



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NOS. 31A, 31B AND 31C OF 2018

WILLIAM TONGOYO.....1ST APPELLANT

KESUE NAMPASO.....2ND APPELLANT

LEYIAN LANG'ISA CHACHA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The first appellant has appealed against sentence only. He was sentenced to ten years' imprisonment in respect of the offence of stock theft contrary to section 278 of the Penal Code (Cap 63) Laws of Kenya
2. The 2nd and 3rd appellants have appealed against their conviction and sentence of ten years' imprisonment in respect of the offence of stock theft contrary 278 of the Penal Code (Cap 63) Laws of Kenya.
3. The state has supported both the conviction and sentence.
4. The law requires the evidence against each appellant to be considered and for convenience, I will start with the first appellant's appeal.

1ST Appellant's Appeal- William Tongoyo.

5. In this court, this appellant has appealed against sentence only. He raised four grounds in his amended grounds of appeal. In ground 1 the appellant has faulted the trial court for failing to take into account the period, he had been in custody as required by section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya. In this regard, the trial court took into account that the appellant had gone through trial for close to one and a half years (1½). It is clear the court took into account that this appellant had been in custody for one year and a half year. This ground lacks merit and is hereby dismissed.

6. In ground 2 the appellant has faulted the trial court for failing to take into account that he had two wives, nine school going children and that the family of his late uncle all depended on him. In this regard, also the trial court took into account the appellant's mitigation including the fact that the appellant had children and was a bread winner. This ground lacks merit and is hereby dismissed.

7. In grounds 3 and 4 the appellant has urged the court to take into account that he is remorseful. Additionally, he has urged the court to impose upon him a non-custodial sentence. He has also urged the court to take into account that he sustained a fracture in his head, which still causes him problems.

8. The maximum sentence provided for this offence is fourteen years imprisonment.

9. The charge sheet was amended during trial and this appellant and the co-appellants pleaded to the amended charge. His rights were explained. The record is silent as whether the appellant and co-appellants exercised their right to recall the witnesses who had testified in terms of section 214 (1) (ii) of the Criminal Procedure Code (Cap 75) Laws of Kenya. An accused is given a discretionary power to recall witnesses for further cross examination. It is clear that it is not the charge that was defective, but the lack of not having exercised the right to recall the witnesses. In view of the fact that the appellant has challenged only his sentence, it seems he was not prejudiced in terms of section

10. Furthermore, the appellant in his evidence testified that he was arrested on 26th March 2017. He was taken to court on 31st March 2017 for plea. It is not correct that he was in police custody for months before being taken to court. This submission is without merit and is hereby dismissed.

11. I find that the trial court did not consider the recovery of the stolen cattle before sentencing the appellant. Since the cattle were recovered, the sentence is hereby reduced to five years' imprisonment, which now the appellant has to serve.

2nd Appellant's Appeal-Kesue Nampaso.

12. This appellant raised seven grounds of appeal in his amended grounds of appeal in this court.

13. In grounds 1 and 2 the appellant has faulted the trial court for convicting him when the ingredients of the offence of stealing were not proved to the required standard. In his submissions the appellant has submitted that he was not positively identified as one of those who broke into the cattle boma of the complainant (PW 1). The appellant further submitted that he did not hire the lorry that transported the stolen cattle. Furthermore, the appellant has submitted that he is not the one, who applied and was given the permit, that authorized the transportation of the stolen cattle. The appellant was convicted for being in possession of recently stolen property namely the cattle.

14. The evidence against this appellant through Peter Karanja Ngige (Pw 3) was that he was the driver of the lorry registration No. KCA 192J, that took the stolen cattle to Kinungi slaughter house. It was the further evidence of Pw 3 that this appellant took the stolen cattle in the company of the co-appellants.

15. Furthermore, there is evidence of Peter Mbiyu Mbugua (Pw 4), who is in charge of the slaughter at Kinungi that on 25th March 2017, this appellant was the driver of the lorry that transported the stolen cattle to Kinungi, who was in company of the co-appellants.

16. In addition to the foregoing evidence, there is the evidence of Kenneth Kiplangat Rono (Pw 9). Pw 9 testified that this appellant and his co-appellants loaded the stolen cattle onto lorry registration KCA 192J, that took them to Kinungi.

17. Then there is the evidence of AP IP John Mbirika (Pw 10), who was in charge of Kinungi AP Camp, who testified that he arrested this appellant along with Leteiyo Ole Parsekui (who jumped bail during mid-trial). When this appellant saw Pw 10 he tried to escape, but he managed to arrest him. This appellant was re-arrested by PC Dennis Mugambi (Pw 11) along with Leteiyo Ole Parsekui. Pw 9 then handed the nine stolen cattle to the owner (Pw 1).

18. It was the evidence of Tompoi Ole Keiwa that his stolen cattle had been branded with marks "Y25" and "KPO." He further testified that mark KPO is for Ol Pejeta Nanyuki, which brand appears in photograph exhibit 3(f). They also bore another brand namely "Y25", which is clear in photograph 3(g). These photographs were put in evidence by Cpl. Paul Kiilu (Pw 2).

19. In answer to the foregoing evidence, the appellant made an unsworn statement. This appellant stated he woke up at Kiraka. He then went to buy drugs for his sheep and that is when he was arrested at the stage by police. This appellant further stated that Peter Mbiu (Pw 4) lied when he testified that he saw him at the slaughter house and that he was the driver of the lorry that transported the stolen cattle.

20. I have re-assessed the prosecution and defence evidence and I find that this appellant was positively identified as one of those in possession of the stolen cattle. Grounds 1 and 2 are therefore without merit and are hereby dismissed.

21. In ground 3 the appellant has faulted the trial court for failing to considering his defence and for failing to give reasons for rejecting his defence without giving cogent reasons. There is overwhelming circumstantial evidence that points to this appellant as one of those that stole the cattle. This appellant's sentence is reduced to five years' imprisonment, for the reasons given in respect of the first appellant's sentence.

3rd Appellant's appeal- Leyian Laning'isa Chacha

22. In this court the appellant has raised four grounds in his amended grounds of appeal. In ground 1, this appellant has raised the same ground of appeal as the second appellant. This ground of appeal fails for the reasons given in respect of the second appellant.

23. In ground 2 this appellant has faulted the trial court for misconstruing the circumstances of his arrest at Kiserian, which connected him to the stealing of the complainant's cattle. In this regard, there is the evidence of Peter Karanja Ngige (Pw 3), who was at the slaughter house at Kinungi that on 25th March 2017 this appellant along with his co-appellants brought the stolen cattle to the slaughter house. Pw 3 further testified that this appellant had before this incident taken cattle there. He was a person known to him. The in charge of the slaughter house (Pw 4) testified that it is this appellant who gave him the permit that purportedly authorized the movement of the stolen cattle to the slaughter house. Upon investigation, it was found that the said permit was issued by Joseph Kibyegeon Langat (Pw 5), the veterinary officer. The permit was for lorry registration No. KBU 445Q, which transported the cattle to Dagorett. This appellant therefore gave Pw 4 a fake permit.

24. Furthermore, PC Dennis Mugambi (PW 11), who was the investigating officer, testified that he arrested the first appellant at Gitaru; but then this appellant escaped. Through his cell phone this appellant was then tracked to Kiserian, where he was arrested by Pw 11 on 29th April 2017.

25. In answer to the foregoing evidence, this appellant testified on oath that he buys and sells goats. It was his evidence that on 29th April 2017 he had gone to Kiserian to sell goats. In the process, he was arrested. He was not told the reasons for his arrest. Thereafter he was

charged in court. It is common ground that he was arrested at Kiserian. According to him he was arrested in the course of his business. The circumstances, of his arrest are therefore clear. This ground is without merit and is hereby dismissed. The sentence of this appellant is reduced to five years imprisonment, in line with sentence of his co-appellants.

The case of Leteiyo Ole Parsekui

26. This was the second accused in the trial court, who jumped bail during the trial. He jumped his bail after all the accused including himself were put on their defence. The trial then proceeded in his absence and was convicted but not sentenced, because he had not been arrested. A warrant of arrest was issued, which is still in force. There is therefore no appeal in respect of that accused, in this court. I therefore say no more.

Judgement signed, dated and delivered in open court at Narok this 30th day of September, 2019 in the presence of all the appellants and Ms. Nyaroita for the state.

J. M. Bwonwong'a

Judge

30/9/2019