



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 66 OF 2015
ABDI MOHAMED DUBLE ... APPELLANT
VERSUS
REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 111 of 2015 in the Senior Principal (sic)Magistrate’s Court at Wundanyi delivered by Hon Orenge K. I. (SRM) on 8th September 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Abdi Mohamed Duble, was tried and convicted by Hon Orenge K. I., Senior Resident Magistrate for the offence of stealing stock contrary to Section 278 of the Penal Code Cap 63 (Laws of Kenya). He was sentenced to serve seven (7) years imprisonment.

2 . The particulars of the charge were as follows :-

“On the 22nd day of March 2015 at Mwananchi Ranch of Mwachabo Location within Taita Taveta County stole 10 cattle all valued at Kshs 350,000/=, the property of ABDI MUHUMED ISACK.”

3. Being dissatisfied with the said judgment, on 25th November 2015, the Appellant filed a Notice of Motion application seeking leave to file an Appeal out of time. The said application was allowed and the Petition of Appeal was 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 in failing to consider that the prosecution failed to prove their case beyond reasonable doubt c/sec 109 and 110 of the evidence act (sic).

2. THAT the learned trial magistrate erred in law and facts in failing to consider that there were no cogent reasons to link him to the matter in question.

3. THAT without prejudice to the foregoing, the pundit trial magistrate grossly erred in matters of law and facts to rely on shoddy and unreliable prosecution evidence which was inconsistent and contradictory c/sec. 163 (1) (c) of the evidence act (sic).

4. THAT the learned trial magistrate erred in law and facts in failing to adequately consider his defence which was firm and unshakeable to cast doubt on the prosecution case.

4. On 26th October 2016, this court directed him to file his Written Submissions. His Written Submissions and his Reply to the State's Written Submissions that were dated and filed on 20th December 2016 were filed on 23rd November 2016 and 1st February 2017 respectively. He re-stated the aforesaid Grounds of Appeal in two (2) sets of Written Submissions.

5. When the matter came up on 16th February 2017, both the Appellant and the counsel for the State requested this court to deliver its judgment based on their respective Written Submissions which they were relying upon in their entirety. The Judgment herein is therefore based on the parties' respective Written Submissions.

LEGAL ANALYSIS

6. 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”.

7. It appeared to this court that the only issue that was really before it for determination was whether or not the Prosecution had proven its case beyond reasonable doubt. The court therefore dealt with the Grounds of Appeal together as they were all related.

8. The Appellant submitted in the case of **Muiruri Njoroge vs Republic Cr App No 115 of 1982**, it was held as follows:-

“It is a well established rule of practice that a court of law does not act on mere assertions not unless such assertions is(sic) proved by evidence beyond reasonable doubt.”

9. He also referred this court to the definition of **“assertions”** in the Chambers 21st Century Dictionary Revised Edition which was:-

“as a positive or strong statement or claim or the act of making such a claim or statement, an assertion would need to be proved by evidence.”

10. He argued that PW 1 and PW 2 were not credible witnesses and the Learned Trial Magistrate erred in law and facts in failing to analyse the evidence that was adduced contrary to what was held in the case of **Okeno vs Republic (Supra)** (sic).

11. He submitted that there were contradictions in the evidence of the Complainant, Abdi Muhumed Isack (hereinafter referred to as “PW 1”) and Khalif Hussein (hereinafter referred to as “PW 2”). He pointed out that PW 1 referred to 23rd March 2015 while PW 2 spoke of 22nd March 2015 as the date of the alleged incident.

12. He questioned where PW 2 got his information from because PW 1 was clear in his testimony that he (the Appellant) was the “only one on that day” and hence contended that PW 2 was not honest in his evidence. It was his evidence that PW 2 was his miraa customer and he (PW 2) had a grudge with him due to a woman.

13. In his unsworn evidence, he denied that he did not know PW 1. He stated that it was unreasonable for

PW 1 to have hired him to take care of something as valuable as cows without having a written employment agreement. It was his further contention that PW 1 did not mention that the cows had any particular marks and thus questioned how he was able to identify the said cows from Joshua Nthei Kiune's (hereinafter referred to as PW 4) place. He also argued that PW 4 did not adduce in evidence any agreement to demonstrate that he had sold him the cows. He therefore urged this court to allow his Appeal.

14. On its part, the State submitted that the evidence that was adduced by all Prosecution witnesses was consistent and cogent and was sufficient to sustain a conviction against the Appellant herein. It said that there was no reason why PW 1, PW 2, PW3 or PW 4 would have fabricated the charges against him. It added that the Appellant also failed to illustrate any ill motive on their part to implicate him in the charges of the stealing of the stock theft.

15. It argued that the fact that there was no receipt to prove ownership of the cows by PW 1 did not negate the fact he was the owner of the said cows, a fact it said was confirmed by PW 2. It also stated that an oral agreement of the Appellant's employment was a valid agreement and in any event, PW 2 did confirm in his evidence that the Appellant was PW 1's employee at the material time.

16. It also stated that Peter Kileka Mdinyu (hereinafter referred to as "PW 3") testified how the Appellant went to his home at night of 22nd March 2015 with five (5) cows and that the cows were recovered on 26th March 2015 from PW 4's place. It added that PW 4 told the Trial Court that he purchased the cows from the Appellant, a transaction that did not need to be witnessed by a sale agreement.

17. It pointed out that the Appellant failed to provide a credible defence as his unsworn evidence was not subjected to cross-examination to test its veracity and that the disappearance and recovery of the cows thus linked him to their theft. It therefore urged this court to find that the doctrine of recent possession was applicable in the circumstances of the case.

18. It placed reliance on the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs RNYR CA Criminal Appeal No 272 of 2005** where the Court of Appeal stated as follows:-

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof first, that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was recently stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

19. This court carefully considered the evidence that was adduced in the Trial Court and noted that there was a material contradiction in PW 1's, PW 2's, PW 3's and PW 4's evidence regarding the date of the alleged disappearance of the cows. PW 1 spoke of the Appellant having failed to return to the Ranch on 23rd March 2015 whereas PW 2 said that this was on 22nd March 2015.

20. This court was not inclined to conclude that this in itself was a material inconsistency because it is not uncommon for witnesses to confuse dates when testifying. Such an inconsistency has to be looked at against the background of other inconsistencies that may crop up in such a witness' evidence.

21. Notably, there were certain contradictions, gaps and inconsistencies that this court found difficult to ignore. According to PW 3, the Appellant came to his home on 22nd March 2015 at 11.00 pm with the intention of keeping five (5) cows and also to sleep until the following morning when he would continue with his journey.

22. Whilst it was not impossible, it was, however, difficult for this court to fathom how PW 3 could have trusted the Appellant who was a total stranger to sleep in his house and also leave him in his house the

following morning to go to work. It was his testimony that he allowed the Appellant to sleep in his house at night and then left him in his house on the morning of 23rd March 2015 to go to work.

23. The court asked itself the same question regarding the trust between the Appellant and PW 4 who were not previously known to each other. In his testimony, PW 4 said that he met the Appellant at about 8.00am when he informed him that he had cows to sell. He said that they then went to PW 3's house where he saw the cows and "the old man" told him that the cows belonged to the Appellant.

24. His evidence was that as he did not have money to purchase the cows, the Appellant asked him to send the money to him by Mpesa. It was difficult to comprehend how money transfer regarding sale of five (5) cows could be taken so casually by two (2) total strangers.

25. Going further, there was missing evidence to demonstrate how the police connected PW 3 to the lost cows leading to his arrest as he had said that he left the Appellant in his house in the morning and went to work. It was not clear who from PW 4's evidence who "the old man" was as PW 3 had testified that he went to work in the morning. If "the old man" was PW 3, PW 3 was silent on when he went home and confirmed to PW 4 that the Appellant was the owner of the cows.

26. There was also a gap as to how PW 1 established that the Appellant was at Fly-Over so that he could go to seek the assistance of No 90085414 Inspector of Police (hereinafter referred to as "PW 5") to arrest him. According to PW 1, the Appellant had only been his employee for seven (7) days. It was incumbent upon him to demonstrate that he was able to identify him and to trace his whereabouts in the Kamtonga area.

27. Further, PW 1 did not also disclose who told him that some cows were seen at PW 3's home at Kamtonga on 29th (sic) or how he established that the cows were sold to PW 4 as had been stated by PW 5. Indeed, if PW 1 was informed that the cows were seen at PW 3's place on 29th March 2015, then there was a divergence in his evidence and that of PW 3 and PW 4 as PW 3 said that the Appellant left his home on 22nd March 2015 while PW 4 said he purportedly purchased the cows on 23rd March 2015. If the cows were still at PW 3's home as at 29th March 2015, there was no evidence that was adduced to fill the gap between 22nd – 29th March 2015 on the whereabouts of the Appellant and the cows he was alleged to have stolen from PW 1.

28. Turning to the identification of the cows, this court noted that PW 1 never identified the cows in the photographs that were tendered in evidence by Number 91461 PC Clement Kiharau (hereinafter referred to as "PW 6"). PW 6 merely stated that PW 1 identified two (2) cows that were found at Kamtonga. On his part, PW 1 never mentioned in his evidence that he identified any cows as Kamutonga. His only evidence was that he traced the Appellant's whereabouts to Fly-Over. It was therefore not clear from his evidence whether the cows in the photographs belonged to him or not.

29. It was also not clear to this court if PW 6 was certified and/or gazetted to produce the photographic evidence in court. This court took judicial notice that any photographic evidence adduced by the Scene of Crime Officer ought to be accompanied by proof of gazettement to adduce such photographic evidence. The Prosecution laid no basis to demonstrate why PW 6 adduced the said photographs as opposed to them being produced by the developer of the said photographs.

30. Accordingly, having considered the Appellant's Petition of Appeal, the Written Submissions and the case law that each party relied upon, this court found itself in agreement with the holdings in the cases of **Muiruri Njoroje vs Republic**(Supra) and **Okeno vs Republic (1972) E. A 32** that the Prosecution witnesses made certain assertions that they were not able to prove as had been submitted by the Appellant herein.

31. As the Appellant was never found in possession of the cows, the doctrine of recent possession was not applicable herein. The case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs RNYR** (Supra) that was relied upon by the State was thus distinguishable from the facts of this case and was not relevant

in the circumstances of the case.

32. Further, although the Appellant adduced unsworn evidence that had little or no probative value as the same was not tested through cross-examination, he was under no obligation to assist the Prosecution's case. Indeed, he had a constitutional right to remain silent and leave the Prosecution prove its case.

33. It was this court's view that there were too many gaps, lacunae, inconsistencies and/or contradictions that were of the nature that could not be ignored as they raised doubt in the mind of this court as to what really transpired and would cause great injustice to the Appellant herein if ignored.

34. In this regard, this court came to the firm conclusion that the evidence that was presented before the Trial Court was not sufficient to demonstrate that the Prosecution had proved its case against the Appellant beyond reasonable doubt as the Learned Trial Magistrate had concluded.

DISPOSITION

35. For the foregoing reasons, in view of the fact that the evidence that was adduced before the trial created doubt in mind of this court, that benefit of doubt leads 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.

36. The upshot of this court's Judgment was that the Appellant's Appeal that was lodged on 25th November 2015 was merited and the same is hereby allowed. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

37. It is so ordered.

DATED and **DELIVERED** at **VOI** this **11th** day of **April** 2017

J. KAMAU

JUDGE

In the presence of:-

Abdi Mohamed Duble - Appellant

Miss Anyumba - for State

Josephat Mavu- Court Clerk