



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRA NO. 130 A & 130 B OF 2017

SAMWEL CHEPKWOKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being a consolidated appeal from the original

conviction and sentence in Kabarnet criminal

cases nos. 899 of 2016 and 897 of 2016

by Hon. E. M. Ayuka [RM]

JUDGMENT

1. The appellant in the consolidated appeal was convicted and sentenced to respectfully imprisonment for 3 years and a fine of Ksh. 30,000/= and in default 12 months imprisonment for the offence of stock theft in separate charge sheet in KBT PMC Criminal Case nos. 899 of 2016 and 897 of 2016. See order for consolidation of appeals made on 14/11/17.

2. The charges related to stock theft of two goats belonging to two different complainants allegedly stolen on 15/8/2016 and recovered on 30/8/2016 from the appellants homestead with their earmarks altered to conceal the complainant's marks on the goats.

3. The two goats recovered from the appellant's homestead were produced before the court in the respective cases as PEX. No. 1. They were recovered by a village search party who went to the appellant's homestead, according to the prosecution witnesses, because he was a known stock thief. In his unsworn defence in the two cases the appellant stated that the animals had strayed and joined with his goats; the first on 26/8/2016 and the other on 27/8/2016. However, according to the 2 complainants, their goats had been missing since the evening of 15/8/2016 and 29/8/2016, for complainant in Criminal case nos. 899 and 897 of 2016, respectively.

4. In this appeal, the appellant reduced his appeal to one against the sentence under grounds of appeal entitled "Appeal on leniency" raising 4 points as follows:

1. ***THAT*** I was satisfied with the 1st Sentence of 3 years.

2. **THAT** the two sentences originates from the same conviction of which one is greater than the other, my Lord it's from this reason I kindly request the Honorable Court, that the two sentences as mentioned herein may run concurrent as the court may deem lenient.

3. **THAT** the Honorable Court may reduce the said sentence and allow me go home in time and not to languish in Prison.

4. **THAT** I have learnt my mistakes fully and I do promise that I will be a good citizen as per the rules and Laws of the Land.

5. Again, in his oral submissions before the court, the appellant urged as follows:

“I pray the court to consider the case. The goats came with my herd. It stayed with my goats for 2 weeks. I did not cut the goats’ ears to mark it as my own.”

6. The DPP opposed the appeal pointing to the cutting of the goats’ ears and failure to report to the chief or any other authority the straying of the goats as proof of the appellant’s guilt.

7. In accordance with **Okeno v. R** [1972] EA 32, this court as a first appellate court has considered the evidence presented before the trial court in the two cases subject of consolidated appeals. Pursuant to **Okeno**, supra, the appellate court must give allowance to the fact that it had not seen the witnesses testifying in court. Significantly, the issue of cut ear marks on the goats is a matter which the appellate court must defer to the finding of the trial court before which the goats were produced as exhibits. The trial court found that the appellant had “chopped off the goats’ ears”.

8. Weighting the evidence of cut ear marks and the period when the appellant stayed with strayed goats without reporting to the Area Chief or any other authority against the bare unsworn allegation of accidental straying of the goats, I would find the charges of theft in the two cases proved beyond reasonable doubt. I would, accordingly, dismiss the appeal from conviction in the two cases in Criminal Appeals nos. 130A and 130B of 2017.

Concurrent sentences

9. As regards the sentences, the request for an order for execution of sentence to run concurrently is well taken in view of the **same transaction** principle for concurrent sentence orders. Recently, this court had occasion in the case of **Chirchir v. R**. KBT HCCRA No. 27 of 2017, to consider the principle on concurrent sentences, as follows:

*“21. The principle is that in cases where the offences are part of the **same transaction**, concurrent sentence should be ordered. The Court in **Odero v. R**, (1984) KLR 621, (Bratt and Mbaya, JJ.) explained the principle as follows:*

*“In cases where a person has been charged with and convicted of two or more counts involving the **same transaction**, the practice is to direct that the sentences should run concurrently: see **R v Fulabhai Jethabhai & Another** (1946) 13 EACA 179. We think that in the instant case the three counts for which the appellant was convicted were a series of offences founded on the same facts and **committed in the course of the same transaction**. That is why the three counts were joined in one charge as is envisaged by section 135(1) of the Criminal Procedure Code (cap 75). The phrase “**same transaction**” was considered by the former Court of Appeal in **Rex v Saidi Nsabuga s/o Juma and another** (1941) 8 EACA 81 and explained again by the same court in **Nathani v R** (1965 EA 777). The court said that the proper construction of the phrase “**same transaction**” is that:-*

“If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, then the offences constituted by these series of

acts are committed in the course of the same transaction.”

In the instant case the series of acts were the rumour-mongering which the appellant indulged in within the proximity of eleven days from the first act of December 7, 1982 to the last one on December 19, 1982. There was continuity of action and purpose, for what the appellant did was merely to repeat publication of the very rumour he spread on the first occasion”

10. Indeed, two charge sheets in the consolidated appeals alleged the commission of the offences of theft of the two goats on the same date the 15/8/16 and on the evidence the two offences are so closely connected in terms of time, place and method of commission defacing the goats’ earmarks as to properly amount to the same transaction.

Pre-trial detention

11. However, in sentencing the appellant to serve imprisonment for 3 years in Criminal case No. 899 of 2016, the trial court is not shown as having considered, as required by the proviso to section 333 (2) of the Criminal Procedure Code, the period that the appellant had been remanded in custody awaiting trial. The court record shows that the appellant was arraigned in court on 3/10/2016 and remanded for trial which commenced on 12/10/2016 and lasted until sentencing on 6/2/2017, a period of four months.

12. I do think that a sentence of imprisonment for 3 years is excessive for theft of one goat. I consider that a period of 2 years imprisonment should meet the objective of retribution and deterrence in such circumstances. The two objectives would then result in the society’s concern for eradication or reduction of stock theft considered prevalent in the region. The Court has in previous decisions distinguished the theft of one goat from systematic rustling of goats and cattle also prevalent in the region, reserving heavier punishment for the latter.

13. I consider the fine of Ksh. 30,000/= in the Criminal case no. 897 of 2016 to be on the higher side even when considered that the appellant at the time of sentence had a previous record in the conviction and sentence for the theft of the other goat in Criminal case no. 899 of 2016. In accordance with **Wanjema v. R** [1971] EA 493, having considered the fine for theft of one goat at Ksh. 30,000/= excessive, the Court feels justified to interfere with sentencing discretion of the trial court to reduce the fine to Ksh. 20,000/=. In accordance with section 28 of the Penal Code the default sentence of imprisonment for fines of between Ksh. 15,000/= - Ksh. 50,000/= is set at **6 months**. The unlawful default sentence of 12 months for the fine of Ksh.30, 000/- is set aside.

Orders

14. Accordingly, for the reasons set out above, pursuant to section 354 (3) of the Criminal Procedure Code the appellant’s consolidated appeals from conviction are dismissed. The appellant’s appeals from the sentence are allowed and the sentence in Criminal case no. 899 of 2016 reduced to imprisonment term of 2 years beginning 3/10/2016 when the appellant was first remanded to await trial. The sentence in Criminal case no. 897 of 2016 is reduced to a fine of Ksh. 20,000/= and in default of payment of the fine to serve an imprisonment term of 6 months.

15. As the two offences were part of the same transaction, the sentence of imprisonment for 6 months in default of the fine in Criminal case no. 897 of 2016 will be served concurrently with the sentence of imprisonment for 2 years in Criminal Case No. 899 of 2016.

16. Accordingly, as remission for industry and good conduct is in the discretion of the Commissioner for Prisons under section 46 of the Prisons Act, cap. 90 Laws of Kenya, the appellant should be released on **3/10/2018**, unless he is earlier released, in the discretion of the Commissioner for Prisons, on remission.

Orders accordingly.

DATED AND DELIVERED ON 13TH DAY OF APRIL OF 2018

EDWARD MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia Ass. DPP for Respondent.