



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL APPEAL

No. 22 of 2017

BETWEEN:

ANTHONY MATIVO KIOKO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. N. N. Njagi SPM at SPM's Court Wundanyi. CR. Case No.614 of 2016 delivered on 6th February 2017)

J U D G M E N T

1. The Court has before it an Appeal against conviction and sentence. The Appeal is brought against the Judgment of Hon N.N. Njagi SPM delivered at the SPM's Court in Wundanyi on 6th February 2017. On that day the Appellant was convicted of the offence of stock theft (**Section 278** of the **Penal Code**) and sentenced to 8 years imprisonment.

2. The Petition of Appeal was filed on 23rd April 2017 together with a Notice of Motion Application for leave to file an appeal out of time. The Order granting that leave is not readily apparent on the Court file, However, Hon J. Kamau J proceeded on the basis that the leave had been granted. The Appeal was admitted for hearing on 17th November 2017. The Grounds of Appeal attached to the Petition are:

(1) That the learned trial magistrate erred in law and fact by failing to consider that the prosecution did not prove their case beyond reasonable doubt as required by the law.

(2) That the trial magistrate erred in law and fact by failing to consider that the conviction was against the merits of the prosecution case.

(3) That the trial magistrate erred in law and fact by relying on incredible and incontinent prosecutions evidence

(4) That the honourable magistrate erred in law and fact by failing to consider no cogent reasons linking I the appellant to the alleged offence

(5) That the pundit trial magistrate erred in law and facts by failing to adequately consider my defence.

The Petition prays for the conviction to be quashed and the sentence set aside.

3. The Appellant was directed to file his written submissions by 22nd November 2017. As part of his written submissions he incorporated an application for leave to amend his grounds of Appeal under Section 350 of the Criminal Procedure Code after receiving the proceedings. The amended Grounds are:

(1) NONE DISCLOSURE of all the evidentiary materials by the prosecution in disregard of the application for the same by the applicant

(2) That the learned trial magistrate erred in both law and fact fail to note that the benefit of doubt was not discharged beyond reasonable doubt.

(3) That the learned trial magistrate erred in both law and fact fail in not considering that the Appellant is a first offender hence

deserved an alternative sentence.

(4) That the learned trial magistrate erred in both law and fact in not considering that my defence evidence which created a reasonable doubt to the prosecution whereby the benefit out to have been given to me.

4. The Appellant's Written Submissions were filed on 22nd November 2017. The Written Submissions on behalf of the Respondent were filed on 17th January 2018. Their respective arguments are set out in the Written Submissions.

5. Dealing with the arguments in the order set out by the Appellant. In relation to non-disclosure of evidential material by the Prosecution, the Appellant argues that as a consequence of that non-disclosure he was denied his constitutional right to a fair trial. The Appellant states that the prosecution did not provide him with a copy of the witness statements and the trial court failed to compel the prosecution to disclose those statements to the accused thereby denying him his legitimate right and expectation to a fair trial and hearing. The Respondent's Written Submissions assert that the Appellant's constitutional rights were not infringed. It is argued that during the plea taking the trial magistrate made an order directing the appellant to be supplied with witness statements. It is argued that on 11th January 2017 when the matter proceeded to hearing the Appellant confirmed that he was ready to proceed. The Respondent argues that even at the close of the trial process there was no mention by the appellant that he had not been supplied with witness statements "thus he cannot claim that his right to a fair trial was infringed".

6. The Appellant's next amended ground was that he was not assigned an Advocate during his trial. He argues that was a violation of his constitutional right under **Article 50(2)(h)** of the Constitution and he was denied a fair trial. The Respondent's argument in relation to that issue is that the right to provision of an advocate is a progressive right which has not been fully realised. There is no framework for free legal representation save for persons charged with capital offences. That is, in fact how the situation stands. The recourses available allow only for representation in capital cases.

7. The Appellant also challenges the identification evidence against him and submits that he was not identified by PW2. The Appellant relies on the Court of Appeal Judgment in **Joseph Ngumbau Nzalu vs Republic [1991] 2KLR pg 272** in which the Court of Appeal gave directions in relation to how identification evidence should be assessed in the context of the prevailing conditions. The Appellant also suggests he had an alibi to the offence. He also complains that the sentence is too severe.

8. The Appellant is appealing against both conviction and sentence. The duty of the Court was set out succinctly in **Criminal Appeal No 145 of 2013**. The Court said:

*This being the first appeal this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that neither saw the witness nor heard the evidence when parties were testifying to see their demeanor. See the case of **MARK OIRURI MOSE –VS- REPUBLIC [2013] e KLR Criminal Appeal No.295 of 2012** where the Court of Appeal stated: "It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."*

9. The Appellant was charged with stock theft contrary to **Section 278** of the **Penal Code**. He was charged with one other Fanny Shake Mkwanjomba. the Particulars of the Offence as set out on the Charge Sheet are that on the night of the 14th and 15th November 2016, at around 8:00 pm at Taita Taveta Estate at Mwatate Location within Taita Taveta County jointly were found having stolen one brown cow the property of taita estate company worth Kshs50,000. The said cow colour is brown with a mark YIT. There was an alternative charge of Handling Stolen Goods Contrary to Section 322(1) as read with Section (2) of the Penal Code. The Particulars of that Offence were that the two accused did "on the night of the 14th and 15th day of November 2016 at around 8:00pm at Taita estate, in mwatate location within Taita-Taveta County jointly, otherwise than in the course of stealing, dishonestly retained a hide of a cow brown in colour, knowing or having reason to believe it to be stolen goods". Clearly that charge related to a joint enterprise.

10. The Learned Trial Magistrate found the First Accused Guilty of the first count and sentenced him to 8 years imprisonment. The Second Accused who was said to be the wife of the First Accused was found not guilty of both counts. In his Judgment the Learned Trial Magistrate held that the value of the slaughtered cow was Kshs. 85,000/=. There is no evidence of the value of the cow in the proceedings and therefore the discrepancy between that figure and the value in the charge sheet is not explained. The evidence upon which the Appellant was convicted is that he was seen by neighbours and people in the area who knew him well carrying raw meat in a bag, possibly made of sisal, that was dripping with blood. Following a search of his home, meat was recovered. In fact in her own evidence the Second Accused admitted to cooking the meat she said she was given to her by the First Accused. Also found was the skin of a cow, brown in colour. Prior to that there had been a number of cows that had gone missing. Firstly, there were reports that cattle had gone missing. The Ranch Manager of the Taita Estate had reported to the assistant security manager, a Abubakari Mohamed that eight head of cattle had gone missing. The witness that was called was the Assistant Security Manager a Mr Mohammed who was PW-1. He said he went to look for the cattle and did not find them. The Judgment of the lower court does not contain a description of the cattle. At about the same time a PATRICK MWAZIGHE CHAO who lives next to Taita Estate got home at 9.00 (supposedly on 14th November 2016) when he checked on his cow he realised one bull of his was missing. He went to look for the lost animal and also reported the matter to the village elder. Mr Mwazinghe was PW-2. He gave evidence that during his search he came across two men who were carrying bags. He gave evidence that there was meat in the bags and there was blood dripping from the bags. PW-2 said he recognised the two men as the First Accused and his brother. He says he recognised the First Accused because he was his neighbour. PW-2 then reported the matter to PW-1. It was also PW-2 who stated that he found the carcass of a slaughtered cow in the Estate. His evidence is recorded as saying I found the carcass was brown. It had a mark "YIT". It is difficult to see how that a carcass could have a mark on it denoting its ownership applied when it was alive. PW-2 did not find his bull. When he reported the matter to his Village Elder (Jane Mkaiwavi Mwanjele alias Jane Mwasi who was also PW-3. PW-1 also gave evidence that he informed PW-1 that he had found a slaughtered cow. He made a statement at the sisal estate. It seems that statement was not used as evidence before the Court. On identification evidence PW-2 was cross-examined and he confirmed that he saw the First Accused. he had previously said he had the benefit of his torch and the moonlight. The Witness is also recorded as identifying the skin MFI.1

11. The Evidence of PW-3 was that she was told by PW-2 that he had seen the First Accused the previous night carrying meat. Since she did not observe those events herself the evidence relating to those events is hearsay which is inadmissible and so cannot be used to corroborate PW-2. All she can give evidence on is the fact that she was informed of those matters. In her evidence as recorded is that she went to the shop of a neighbour with PW-2 on the way she saw the First Accused. "they" then left driving away on a motorcycle without stopping. She says that she then reported the matter to PW-1 the security officer. She told him their cow had been slaughtered. She said she found the skeleton and skin was brown in colour. She does not explain whether the skeleton she found was the same as the one previously also found by PW-2 or a different one. She does not say where she found the skin.

12. The Prosecution called a further witness Dan Mzenge Mbori the Ranch Supervisor of Taita Estate. He says that on 14th November 2016 he went to check on the cattle and found a total of eight (8) cows missing. There was no reference to any calves. He said he searched but did not find them. He says that he then found one cow was slaughtered. It was at the border of the Sisal Estate. He managed to get the head, skin, skeleton and hooves which were found at the scene. The name "Y.I.T" was made on the skin and it was brown. It was a Borana cow bred for meat. He says that he then reported the matter to the police. They arrested the First Accused. They say he was arrested with the meat. It was in fact the evidence of the Arresting Officer PW-5 69599 Sgt. Flavian Mwangecho that reports that the First and Second accused were arrested with the piece of meat weighing 5 Kgs in their possession. They live 100 metres from the scene. It is unclear what that means unless it is the place the carcass was found. In his evidence PW-5 stated that he had a report that "the people who stole and slaughtered the cow were found at Kengeleni". He does not say how he already knew those were the people who had stolen the cow. PW-6, the Scenes of Crime officer Peter Kyalo IP 23523 confirmed that there was theft of cattle. The scene of the crime was where pregnant cow had been slaughtered. He took photos which are produced as Exhibits. The photo shows the remains of a brown cow and a brown calf standing next to it. The following day meat was recovered from the Accused. We then come to the evidence of PW-6 Senior Sergeant Mohammed Ali No. 62182. He says he was investigating an incident of stock theft. He says the incident occurred on 15th November 2016. It was the evidence of the eye witnesses that the cattle went missing on 14th November and there were two incidents one where one animal went missing and another where 8 animals were taken. His evidence is recorded thus "*the accused were involved in the theft. I gathered the evidence of the witnesses, the accuseds were involved with theft. The accused 1 and another not in court was seen with the meat of the cow that had been stolen*". He then says he can identify the accused in the dock. He also confirms that the value of the cow was KShs.50,000/=. The Second Accused gave evidence and she said that the First accused gave her the meat to cook. It seems that was the meat the police seized. The First Accused was said to be at the home of his mother. That alibi was not asserted nor investigated at the trial.

13. In his Judgment the learned trial magistrate gave the cow two values KShs.85,000/= and 60,000/= neither of those figures appears in the proceedings and the source is therefore unclear. The Judgment relates that a cow was stolen and killed. The First Accused was caught carrying the meat at night and meat was recovered at his home. "It was suspected" that the meat came from the stolen cow. The First Accused denied the allegations and stated that he did not see PW-2 at night and that he was given the meat by his brother. That brother was not Charged. The Second Accused gave evidence and in her evidence she admitted she had been cooking the meat that was seized by the Police. The Learned Trial Magistrate found the First Accused guilty of stock theft and found the Second Accused not guilty on both counts. The reasoning provided is "*The Accused 1 and A2, are alleged to have been found with a skin of the slaughtered cow. It was brown in color. It was in the accused 1's house. it is my humble (sic) that if it is not the A1, who had slaughtered the cow then he would not have been found with the skin of the cow of the complainant which had been stolen and slaughtered. The A1 did not give any reason as to why he was found with a skin and meat of the stolen cow. The skin was branded and belonged to the complainant. On that evidence the Learned Trial Magistrate found that "The evidence before the court, all taken in totality including the evidence of the investigator reveals that it is the A1 who was the man who stole the complainants cow, slaughtered it with others not before the court, and disposed off the meat. I have absolutely no doubt the evidence against the A1, in respect of the main count is overwhelming.*".

14. The First Count was stock theft under Section 278 of the Penal Code which is defined as

278. Stealing stock

If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.

That section must be read with Section 268.

268.

Definition of stealing

(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the

taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.

15. Looking at the particulars of charge, the First Accused was accused of having been found "to have stolen" the cow. That statement already presupposes the guilt of the accused. Those particulars list the matters of evidence that must have been found in order to make a finding of guilt.

16. In this case the Learned Trial Magistrate found that he had heard overwhelming evidence of the theft of the cow. The evidence that appears on the record is circumstantial evidence of the theft. There is no evidence that places the accused at the scene of the crime. There is absolutely no evidence that places the accused on either of the properties where animals were stolen. There is no evidence that anyone saw the Accused on the Ranch or near any of the stolen animals. In the circumstances, the evidence that is on the record does not establish overwhelmingly, or at all the fact of the theft. If it was the case that there were witness statements that were used and/or presented in Court those do not form part of the record. The Appellant now complains that he was not given the witness statements. The Prosecution asserts (1) that the Court ordered it and (2) the Accused did not complain loudly enough. Those are dismaying Submissions when the prosecutor's office is equally responsible for the fair and proper administration of justice, like any officer of the Court. To say court orders need only be obeyed when there is someone to complain does not augur well. The Appellant goes on to say that he did not have a fair trial as a consequence. To that extent the Court does have some sympathy for the Prosecutor's argument. It cannot be right for Accused persons to participate in proceedings knowing there is a shortcoming and then attempt to upset all findings by alleging a fact they were fully aware of at the start. That could be an abuse of the process. Equally there are victims to the crimes that were committed.

17. This Court is then left with the task of balancing the scales of justice after the event. The Witness Statements do not appear to have been provided to the Accused. They similarly do not appear on the record and do not therefore form part of the evidence re-considered by this Court. In the event that Witness Statements are intended to be relied upon they must be shared and properly presented in Court so that any accused can have a fair trial within the meaning of **Section 50 of the Constitution of Kenya 2010**.

18. Therefore on the evidence now before the Court it is clear that there is no evidence that linked the Accused with the theft of the cow. Perhaps due to the gory characteristics of the offence, the Learned Trial Magistrate does not address that in his judgment. On a fresh analysis of the evidence on the record, this Court does not find there is any evidence of the actual theft by the Accused. However, there is ample direct evidence to show that the Accused was seen on several occasions by several people with the meat of a freshly killed animal in his possession. Taken with the fact that there was a freshly killed animal in the vicinity and that the accused is said to also have in his possession the skin of that animal, there is absolutely no doubt that the Appellant was handling stolen property within the meaning of the Second Charge namely handling stolen good contrary to **section 322(1)** as read with **sub-section 2** of the *Penal Code*. The Court also takes into account that the Appellant is a first time offender.

19. This Court therefore orders as follows:

- (1) Conviction for Stock theft is quashed
- (2) It is replaced with a conviction on the second count of handling stolen goods and
- (3) The Appellant to serve a term of imprisonment of 4 years for that conviction.

To that limited extent the Appeal succeeds.

It is so ordered,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 24th day of July 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant: In Person

Respondent: Ms Anyumba