



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 24 OF 2017

JULIUS BOMU MASHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 14 of 2016 in the Senior Principal Magistrate's Court at Wundanyi delivered by Hon N.N. Njagi (SPM) on 6th February 2017)

JUDGMENT

1. The Appellant herein, Julius Bomu Masha, was charged with three (3) Counts. Count I related to the offence of stealing stock contrary to Section 268 (1) as read with Section 278 of the Penal Code Cap 63 (Laws of Kenya). The particulars of this Count were that on 31st December 2015, at around 4.00pm at Jombo village in Mwachobo Location within Taita Taveta County, he stole a bull valued at Kshs 30,000/= the property of Holiness Mrunde Kisombe (hereinafter referred to as 'PW 1').
2. Count II was also in respect of the offence of stealing contrary to Section 268 (1) as read with Section 278 of the Penal Code. The particulars of this offence were that on the aforesaid date, time and place, he stole a cow valued at Kshs 35,000/= the property of Fridah Mwashuma Mwakio.
3. As an alternative to Counts I and II herein, he was charged with the offence of handling stolen goods contrary to Section 322 (1) as read with Section 322(2) of the Penal Code. The particulars of this offence were that on 3rd January 2016 at around 3.00pm at Kipusi village in Mwatate location within Taita Taveta County, otherwise than in the court of stealing, dishonestly retained two cattle (a bull black in colour and a cow whitish in colour) knowing or having reasons to believe them to be stolen goods.
4. On Count III, he was charged with giving false information to a person in public service contrary to Section 129 of the Penal Code. The particulars of this offence were that on the 2nd day of January 2016, at around 2.00pm at Mwatate Police Station within Taita Taveta County, he informed No 88391 PC David Masinde, (hereinafter referred to as "PW6") a person employed in the public service as a Police Officer, that two cattle belonging to unknown persons had trespassed into his shamba and grazed on his crops, information he knew to be false, knowing it to be likely that he would thereby cause the said PW6 to arrest and charge the owners of the said two cattle which ought not to have done if the true state of facts respecting which such information was given had been known to him.
5. The matter was part heard before Hon G.M. Gitonga, Resident Magistrate. Hon N.N. Njagi, Senior Principal Magistrate (hereinafter referred to "the Learned Trial Magistrate") took over the matter and informed the Appellant of the provisions of Section 200(1) of the Criminal Procedure Code Cap 75 (Laws of Kenya) to which he (the Appellant) indicated that the trial should proceed from where it had reached.
6. In his judgment, the Learned Trial Magistrate concluded that the Prosecution did not prove its case in respect of Counts I and II and thus acquitted the Appellant herein. He, however, convicted him on Count III and on the alternative Charge and sentenced him to serve three (3) years imprisonment for each offence. He further ordered that the sentences were to run consecutively.
7. Being dissatisfied with the said judgment, on 26th April 2017, the Appellant filed a Notice of Motion seeking leave to file his Appeal out of time which application was allowed and deemed to have been duly filed and served. He relied on five (5) Grounds of Appeal. On 21st September 2017, the Appellant filed Amended Grounds of Appeal and his Written Submissions. This time he relied on six (6) Amended Grounds of Appeal. The Respondent filed its Written Submissions dated 13th November 2017 on 14th November 2017.
8. When the matter came up on 13th December 2017, both the Appellant and counsel for the State asked the court to deliver its judgment based on their respective written submissions. The judgment is therefore based on the said written submissions.

LEGAL ANALYSIS

9. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

10. After perusing the Appellant’s and the State’s Written Submissions, this court was of the view that the issues that had been placed before it for determination were as follows;

- 1. Whether the charge sheet was defective;**
- 2. Whether the prosecution proved its case beyond reasonable doubt;**
- 3. Whether the sentence was harsh, severe and manifestly excessive warranting interference by this court.**

11. The said issues were therefore dealt under separate and distinct headings as shown hereinbelow.

I. DEFECTIVENESS OF CHARGE SHEET

12. Amended Ground of Appeal No (1) was dealt with under this head.

13. The Appellant submitted that the Charge Sheet as drafted against him was defective. He pointed out that it was alleged in the Charge Sheet that the theft of the stock took place on 31st December 2015 which he said was contrary to PW 1’s evidence that her black bull was stolen on 1st January 2016. He added that the Charge Sheet had also indicated that the said black bull was valued at Kshs 30,000/= while she said that it was worth Kshs 35,000/=.

14. He also contended that the assertions by “PW 6” that he had **intended** (emphasis Appellant) to steal the stock, contradicted PW 1’s evidence that he was the one who stole the black bull.

15. He was categorical that the Prosecution had an opportunity to amend the Charge Sheet in accordance with Section 214 of the Criminal Procedure Code Cap 75 (Laws of Kenya) but failed to do so which rendered the Charge Sheet defective.

16. On its part, the State argued that the discrepancy of time in the Charge Sheet vis-a-vis the evidence of the Prosecution witnesses was a discrepancy that was curable under the provisions of Section 383 of Criminal Procedure Code. In this regard, it referred this court to the case of **Josphat Wagura Macharia vs Republic [2013] eKLR** where the Court of Appeal held that discrepancy as to the date of arrest and/or offence was not material if it was inconsequential to conviction and sentence.

17. This court noted that the Appellant’s assertions regarding the defectiveness of the Charge related to the offence of stealing. In view of the fact that he had been acquitted of Counts I and II relating to stealing where date and time would have been relevant in his argument, this court found that there was no value in analysing the said submission.

18. In the premises foregoing, this court found Amended Ground No (1) not to have been merited and the same is hereby dismissed.

II. PROOF OF THE PROSECUTION’S CASE

19. Amended Grounds of Appeal Nos (2), (3), (4), (5) and (6) were dealt with under this head as they were related.

20. The Appellant submitted that he was convicted on fabricated evidence, a submission the State categorically rejected. He reiterated his evidence that the stock had strayed into his farm and destroyed his maize plantation whereafter he went and reported the matter of the trespass to the Police Station. He relied on a letter from the Officer Commanding Station (OCS) Mwatate Police Station which had authorised him to detain the stock so that the owner(s) could come for their animals. The said letter was marked for identification.

21. He pointed out that if he had indeed stolen the animals, he would not have gone round the village asking to whom the animals belonged to. He therefore stated that the Learned Trial Magistrate erred when he rejected his sworn evidence.

22. On its part, the State submitted that PW 1 and Alfred Ezekiel Kisombe (hereinafter referred to as “PW 5”) confirmed that the black bull belonged to PW 1 and that the Appellant did not claim it as having been his. It added that he gave false testimony that caused PW 6 to arrest the owners of the animals.

23. In his judgement, the Learned Trial Magistrate stated that the Appellant was found with two (2) bulls but that he could not explain how they came into his possession. He noted that PW 6 **“realised”** that the Appellant did not have a farm with plants that could have been damaged and hence determined that the Appellant had not been truthful as he had no farm where the animals could have grazed and that his report caused PW 6 to arrest the owners of the animals.

24. The Learned Trial Magistrate also pointed out that Martha Makabali (hereinafter referred to as “DW 1”) denied that the Appellant had any cow at Peleleza area. He found that the Appellant’s evidence to have been a sham and that the Prosecution had proved its case against

him.

25. According to PW 1, the police told her that the Accused person was found with the black bull, which she identified from the photos that were adduced in evidence by the Scenes of Crime Officer No 235243 IP Peter Kyalo (hereinafter referred to as "PW 4") as having belonged to her.

26. Two (2) issues emerged from her evidence. Firstly, she did not explain how she identified the black bull to have been hers. She ought to have given a distinct or peculiar mark that would have satisfied this court that indeed the black bull belonged to her. Despite stating that she identified the black bull which PW 1 came and confirmed was hers, PW5 did not also point out the peculiarities that would have made him identify the black bull as having belonged to PW 1.

27. Secondly, the police officer(s) who told PW 1 that the Appellant was found in possession of the black bull were not identified and/or called as a witness(es) in this case. That witness(es) was a crucial witness because the circumstances under which the Appellant came to possess the animals differed greatly between the Prosecution case and that of the Appellant herein.

28. Notably, PW 6 testified that on 2nd January 2016 at 2.00pm, he found the Appellant at the Mwatate Police Station with one (1) cow and one (1) bull and he informed him that they should remain at the Police Station as they had destroyed his crops. The following day 3rd January 2016, the Appellant brought PW 5 to the Police Station to see if one of the two (2) animals belonged to him. In PW 5's evidence, the Appellant had asked him to go to the Police Station to see if any of the animals were his. PW 5 said that none of the animals were his.

29. PW 6 then spoke of a man he was to arrest at Kipusi. He went on to say that he was told the man had run away and he found "them" on the way. He did not elaborate who "them" were. He merely stated that the Appellant had a letter from the OCS to show that he had been attacked by thieves because of the cows that he had been given by the OCS. He then arrested the Appellant and that PW 1 who was accompanied by PW 5 came and identified the black bull as having belonged to her. He said that he learned that the Appellant had shown PW 5 different cows. He was emphatic that he had seen the Appellant previously and that he had no farm in Mwatate.

30. It was evident that PW 6's evidence was hazy, inconsistent and disjointed. It was not clear from his evidence at what point the Appellant removed the animals from the Police Station so that he could find him along the way on 3rd January 2016. It was also not clear how he knew on which road he was walking the animals so as to have pursued him as Mwatate is an expansive area.

31. Indeed, his evidence was contradicted by that of Peter Righa (hereinafter referred to as "PW 2") who testified that the animals were taken to the Police Station by Athuman Mwangale (hereinafter referred to as "PW 3"). In fact, PW 3 said that they led the cows to the Police Station on foot and that is when they met a Police Vehicle and the Appellant already having been arrested.

32. Notably, PW 6 did not explain how he knew that the Appellant had no farm in Mwatate. He ought to have delved further into how he was known to the Appellant as the Learned Trial Magistrate heavily relied on his evidence that he had no farm at Mwatate.

33. This court found the Learned Trial Magistrate erred when he relied on PW 6's evidence that the Appellant had no farm at Mwatate because PW 5 had testified that the Appellant was trying to find its owners had damaged his crops. PW5 did not dispute the fact that the Appellant had a farm. It was the considered view of this court that the Learned Trial Magistrate ought to have taken into account PW5's evidence as he was the Appellant's neighbour while PW6 was a police officer who did not expound how he knew the Appellant had no farm.

34. It is also important to note that the woman PW 3 said had told him that it was the Appellant who tethered the animals was also not called as witness. That woman was a crucial witness. Abdalla Kassim who was said to have alerted PW 2 about stolen cows was also not called as a witness yet he would have provided a link as to how he established the cows were stolen so as to have called him.

35. Notably, Section 143 of Evidence Act Cap 80 (Laws of Kenya) provides:-

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"

36. Although there is no legal requirement on the number of witnesses the prosecution needs to call to prove a fact, its failure to call crucial witnesses renders its case a fatal blow.

37. The Learned Trial Magistrate did not also address his mind to the letter from the OCS authorising the Appellant to keep the animals, which the Prosecutor had said was genuine but added that there was a mischief in the same. This mischief was not elaborated. The said letter was material as the Appellant did not deny having been in possession of the animals. Although the said letter was not adduced in evidence, the Prosecution nonetheless admitted to the Learned Trial Magistrate as having been genuine. There was therefore a possibility that he might not have come in possession of the animals unlawfully.

38. The Appellant persuaded this court to agree with him that it was not logical for him to have gone round the village asking to whom the animals belonged if he was actually handling stolen property. He went to PW 1's father and PW 5 to ask them if they had lost any animals. PW 1 said they were neighbours. There was a possibility of cows having strayed to the Appellant's farm as PW 5 had alluded to in his evidence. PW 6's assertion that the Appellant showed PW 5 the wrong animals was not corroborated by PW 5 and improper motive could not therefore be imputed against him. It appeared to this court that PW 6 testified on several issues which had gaping holes.

39. Going further, this court note that although the Learned Trial Magistrate convicted the Appellant for the offence of giving false information to a person in public service, there was no evidence that was tendered before the Trial Court to show who was arrested as a result of the Appellant's false report.

40. Accordingly, having analysed the evidence that was adduced by the Prosecution witnesses, this court came to the firm conclusion that the Prosecution's case was inconsistent and not cogent and that it had not proved its case to the required standard which was proof beyond reasonable doubt.

41. Amended Grounds of Appeal Nos (2), (3), (4), (5) and (6) were merited and the same are hereby allowed.

DISPOSITION

42. For the foregoing reasons, the Appellant's Petition of Appeal filed on 26th April 2017 was merited and is hereby allowed. The conviction is hereby quashed and the sentence set aside as it was unsafe to confirm the same.

43. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

44. It is so ordered.

DATED and DELIVERED at VOI this 27th day of February, 2018

J. KAMAU

JUDGE

In the presence of:-

Julius Bomu Masha - Appellant

Miss Anyumba - for State

Susan Sarikoki- Court Clerk