceedings court directed that he be furnished with witnesses' statement on 9.11.2015 and on 22.2.2016 when hearing commenced, he never raised the issue about the statement.

She submitted that the appellant was given date for defence hearing and he elected to give sworn evidence and on 24.3.2016 on defence hearing date he opted to remain silent and he was asked to mitigate and she further submitted that the name of the complainant was not in the charge sheet because the cow was suspected to be stolen and she prayed the court to dismiss the appeal.

This is a first appeal. The duty of this court is well stated in the case of **Okeno v Republic 1972 EA**.

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic [1957] EA36) and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (Shantilal M. Ruwala versus Republic [1957] EA 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings, and conclusions. It must make its own finding and draw its own conclusions. Only then can it decide whether

the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.”

From the evidence and submissions, the issue that lends itself for determination is whether the appellant was found in possession of cow suspected to be stolen and whether he gave an account of how he came by it. From the evidence the appellant committed the offence of conveying suspected stolen property Contrary to Section 323 of the Penal Code.

Section 323 of the Penal Code provides as follows:

“Any person who has been detained as a result of the exercise of the powers conferred by Section 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanor.”

There are the following ingredients to be satisfied for an offence to be committed under the above section

- a) A person must have been detained pursuant to Section 26 of the Criminal Procedure Code (Cap 75);***
- b) The person must be having in his possession or conveying in any manner anything reasonably suspected of having been stolen or unlawfully obtained, and***
- c) The person does not give an account to the satisfaction of the court of how he came by the same.***

Section 26(1) of the Criminal Procedure Code (Cap 75) empowers any police officer or other person authorized on that behalf by the Commissioner of Police to stop, search and detain:

“... (c) any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

Section 323 of the Penal Code and I set the section out below for convenience.

“Section 323: Any person who has been detailed as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained and who does not give an account to the satisfaction of the court of how he came by same is guilty of a misdemeanor.”

Looking at facts and evidence before this court I am satisfied that the prosecution proved its case beyond reasonable doubt against the appellant. I find the conviction was proper and uphold the same.

On sentence the matter of sentence is governed by section 36 of the Penal Code which contains the general punishment for a misdemeanor being imprisonment for a term not exceeding two years or fine or both.

I note that the appellant was sentenced to serve a term of 5 years imprisonment. The sentence from this offence is a maximum of 2 years imprisonment or fine or both. The sentence of 5 year imprisonment is hereby set aside. The appellant to serve 2 years imprisonment from date of conviction on 22.4.2016.

Dated and Signed at Bungoma this 24th day of July, 2019.

S.N. RIECHI

JUDGE