



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 64 OF 2016

HAMISI RASHID.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 204 of 2016 in the Senior Resident Magistrate's Court at Taveta delivered by Hon G. Kimanga (RM) on 19th November 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Hamisi Rashid, was jointly tried with Simon Nyambu and Kioko Kituku (hereinafter referred to as "his Co-accused persons") on two (2) Counts. Count I was in respect of the offence of stealing stock contrary to Section 278 of the Penal Code Cap 63 (Laws of Kenya). Count II was in respect of killing an animal with intent to carry its carcass contrary to Section 289 of the Penal Code.
2. The Appellant had also been charged jointly with the aforesaid Simon Nyambu with the alternative offence of handling property contrary to Section 322(1)(2) of the Penal Code.
3. At the conclusion of the case, the Learned Trial Magistrate, Hon Orenge K. I., Senior Resident Magistrate convicted the Appellant and Kioko Kituku on Count I and sentenced each of them to serve seven (7) years imprisonment. He also convicted the aforesaid Simon Nyambu on the alternative Charge.
4. The particulars of the charges were as follows:-

COUNT I

"On the 16th day of June 2016 at an unknown time at Bahati Village within Taita Taveta County stole two (2) goats valued at Kshs 20,000/=, the property of Danson Warombo.

COUNT II

"On the 16th day of June 2016 at an unknown time at Bahati Village within Taita Taveta County killed a she-goat valued at Kshs 10,000/= with intent to steal its carcass.

ALTERNATIVE CHARGE

“On the 16th day of June 2016 at an unknown time at Bahati Village within Taita Taveta County otherwise than in the course of stealing, dishonestly received or retained one she goat valued at Kshs 10,000/=, the property of Danson Warombo knowing or having reason to believe them (sic) to have been stolen goods (sic).

5. Being dissatisfied with the said judgment, on 28th November 2016, the Appellant filed a Petition of Appeal. He relied on six (6) Grounds of Appeal. On 13th April 2017, he filed three (3) Supplementary Grounds of Appeal and five (5) Amended Grounds of Appeal.

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 issues that had really been placed before it for determination were as follows:-

a. Whether or not the Prosecution had proven its case beyond reasonable doubt; and

b. Whether or not the sentence that was meted upon the Appellant was harsh, severe and manifestly excessive in the circumstances.

8. The Appellant argued in his Written Submissions that his constitutional right to fair trial as enshrined in Article 50(2)(h) of the Constitution of Kenya 2010 was infringed upon as he was not assigned legal representation.

9. On its part, the State argued that the right to legal representation enshrined in Article 50(2)(h) of the Constitution of Kenya was not an absolute right and that the practise was to assign counsel to persons who had been charged with treason or murder.

10. It relied on the case of **David Njoroge Macharia vs Republic Cr Appeal No 497 of 2007** (eKLR reference not cited). In the said case of **David Njoroge Macharia vs Republic [2011] eKLR** the Court of Appeal held that:-

“Under the new Constitution, state funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.

11. This limitation of the right to be assigned legal representation by the State was addressed by the Court of Appeal in the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR** when it stated as follows:-

“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result’ and to include *all situations where an accused person is charged with an offence whose penalty is death*. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.

Again, this Court differently constituted in the case of Moses Gitonga Kimani v Republic, Meru Criminal Appeal No. 69 of 2013, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person’s right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:

“It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State’s expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation.”

Article 261 of the Constitution provides *inter alia*:-

(i) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.

(ii) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year

It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the Constitution to provide guidelines on legal representation at State’s expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution.”

12. Whilst this court agreed with the Appellant that there was discrimination relating to the provision of legal representation, it took cognisance of the aforesaid decision by the Court of Appeal and only hoped that the right to assign legal representation to all(emphasis court) accused persons will be realised progressively but sooner than later. In light of the aforesaid limitations on assignment of legal counsel, this court was not persuaded to find that the Appellant’s rights to fair trial had been infringed as he had contended and his Written Submissions.

13. Turning to the substantive issues, the Appellant argued that the Prosecution witnesses adduced contradictory evidence relating to his alleged arrest and recovery of the animals. He pointed out that although the Complainant herein, Danson Warombo (hereinafter referred to as “PW 1”) had referred one

(1) goat having been stolen, the Charge Sheet had alluded to two (2) goats. Further, he stated that PW 1 had confirmed that he was never arrested with the goat and that he never saw him.

14. He also submitted that the evidence of Alphonse Otieno (hereinafter referred to as “PW 2”) that the goats were stolen on 12th June 2016 at around 11-12pm contradicted PW 1’s evidence and that the facts in the Charge Sheet that the goats were stolen on 16th June 2016. He further averred that PW 2 stated that he was the one who killed the goat yet it was with Kioko Kituku, his Co-accused.

15. He also contended that the Police Officer, No 85237 Ramadhan Musa (hereinafter referred to as “PW 3”) contradicted himself when he testified that he (the Appellant herein) was the one who was arrested with both goats and yet again, that he (the Appellant herein) was the one who was found with the dead goat. He added that the Investigating Officer No 87991 PC Changamwa (hereinafter referred to as “PW 4”) never visited the scene.

16. He was emphatic that the Learned Trial Magistrate erred in both law and fact when he failed to consider his defence and that there were no eyewitnesses to the alleged stealing of the goats.

17. On its part, the State was categorical that the Prosecution adduced a consistent case and that the Learned Trial Magistrate acted correctly when he convicted the Appellant on Count I. It submitted that the PW 2’s evidence that he met the Appellant herein on 17th June 2016 could occur due to human error but that in any event, PW 1 was the owner of the goats and he must have known the date his goats were stolen which tallied with the date in the Charge Sheet.

18. It further averred that the Appellant failed to demonstrate any motive for the Prosecution witnesses to have framed him with the stealing of the goats, he failed to prove his alibi that he was watching football on the date the goats were stolen and that the Appellant was actually found in possession of the dead goat.

19. According to the proceedings herein, on 16th June 2016, PW 1 was at his house when at about 11.00 pm, he heard a commotion in the goat shed outside the house. He went out of the house and checked round the compound but he did not see any one. On checking the shed, he found two (2) goats missing. He raised an alarm and together with neighbours, they followed footsteps towards a place known as Riata. However, they did not recover the goats.

20. The following day, at about 11.00 am, PW 1 was alerted by some herders that the goats had been recovered at a place known as Bura Ndogo B. He went to Taveta Police Station and identified a live she goat and a kid as his.

21. According to PW 2, on 17th June 2016, he was coming from a funeral at about 11pm- 12pm when he saw the Appellant herein carrying a goat while running. The Appellant had held both hands and covered its mouth so that it could not bleat. He said that another person who he did not know, was carrying another goat whose tongue was hanging as if it was dead. Riders in three (3) Motor bikes, who also confirmed they had seen the Appellant herein running, came and they helped beat this other person who said that the goat belonged to Kimwongo. This person was Kioko Kituku. The people who told him that they had met the Appellant herein were Baya and Aziz.

22. When they went to Kimwongo’s place, the said Kimwongo denied that the goat belonged to him. The persons with the Motorbikes followed the Appellant herein and arrested him with the goat he had been carrying while running. In his Cross-examination, PW 2 contended that the Appellant was wearing a white jacket and yellow rubbers and that he was able to identify him as there was clear moonlight. He averred that the people on the Motorbikes arrested the Appellant with the goat at his house at Bura Ndogo.

23. In his Cross-examination, PW 3 stated that the Appellant was his neighbour and that on 17th June 2016, he heard people outside his house shouting “thief”, “thief”. He came out of his house and found PW 2, Kioko Kituku and other people. Kioko Kituku then said that the goat he had been caught with belonged

to PW 3 which PW 3 denied. He rescued the Appellant and Kioko Kituku from being lynched by members of the public and took him to Taveta Police Station.

24. His further evidence was that they went to Kioko Kituku's house and found the Appellant herein and Simon Nyambu, who Kioko Kituku had implicated, with a goat. He added that PW 2 was the one who identified the Appellant as having had the live goat. During his Cross-examination, PW 4 stated that the Appellant herein and Simon Nyambu were found in Kioko Kituku's house with a live goat.

25. No 91279 PC Vincent Baraza (hereinafter referred to as "PW 6") confirmed that Kioko Kituku was brought to Taveta Police Station by PW 2 and other members of public on 17th June 2016 at about 1.52 am.

26. A careful analysis of the evidence herein shows gaps in the manner the Appellant herein was identified by PW 2 as having been the person who was carrying a goat as the alleged incident is said to have occurred at between 11.00 pm and 12 midnight when lighting conditions were not favourable for identification.

27. Although PW 2 stated that there was moonlight, this court was unable to comprehend how he identified the colour of the clothes that the Appellant was wearing at the material time. It was the considered view of this court that the Prosecution did not demonstrate beyond reasonable doubt that PW 2 positively identified the Appellant herein.

28. The motor bike people who PW 2 said had seen the Appellant running with the goat and who beat up Kioko Kituku namely, Baya and Aziz were not called to testify. Although the Prosecution has the discretion to decide how many witnesses to call, Baya and Aziz were crucial witnesses as they would have corroborated PW 2's evidence that they saw the Appellant herein running, carrying a goat. In addition, the Prosecution ought to have called the said Kimwongo, who PW 2 said Kioko Kituku had indicated was the owner of the goats, which Kimwongo denied.

29. Going further, there appeared to have been inconsistencies in the manner the Appellant was arrested. According to PW 1, he was informed by three (3) herders that three (3) people had been arrested with the goats. These three (3) people were not called as witnesses to explain how they knew the goats that were stolen belonged to PW 1. Indeed, it was not clear under what circumstances the herders called him to inform about the goats.

30. It was also apparent from PW 2's evidence that the Appellant herein was arrested at his house at Bura Ndogo B. On the other hand, PW 3 was emphatic that the Appellant was arrested at Kioko Kituku's house. Although PW 3 said that PW 2 was present when the Appellant and Simon Nyambu were arrested at Kioko Kituku's house, in his evidence, PW 2 did not mention the Appellant having been arrested with Simon Nyambu or being arrested at Kioko Kituku's house as had been contended by PW 3. PW 2's assertions that "they" went for the Appellant later and arrested him at his house at Bura Ndogo with the second goat seemed to suggest that the Appellant herein never went anywhere near Kioko Kituku's house as had been contended by PW 3.

31. It was therefore evident that the place the Appellant herein was said to have been arrested contradicted PW 3's evidence who testified that the Appellant herein was arrested at Kioko Kituku's house at Bura Ndogo. In addition, from the testimony that was adduced in court, no Prosecution witnessed the Appellant and his Co-accused persons enter into PW 1's compound to steal the two (2) goats.

32. In view of the contradictions in PW 2's and PW 3's evidence on how the Appellant came to be linked to the goat, this court found that the Prosecution did not satisfy it that the doctrine of recent possession was applicable herein as was envisaged in the case of Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs Republic [2006] eKLR 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.”

33. The Appellant had a constitutional right to remain silent and leave the Prosecution prove its case. 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 that the Appellant was involved in the stealing of PW 1's goats as the Learned Trial Magistrate had concluded.

35. On the issue of the sentence that was meted upon the Appellant was severe, harsh and manifestly excessive. In the event, this court would have upheld the Appellant's conviction, it would have a minimal custodial sentence or a non-custodial sentence in view of the fact that the value of the stolen goats were Kshs 20,000/=.

DISPOSITION

36. 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.

37. The upshot of this court's Judgment was that the Appellant's Appeal that was lodged on 28th November 2016 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.

38. It is so ordered.

DATED and DELIVERED at VOI this 17th day of October 2017

J. KAMAU

JUDGE

In the presence of:-

Hamisi Rashid - Appellant

Miss Anyumba - for State

Josephat Mavu- Court Clerk