



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 55 OF 2017

BETWEEN

CHRISTOPHER ONYANGO ODHIAMBO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C. N.Njalale at Senior Resident Magistrates Court at Winam in Criminal Case No. 165 of 2011 dated on 15th November 2017)

JUDGMENT

1. The appellant, **CHRISTOPHER ONYANGO ODHIAMBO**, was charged with and convicted of the offence of stealing contrary to **section 275** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on 17th February 2011 at Mayfair Village in Miwani Location within Kisumu East District, the appellant stole 90 tonnes of sugarcane valued at Kshs. 360,000/-, the property of George Bruno Abongo.
2. The appellant was also charged with the offence of forgery contrary to **section 348** of the *Penal Code* and the offence of making a document without lawful authority contrary to **section 357(a)** of the *Penal Code*. On the second count, it was alleged that between 28th March 2004 and an unknown date in September 2009 in Kisumu East District, he forged a certain document namely a sugarcane lease agreement purported to have been made between one Dorothy Ayieko and Christopher Onyango. The third count alleged that between 28th March 2004 and an unknown date in September 2009 in Kisumu East District, with intent to defraud and without lawful authority made a certain document namely a sugarcane lease agreement between Dorothy Ayieko and Christopher Onyango purporting it to be a lease prepared on 26th March 2004.
3. The appellant was convicted on the first count of stealing and acquitted on the second and third counts. He was sentenced to serve 18 months' imprisonment and now appeals against the conviction and sentence.
4. In his petition of appeal, the petitioner faults the trial magistrate for failing to appreciate the glaring contradictions in the prosecution evidence. He complains that the trial magistrate erred in fact and in law in holding that the property in question was the property of the complainant. The petitioner further complains that the trial magistrate relied on erroneous reasoning contrary to laid down principles and thus arrived at a wrong decision against the weight of the evidence. Finally, that the trial magistrate erred in convicting the appellant with the offence of stealing even when the other offences of forgery had not been proved against him. Mr Singahachi, counsel for the appellant, emphasized that since the appellant was acquitted on the second and third counts, he could not be convicted of the offence of stealing. Mr Muia, counsel for the State, opposed the appeal and submitted that the prosecution proved that the appellant stole the complainant's sugar cane beyond reasonable doubt.
5. This being a first appeal, it is the duty of this court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic [1972] E.A 32*).
6. The evidence emerging at the trial was as follows. The complainant, George Bruno Abongo (PW 1) entered into a lease agreement dated 2nd April 2009, with Dorothy Ogada Ayieko (PW 7) for a seven-acre parcel, KISUMU/KIBOS/5451/2 for Kshs. 70,000/-. According to the agreement, he was to take over possession of the land from the appellant who was at the time in possession of the land. PW 1 testified that the appellant had entered into an agreement with PW 7 for the same land in 2004 and his lease was to end in 2009 after the appellant harvested the second ratoon crop. PW 1 recalled that after the appellant harvested the second ratoon crop he took over the farm and hired Lorbatus Odongo Mbogo (PW 6) to prepare the crop for maturity and harvest.
7. On 19th February 2011, PW 1 was informed by Chrispine Ofundo (PW 2) that the appellant had burned down his sugarcane plantation and

was busy harvesting the cane. PW 1 informed the police who came to the farm to investigate the matter. He also wrote to Kibos Sugar not to accept the sugarcane as it was stolen.

8. PW 7 confirmed that she got into an agreement with PW 1 for the lease of sugarcane growing land. She also confirmed that the land she leased to PW 1 was the same land she had leased to the appellant and that PW 1 was to take over from the appellant after the appellant's agreement lapsed. She explained that the contract between her and the appellant was not based on the age of maturity of the cane but rather the number of times the sugarcane would be harvested. She told court that according to the agreement, the appellant was to harvest the first crop and then two ratoon crops making it a total of three harvest cycles. She explained that the appellant harvested the second ratoon crop in September 2009 and that marked the end of his contract.

9. Police Constable Jeremiah Sagiti (PW 4) testified that after receiving information from PW 1 that someone was harvesting his cane, he proceeded to the site and found the cane being harvested. He recorded statements of witnesses who had seen the appellant authorise the cutting of the cane and after investigations, he decided to charge the appellant with the offence of stealing.

10. When put on his defence, the appellant stated that he entered into an agreement with PW 7 on 28th March 2004 which stated that he was to plough the land, plant sugarcane and then harvest thrice and the last harvest would be in 2011. Before the lease period was over, he entered into further agreements with PW 7 on 8th February 2007 where she agreed to increase the acreage of the land from the initial 3 acres to 8 acres and on 4th September 2010 when she agreed to extend the lease period from 3 harvests to 8 harvests. He produced the agreements as exhibits in the matter. The appellant further testified that during that period that he was in occupation of the land, PW 7 did not inform him that there was another lessor and so he considered the cane to be his.

11. The appellant called two witnesses, Charles Onditi Adongo (DW 3) who stated that he was present when the appellant entered into the third contract with PW 7 and so according to him the cane belonged to the appellant. Erick Odindo Ongunyi (DW 1) also testified that he was present when the contract of 2004 was made and it was to run for 8 years.

12. The main issue for determination in this case is whether the prosecution established beyond reasonable doubt that the appellant stole PW 1's sugarcane. The appellant admitted that he harvested the cane on the subject piece of land and his explanation was that he did not know that the land had been leased to another person and as far as he was concerned he was the lessor of the land. Resolution of the issue turns on who was in possession of the land by virtue of the lease granted by PW 7. In her testimony PW 7 insisted that she did not get into any other agreement with the appellant except the one dated 28th March 2004. On his part, the appellant agreed that the first contract was for three harvests but he extended the same.

13. In her judgment the trial magistrate after examining the contracts stated as follows:

The accused person's evidence though was that, his lease was to expire in 2011 because he had extended the subject lease dated 28/3/2004 by another lease dated 3/6/2008 which expanded the acreage to 5 acres from the initial 3 acres and for a further harvest for three times. That however was disputed by Dorothy Ayieko, who denied knowledge of any such lease. The accused person produced the lease dated 3/6/2008 as exhibit D3. I have perused the said lease agreement form and I find that the same is not signed by Dorothy Ayieko. The same does not state the parcel number to which it relates and neither does it state that it is an extension of the earlier lease agreement dated 28/3/2004 for the specific portion of sugarcane it related to.

14. From the evidence, the appellant claims to have expanded the period of the lease is the one dated 4th September 2010. The appellant produced this agreement as Exhibit D1. Although the agreement was referred to by PW 1., he stated that the land leased to the appellant was in another part of the farm as shown in the sketch plan he produced. The trial magistrate did not deal with the agreement dated 4th September 2010 which was witnessed by DW 3. In effect the contents of this agreement remained unchallenged. The other two agreements referred to by the appellant were properly rejected by the trial magistrate as they were not signed by PW 7.

15. While I accept that there was an agreement between PW 1 and PW 7, it is possible that the appellant did not know about the lease between PW 1 and PW 7. It is also possible that PW 7 entered into agreement with both the appellant and PW 1 to reap from both sides. It was the duty of the prosecution to plug and exclude these possibilities. PW 1 testified that he entered into the land in August 2009 and planted his crop in 2011. This creates an overlap between the time when the appellant was still in possession which according to PW 7 expired in September 2009. The cane that is the subject of the charges against the appellant was according to the charge sheet harvested on 17th February 2011. When considered against the average maturing period, it would fall back to a period in year 2009, which was proximate to the time when the initial contract was subsisting. While there is an intervening period between September 2009 and 4th September 2010 when the new agreement was entered into, the subject matter nevertheless falls within the succeeding agreement between PW 7 and the appellant dated 4th September 2010. The complainant himself admitted there was cane in the farm when he commenced farming.

16. This undoubtedly shows there was an overlap in the two agreements between the appellant and PW7 with the agreement entered between PW 1 and PW 7, enough to create a doubt as to who was in possession of the subject matter. More confusion is raised by the fact that the contracts were not specific as to the particular portions of land leased to PW 1 and the appellant. The prosecution did not put the sketch plan drawn by PW 1 to PW 7 to confirm the part leased to the appellant and PW 1 since the lease did not refer to any identifiable part of the land. In any case, PW 7 admitted that she leased the same piece of land to both the appellant and the complainant.

17. The offence alleged under **section 275** of the **Penal Code** ought to be considered within the meaning of stealing under **section 268** of the **Penal Code** being the fraudulent and without claim of right, taking of anything capable of being stolen, or the fraudulent conversion of any property by a person who is not the owner of such property. In this case, therefore, the possibility remains that the appellant and PW 7 were given the same land. All these possibilities create doubt as to whether the appellant intentionally and knowingly harvested PW 1's cane.

18. I allow the appeal and quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 19th day of March 2018.

D.S. MAJANJA

JUDGE

Mr Singahachi, Advocate for the appellant.

Mr Muia, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.