



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NANYUKI
CRIMINAL APPEAL NO. 40 OF 2017

SAMSON LTANING'OI LESINGIRAN.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Maralal

Principal Magistrate's Court Criminal Case No. 1053 of 2015

by Hon. C N Ndegwa Principal Magistrate on 21st June 2016)

JUDGMENT

1. **SAMSON LTANING'OI** alias **Willy (Samson)** was convicted on three counts before Principal Magistrate's court Maralal. On the **1st count** he was charged with offence of **stealing stock contrary to Section 278 of the Penal Code**. The particulars of that count show that Samson was charged with theft of 5 camels belong to Sandero Lesunda. On the **2nd count** Samson was charged with the **offence of stealing stock Contrary to Section 278 of the Penal Code**. The particulars of that 2nd count show that Samson was charged with theft of one camel belonging to Salim Lesachore.

Samson was charged on the **3rd Count** with the **offence of giving false information Contrary to Section 129 (a) of the Penal Code**. The particulars of the offence under 3rd count indicate that Samson was alleged to have given false information to police constable (P.C.) John Muli at Archer's Post police station, to the effect that Camels intercepted at Ngare Mara Road block belonged to his family.

2. On being convicted on all three counts Samson was sentenced to 10 years imprison on 1st count, 10 years on 2nd count and 3 years on 3rd count. All those sentences were ordered by the trial court to run concurrently.

3. Samson being aggrieved by his convictions and sentence filed this appeal against both. As the first appellants court this court is required to re-evaluate, re-assess and re-analyze the trial court's evidence and then determine whether the conclusion reached by the trial court should stand or not: see the case: **ABOK JAMES ODERA t/a A. J. ODERA & ASSOCIATES – V- JOHN PATRICK MACHIRA t/a MACHIRA & CO. ADVOCATES [2013] eKLR**

4. In my consideration of the evidence adduced by the prosecution, during trial, I find that I am faced with a very daunting task. I say so because the evidence adduced is very convoluted.

5. The over view of the prosecution's evidence was that Sandero Lesouda (complainant in 1st count) lost five camels on 15th September, 2015 as they were being looked after by someone called Sanala. Although Salim Lesachore stated in evidence that he lost one camel he did not state the date on which he lost that one camel nor did he state under what circumstances he lost that one camel. Prosecution's scanty evidence adduced by Samuel Keboi, P W 2 was to the effect that on 18th September, 2015 Samson was seen arguing with two elders and a chief over the ownership of five camels. The issued was taken to Lomenyira police post where upon Sergeant Ambala ordered the camels be taken to the home of P W 2 overnight. Later that night Samson took to P W 2 a chief's letter which letter authorised Samson to take with him the five camels. P W 2 requested Samson to take the five camels on the following day at day time which he did.

6. Sandero Lesuuda (complainant's in 1st count) stated in evidence that when he discovered his five camels were missing he mounted a search for them. He said that at first he thought that the camels were missing and not stolen. He followed their hoof prints which led him towards Archer's Post. He later received a phone call and was informed that his five camels had been seen at Archer's Post. He was later informed by police officer at Archer's Post Police Station that the camels were released to Samson. In his evidence he said that his camels were never recovered.

7. Salim Lesachore (the complainant in respect to 2nd count) other than saying he received a telephone call from someone, who did not testify, who informed him his one camel together with Sandero's five camels was driven to Archer's Post, gave no other details of his loss of that one camel.

8. Of all the prosecution's evidence that was most confusing was adduced by Chauline Letupukwa (P W 4) who said he was related to Samson. He said that on 19th September, 2015 he met Samson who was in the company of another man. Samson requested his assistance to get his camels released from the chief's camp where they had been detailed. P W 4 agreed to assist but did not give details of how he assisted other than saying that he (P W 4) together with another elder escorted the camels towards Checheles area. That as they escorted the camels P W 4 lent his motor bike to Samson.

P W 4 and the elder lost the five camels but later found them at P W 4's grandfather's homestead. P W 4 said that on the following day he saw the camels under the care of Samson with other people. Later, on being cross examined P W 4 said that Samson showed him a chief's letter authorizing the release of the camels to him.

9. P W 5 was P C Stanley Kipchumba. On 18th September 2015 he was on duty at Longangine road block where up Samson alighted from a vehicle and informed P W 5 that he was the owner of the five camels. To prove ownership Samson showed P W 5 Occurrence Book (OB) number 12/18/9/2014. It was then P W 5 informed Samson that the camels had been left at the homestead of P W 2. P W 5 said that he learnt that Samson had, on the following day, taken the camels.

10. P W 6 P C John Muli was on duty at report office at Archer's Post police Station. On 18th September 2015 Samson reported to him that five camels which belonged to his (Samson's) father had been detained at police road block. P W 6 issued Samson with an O B number 12 of 18th September 2014.

11. Samson in his unsworn statement in his defence stated that on 15th September, 2014 (note not 2015) he was in Isiolo. He was arrested on 24th September, 2015 on confirming that he knew his cousin Chauline Letupukwa. On being arrested Sandero informed police officers that he did not know Samson.

ANALYSIS AND DETERMINATION

12. From the very outset it is important to state that there was no iota of evidence which proved that the one camel belonging to Salim Lesachore was amongst camels intercepted at the police road block. Indeed as stated before Salim himself was very scanty in his evidence about the alleged loss of his one camel. He did not state when, if at all, he lost his camel or where he lost it. It is because of that observation that the

appeal against conviction on 2nd count must succeed.

13. In respect of the 1st count where Samson is alleged to have stolen five camels it is pertinent to state that the complainant, Sandero failed to give any identifiable marking on those camels. In this regard I agree with the written submissions of Samson.

14. Moreover the prosecution's evidence connecting Samson to the theft on possession of the five camels is contradictory and cannot be relied upon. In that regard I do part ways with the trial court's assessment of the prosecution's evidence. The trial court applied the doctrine of recent possession and found that since Samson had not given any reasonable explanation of his possession the camels it could be presumed that he was the person who stole the five camels.

15. The court of appeal in the case **David Mugo Kimunge v Republic [2015] eKLR** referred to the doctrine of recent possessions as was discussed in the case **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga V. Republic Cr App. No. 272 of 2005 (UR) viz:-**

“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:

- i. that the property was found with the suspect;***
- ii. that the property is positively the property of the complainant;***
- iii. that the property was stolen from the complainant,***
- iv. 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”.

16. As can be seen from the above quoted case Isaac Ng'ang'a Kahiga (supra) for the doctrine to apply there are four prerequisites to be met with positive proof. I will begin by considering the second stated prerequisite, that is the property (in this case the five camels) positively are the property of the complainant. It is important to remind one self that other than that Sandero stating that he lost five camels no other details were given. For example were they male or female camels. Were they adults or young camels, and so on? Sandero stated the camels were lost as they were being looked after by someone by the name of Sanala. That person Sanala was not called to testify and inform the court how the camels were lost. Could it be that it was Sanala who 'spirited away' the five camels. There is grave doubt that the camels that were seen on 18th and 19th September 2015 were the ones that belonged to Sandero.

17. Was there any evidence to show that the camels were stolen. Other than Sandero stating in evidence that his camels went missing while being looked after by Sanala there is no other evidence that they were stolen. Further Sandero's evidence that his camels went missing was not corroborated at all.

18. The greatest failure to show that the prosecution's evidence supported the existence of the doctrine of recent possession is in respect to the first pre requisite, that is whether the camels were found with Samson. The first that the trial court heard connecting Samson with the five camels was when Samuel Keboi (P W 2) testified. He said that on 18th September, 2015 at 2.00p.m. he saw people with five camels. When he went closer he heard Samson and some elders quarrelling over the five camels. Present also was a chief. The issue was referred to the police post. The police officer Sergeant Ambala ordered the five camels to be kept at P W 2's compound for the night. Later Samson presented to P W 2 a chief's letter authorising the release of the five camels to him. He released the camels to Samson on the 19th September 2015.

19. Chauline Letupukwa (P W 4) a relative of Samson painted quite a different picture. That it was he (P W 4) and other elders who drove the five camels away not clear from where, on 19th September 2015. Samson was to get possession of those five camels on 20th September 2015.

20. On the whole the prosecution's evidence is so jumbled up that it was not safe to have convicted Samson on 1st and 2nd count. Since that evidence failed in respect to those two counts it follows that the 3rd count must and does fail. The prosecution did not prove that the specific five camels belonged to Sandero and whether indeed they were stolen. And it follows that the prosecution failed to prove that Samson gave false information, as stated in the third count, that the five camels belonged to his father.

21. The prosecution failed to prove its case on the required standard of proof, beyond reasonable doubt. Accordingly the appeal against conviction and sentence succeeds. The convictions on count No. 1, 2, and 3 are hereby quashed and the sentences on those counts are hereby set aside.

I order the appellant SAMSON LTANING'OI alias WILLY to be set free unless otherwise lawfully held.

Dated and delivered at Nanyuki this 26th day of July 2017.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Appellant: Samson Ltaning'oi

For the State:

Language

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE