



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 40 OF 2016

ARNOLD IRIGHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 361 of 2015

in the Senior Principal Magistrate's Court at Wundanyi delivered

by Hon K. I. Orenge (SRM) on 4th April 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Arnold Irigha and Mfoli Peter (hereinafter referred to as the Appellant's Co-Accused") were jointly tried by Hon K.I. Orenge Senior Resident Magistrate for the offence of stealing stock contrary to Section 278 of the Penal Code Cap 63 (Laws of Kenya) on 4th April 2016. They had also been charged with the alternative charge of handling stolen goods contrary to Section 322 (1)(2) of the Penal Code. The said Learned Magistrate convicted the Appellant but acquitted the Appellant's Co-Accused on the ground that the Prosecution had failed to prove its case against him beyond reasonable doubt.

2. The Appellant was sentenced to serve four (4) years imprisonment on the main count by Hon N. N. Njagi, Senior Principal Magistrate on 16th June 2016. He took over the case from Hon K.I Orenge under the provisions of Section 200 (3) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

3. The particulars of the main charge were as follows :-

“On 20th day of July 2015 in Ngulu Village Werugha Location within Taita Taveta County stole one sheep valued at Kshs 7,000/= the property of one CHRISPUS MWAKAMBA.”

ALTERNATIVE CHARGE

“On the 20th day of July 2015 at Ngulu Village Werugha Location within Taita Taveta County otherwise than in the course of stealing dishonestly received or retained one sheep valued at Ksh 7,000/= having reason to believe it to be stolen good (sic).”

4. Being dissatisfied with the said judgment, on 11th August 2016, the Appellant filed a Notice of Motion application seeking leave to be allowed to file an Appeal out of time. The said application was allowed and the Petition of Appeal deemed to have been duly filed and served. The Grounds of Appeal were as follows:-

1. **THAT the Learned Trial Magistrate erred in law and facts by not considering his defense.**
2. **THAT the Learned Trial Magistrate erred in law and facts by relying on the collaborated (sic) evidence in court by the wife of the accused.**
3. **THAT the prosecution side failed to produce in court any satisfactory evidence to prove that he was the one who sold the sheep to the 2nd accused.**
4. **THAT the Learned Trial Magistrate erred in law and facts by favouring the prosecution side and setting the 2nd accused free.**

5. His Written Submissions were filed on 1st December 2016. Although he was given an opportunity to respond to the State's Written Submissions that were dated and filed on 7th February 2017, he said he did not wish to do so but would rely on the submissions he had already filed.

6. When the matter came up on 7th February 2017, both the Appellant and counsel for the State asked this court to deliver its Judgment based on their respective Written Submissions. The Judgement herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. 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”.

8. All the Grounds of Appeal were dealt with together as they were all related. This court found that the only issue that was before it for determination was whether or not the Prosecution had proved its case beyond reasonable doubt.

9. In his Written Submissions, the Appellant questioned why one Simon was not arrested and charged with the offence herein and yet Bryson Mwamidi (hereinafter referred to as 'PW 3') had said that his Co-Accused purchased the sheep from him. He added that he was a Boda Boda operator and he had only gone to assist his Co-Accused as his Motor Cycle had a puncture(sic). It was his further submission that the Complainant, Chrispus Mwakamba (hereinafter referred to as "PW 1") did not mention that he was the one who had sold the sheep to the 2nd Accused.

10. On its part, the State submitted that the ingredients of the offence of stock theft had been sufficiently proven in that it was clear that PW 1 owned the sheep that was found in the Appellant's Co-Accused's home. It argued that the Appellant adduced unsworn evidence which was not subjected to verification by the Prosecution and that the evidence that was adduced linked him to the stock theft.

11. It pointed out although the maximum sentence prescribed under Section 278 of the Penal Code was fourteen (14) years and the sentence of four (4) years imprisonment that was meted upon the Appellant herein was well within the discretion of the Learned Trial Magistrate, the same was excessive considering that the Appellant was a first offender and the one (1) cow was recovered. It therefore submitted that it

was amenable to the sentence being reduced to two (2) years as an offence the Appellant did actually commit an offence.

12. The court perused the proceedings with a view to establishing where the truth of this matter lay. According to PW 1, on 29th, the month and year were not indicated, he had sent Samwel Mwachofi (hereinafter referred to as "PW 2") his nephew, to tie his black and white goat valued at Kshs 7,000/= in the grazing fields. However, when PW 2 went to untie the sheep later, he found it missing.

13. Upon PW 1 conducting investigations, he was informed that the Appellant herein had been seen ferrying the sheep on a Motor Cycle and was eventually found in his Co-Accused's home. PW 2 and PW 3 corroborated his evidence and said that they were also told that the Appellant herein had been seen ferrying the sheep.

14. PW 2 also said that he was told that the sheep was found at the Appellant's Co-Accused's home. On its part, PW 3 confirmed that he went to the Appellant's Co-Accused's home and found the sheep at his home, a fact that was also reiterated by No 46348 Sergeant Joseph Ringera (hereinafter referred to as "PW 4").

15. In his unsworn evidence, the Appellant herein stated that he was called by his Co-Accused to assist him to ferry a sheep which he delivered to his Co Accused's home. He contended that he left his Motor Cycle at his Co-Accused's home as it had a puncture and was surprised when he went to his Co-Accused's home the following day to collect the same and was informed that it had been taken away. He was emphatic that he only transported the sheep to his Co-Accused's house and had nothing to do with its theft.

16. His Co-Accused also adduced unsworn evidence. He stated that the Appellant herein came with Simon and sold him the sheep for Kenya Shillings three thousand (Kshs 3,000/=) only. Irine Sambu (hereinafter referred to as "DW 2") corroborated the Appellant's Co-Accused version of what transpired. On his part, the Appellant's Co-Accused corroborated the Appellant's evidence that the Appellant left his Motor Cycle at his home because it had a puncture.

17. A perusal of the Judgment by the aforesaid Learned Trial Magistrate showed that he believed the Appellant's Co-Accused because the sheep and the Appellant's Motor Cycle were found at the Appellant's Co-Accused's home. However, there was a logical explanation why the Appellant's Motor Cycle was found at his Co-Accused's home.

18. As can be seen hereinabove, the Appellant's Co-Accused corroborated the Appellant's evidence that he left his Motor Cycle at his home because it had a puncture. Although Simon was not called as a witness, his evidence would not have added any value herein since the Appellant admitted having ferried the sheep to his Co-Accused's home.

19. It was therefore not in dispute that the Appellant took the sheep to his Co-Accused's house and he left his Motor Cycle at his home. What was not clear, however, was under what circumstances did the Appellant take the sheep to his Co-Accused's house. Indeed, it was the Appellant's word against that of his Co-Accused.

20. Both the Appellant and his Co-Accused adduced unsworn evidence. It was not clear why the Learned Trial Magistrate opted to believe the Appellant's Co-Accused and not the Appellant herein. He may have chosen to believe the Appellant's Co-Accused because DW I stated as much in her sworn evidence.

21. PW 1, PW 2, PW 3 and PW 4 all testified how they were told that the Appellant ferried the sheep to his Co-Accused place, which he admitted anyway. However, it was not lost to this court that DW 1 was the Appellant's Co-Accused's wife and would not have adduced any adverse evidence against her husband.

22. From the evidence that was adduced herein, it was not possible to tell who between the Appellant or

his Co-Accused was telling the truth. Both their versions sounded plausible. The Appellant could have transported the sheep to his Co-Accused's home to sell it and his Co-Accused could also have hired him to transport the sheep to his home.

23. If Simon was in the company of the Appellant herein, it was not clear why he was not also charged with the offence herein despite having been arrested. It was also not lost to this court that PW 1's, PW 2's and PW 3's evidence was hearsay and no witness testified that Simon and the Appellant were arrested with the sheep. The sheep was actually found in the Appellant's Co-Accused's home.

24. If the Prosecution had opted not to charge the said Simon with the offence, then it ought to have turned him into a prosecution witness. This court is aware of the provision of Section 143 of the Evidence Act Cap 80 (Laws of Kenya) that stipulates **“that no particular number of witnesses shall in the absence of any provision to the contrary be required to prove any fact.”**

25. In this regard this court placed reliance on the case of **Criminal Appeal No 31 of 2005 Julius Kalewa Mutunga v Republic**(unreported) where the Court of Appeal held that:

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive”.

26. However, the said Simon was a crucial witness who ought to have adduced evidence to link the Appellant to the theft of the sheep from the grazing fields. Failure by the Prosecution not to call him as a witness weakened its case greatly and in fact dealt it a fatal blow.

27. Accordingly, having considered the evidence that was adduced in the Trial Court and the submissions by both the Appellant and counsel for the State, in the absence of direct or circumstantial evidence that the Appellant untied PW 1's sheep from the grazing field which could have proved theft on his part, this court came to the firm conclusion that the Prosecution did not prove its case against the Appellant herein to the required standard, which was proof beyond reasonable doubt.

28. As Grounds of Appeal Nos (1), (2),(3) and (4) of the Petition of Appeal were successful, this court did not find it necessary to address its mind to the sentence it would have meted to the Appellant herein as it had found that the Prosecution had not proved its case beyond reasonable doubt. Suffice it to state that it wholly concurred with the State's submissions that the sentence that was meted upon the Appellant by Hon N.N. Njagi Senior Principal Magistrate was excessive because the value of the sheep was Kshs 7,000/= and it was recovered.

DISPOSITION

29. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 17th November 2016 was merited and the same is hereby allowed.

30. The doubt created in mind of this court led it to quash the conviction and set aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

31. It is so ordered.

DATED and DELIVERED at VOI this 23rd day March of 2017

J. KAMAU

JUDGE

In the presence of:-

Arnold Irigha..... Appellant

Miss Anyumba.....for State

Josephat Mavu..... Court Clerk