



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 35 OF 2017

KENYATTA KOMU KILUNDU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 243 of 2016 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon N. N. Njagi (SPM) on 6th February 2017)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Kenyatta Komu Kilundu was jointly charged with Muchughwa Zai, Ben Tumbo Vilevile, , Grishon Lombo Mjomba, Timothy Isika and Newton Mwasi (hereinafter referred to as “the Appellant’s Co-Accused persons No 1, 2, 4, 5 and 6 respectively”) on two (2) Counts.

2. Count I was in respect of the offence of stealing stock contrary to Section 268(1)of the Penal Code Cap 63(Laws of Kenya). The particulars of this charge were that on the 24th May 2016, at round 7.00pm at Mgeno Ranch at Mwatate Location within Taita Taveta County, they jointly stole a camel valued at Kshs 150,000/=, the property of Musdaf Bisha Yusuf (hereinafter referred to as “PW 1”).

3. They were also charged with the alternative charge of handling stolen goods contrary to Section 322(1) of the Penal Code. The particulars of this charge were that on 25th day of May 2016 at Mgeno Village in Mwatate Location within Taita Taveta County, jointly otherwise than in the course of stealing dishonestly retained or received the carcass (**sic**) of camel (**sic**) knowing or having reasons (**sic**) to believe it to be a stolen good or unlawfully obtained.

4. Count II was in respect of failing to register as a Kenyan citizen contrary to Section 14(1) (a) of the Registration of Persons Act. The particulars of this charge were that on the 25th day of May 2016 at Mgeno Village in Mwatate Location within Taita Taveta County, jointly after attaining over eighteen (18) years (**sic**), they failed to register as Kenyan citizen (**sic**) in contravention of the said Act.

5. After hearing the matter, the Learned Trial Magistrate Hon N.N. Njagi, Senior Principal Magistrate acquitted the Appellant and his Co-Accused persons on Count I as there was no strong evidence against them. He, however, convicted them on the alternative Charge and on Count II. He sentenced each of them to three (3) years imprisonment and three (3) months imprisonment on Count III. He directed that the sentences were to run concurrently.

6. Being dissatisfied with the said judgment, on 4th May 2017, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time, which application was allowed and the Petition of Appeal deemed to have been duly filed and served. He relied on two (2) Grounds of Appeal. He filed his initial Written Submissions on 17th August 2017 and his response to the State’s Written Submissions dated 17th November 2017 and filed on 21st November 2017 on 29th November 2017.

7. When the matter came up in court on 14th December 2017, both the Appellant and the State informed the court that they would rely entirely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. As this is a first appeal, this court analysed and re-evaluated 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”.

9. It appeared to this court that the only issue that had really been placed before it for determination was whether or not the Prosecution had proven its case beyond reasonable doubt. The court therefore dealt with the same under the following head.

I. PROOF OF THE PROSECUTION’S CASE

10. The Appellant submitted that the evidence that was adduced before the Trial Court was intended to fix him. He argued that PW 1 did not confirm that he was the owner of the house as he only stated that he met three (3) people in the house.

11. He also pointed out that Ahamed Mohamed Shakh (hereinafter referred to as “PW 2”) did not explain how he identified PW 1’s house. He added that PW 2 testified that he saw one (1) man wearing a white shirt from a distance of twenty five (25) feet at around 8.00pm but failed to disclose who that person was. His averment was that it was not possible for a person to identify another at that distance at that time of the night.

12. He added that there was no indication of the amount of meat he was found in possession of and that no report was produced by the meat inspector to confirm that the meat indeed belonged to a camel. It was his contention that the photographs of the meat that were presented in court did not specify who the owner of the said meat was and that since the head and leg of the slaughtered animal were not produced as exhibits in court, this raised doubt as to the identity of the meat (**sic**).

13. On its part, the State pointed out that the Appellant had already served the three (3) months sentence in respect of Count II having been convicted on 6th February 2017. It submitted that PW 1 confirmed that he was the owner of the camel that had been stolen as had been stated by PW 2 and that he identified it through a mark on the head.

14. It also averred that PW 1 went to a house and found the Appellant’s Co-Accused persons Nos 3, 4 and 6 inside a house and they had camel meat. It stated that the Appellant’s Co-Accused No 6 testified that he was given the meat by his Co-Accused person No 1 and that his Co-Accused person No 6 did not deny that the Appellant and his Co-Accused person 4 were found at his homestead. In fact, the Appellant herein admitted to having been arrested alongside those who were in possession of the meat.

15. It added that although no report was adduced by the meat inspection officer confirming that the meat belonged to a camel, the Appellant’s Co-Accused persons No 3, 4 and 6 confirmed that they were eating camel meat which the Appellant’s Co-Accused person No 6 stated that he was given the meat by his Co-Accused person No 1.

16. It submitted that PW 2 testified that there was sufficient light from the flash light that he had at the material time enabling him to identify the Appellant’s Co-Accused person No 6 as one of the men who ran away because they were neighbours and they had met several times burning charcoal and herding goats.

17. According to PW 1, on 24th May 2016 at about 7.00pm, he was informed by PW 2 that one of his camels had been stolen and slaughtered by the Appellant and his Co-Accused persons. A search of the camel which had a mark on the neck and head led them to the forest where they found a skin, head and front legs of a camel. He went to a house in a village one (1) kilometre away and found three (3) men inside. The Appellant was among those people. He found three (3) other persons with meat in another house which was also a kilometre away. He identified his camel from the photos that were adduced in court by the Investigating Officer No 40936 Sergeant Stephen Samkul (hereinafter referred to as “PW 4”).

18. PW 2 states that on the material date at about 8.00pm, one (1) camel out of a herd of sixty (60) camels went missing. He said that he looked for the thieves and found them in their houses with the meat. He said that he did not see or know how many people stole the camel but that his flashlight shone on one (1) person who he identified as the Appellant’s Co-Accused No 6 who, at the time, was wearing a white shirt and white shorts. He said that he followed the footsteps of the persons upto the village. In his Cross-examination, PW 2 said that he had seen the Appellant’s Co-Accused person No 6 as a neighbour and that he used to see him burning charcoal and herding goats.

19. Mohamed Bishar Yussuf (hereinafter referred to as “PW 3”) testified that he was a pastoralist and he lost one (1) camel on the material date at 8.00pm. He mobilised other herders and they followed the footsteps of the camel upto where it was slaughtered. He stated that they managed to get two (2) suspects with raw red meat the following day. He said that the Appellant’s Co-Accused persons Nos 2 and 5 were his neighbours.

20. PW 4 reiterated the evidence that was adduced by PW 1, PW 2 and PW 3. He testified that he was led to a house in Mgeno area by PW 1 and on reaching there, he found the Appellant’s Co-Accused persons Nos 3, 4 and 6. Some meat had been hang in the house while the rest was being roasted. The Appellant’s Co-Accused person no 6 led him to another house where he found the Appellant’s Co-Accused Nos 2 and 5.

21. The Appellant’s Co-Accused person No 2 led him to the Appellant’s Co-Accused No 1 who told him that the camel belonged to a Somali and that he slaughtered it after he found it dead. He said that he only found the head and leg at the scene as was evidenced by the photographic evidence that he adduced in court.

22. Save for the Appellant’s Co-Accused No 1 who opted to remain silent and not adduce any evidence or call witnesses, the Appellant and his Co-Accused adduced unsworn evidence and did not call any witnesses. It was correct as the Appellant herein had argued that no scientific evidence was adduced in the Trial Court to confirm that the meat in question was camel meat.

23. However, from the admission by the Appellant herein, his Co-Accused persons Nos 2 and 4, the meat they were found eating was camel meat. It was therefore not necessary for the Prosecution to have adduced further evidence to prove that the meat was camel meat. The position would have been different had they made no reference to the camel meat.

24. For all purposes and intent, this court was persuaded to find and hold that indeed, the Appellant was found eating camel meat. The Learned Trial Magistrate therefore arrived at the correct conclusion when he concluded that the meat in question was camel meat.

25. Notably, eating camel meat was not an offence. The pertinent question was, where did that camel meat come from?

26. It was evident from the Appellant's Co-Accused No 2 testimony that he purchased meat that was being sold. He did not say who sold it to him. The Appellant herein said that he was arrested along with people who had meat and denied any knowledge of the same. The Appellant's Co-Accused person No 6, did not also disclose under what circumstances his Co-Accused person No 1 gave him the camel meat.

27. It was correct as the Learned Trial Magistrate observed that neither the Appellant herein nor his Co-Accused persons gave an explanation as to where they got the camel meat from. In view of the fact that they were found in possession of the camel meat and PW 1's camel had been stolen, in the absence of any plausible explanation where they sourced the meat from, it was reasonable to infer a negative inference against them.

28. Appreciably, the Appellant's Co-Accused person No 6 may or may not have been the person PW 2 saw on the night that the camel went missing because the circumstances of a positive identification were not free of error. This court therefore agreed with the Learned Trial Magistrate that the Prosecution did not prove Count I and he was right in acquitting the Appellant and his Co-Accused persons in that regard.

29. Further, although it was not possible to state with certainty who stole, slaughtered and sold the camel from the evidence that was adduced in the Trial Court, the Appellant's Co-Accused persons implicated each other in the offence herein. He also admitted having been there at the material time.

30. As a result, this court found that although the circumstances under which PW 1, PW 2 and PW 3 established with such precision where the camel was being eaten had a gap, this gap was not sufficient for the Appellant to contend that the Prosecution did not prove its case beyond reasonable doubt.

31. In the circumstances foregoing, this court found and held that Grounds of Appeal Nos 2 and 3 were not merited and the same are hereby dismissed.

II. SENTENCING

32. The State was categorical that the sentence of three (3) years imprisonment that was meted upon the Appellant was fair and within the discretion of the Learned Trial Magistrate because under Section 322(2) of the Penal Code, the maximum sentence he could mete out to him was fourteen (14) years.

33. It referred this court to the case of *Shadrack Kipchoge Kogo vs Republic, Eldoret Criminal Appeal No253 of 2003 (quoted in Arthur Muya Muriuki vs Republic (2015) eKLR)* where the Court of Appeal stated the following on principles of sentencing:-

“Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred.”

34. Section 251 of the Penal Code provides as follows:-

“A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.”

35. This court therefore came to the firm conclusion that in view of the fact that the Appellant and his Co-Accused persons were found eating meat from a camel that had been stolen, a penalty of three (3) years that had been meted upon them were fair and reasonable in the circumstances of the case. This court was not persuaded that it should interfere with the said sentence as the same was not severe, harsh or manifestly excessive.

DISPOSITION

36. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 4th May 2017 was not merited and the same is hereby dismissed. The conviction and sentence are hereby upheld as the same were lawful and fitting.

37. It is so ordered.

DATED and DELIVERED at VOI this 20th day of April 2018.

J. KAMAU

JUDGE

In the presence of:-

Kenyatta Komu Kilundu-Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk