REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 64A OF 2016

SIMON NYAMBU.....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, Simon Nyambu, was jointly tried with Kioko Kituku and Hassan Rashid (hereinafter referred to as "his Co-accused persons") for the offence of stealing stock contrary to Section 278 of the Penal Code Cap 63 (Laws of Kenya)with an alternative charge of handling property contrary to Section 322(1)(2) of the Penal Code.

2. At the conclusion of the case, the Learned Trial Magistrate, Hon Orenge K. I., Senior Resident Magistrate convicted him for the alternative charge and sentenced to serve seven (7) years imprisonment.

3. 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.**
>
> **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).

4. Being dissatisfied with the said judgment, on 28th November 2016, theAppellant filed a Petition of Appeal. He relied on eight (8) Grounds of Appeal. On 13th April 2017, he referred this court to three (3) Supplementary Grounds of Appeal and five (4) Amended Grounds of Appeal.

LEGAL ANALYSIS

5. 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".**

6. 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.

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

8. 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.

9. 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.**

10. 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."

11. 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.

12. He added that he was never furnished with evidentiary evidence to wit the witness statements to enable him prepare his defence to the case. It was his submissions that he expressed his discomfort when PW 2 left the court without any reasonable cause. On its part, the State argued that the Appellant did not indicate any discomfort in proceeding with the case and that he never indicated that he was never furnished with witness statements and consequently, his constitutional right could not be said to have been infringed upon.

13. A perusal of the proceedings shows that the charges were read to him in Kiswahili, a language that he understood and he pleaded not guilty. The Trial Magistrate, Hon Omburah entered a plea of "Not guilty" against him and released him on a bond of Kshs 50,000/= plus surety (sic).

14. When the matter first came up for hearing, the Appellant and his Co-accused persons indicated that

they were ready to proceed with the hearing. The issue of PW 2 having left on that date was neither here nor there and did not prejudice the Appellant. In fact, when the matter came up for hearing on subsequent days, the Appellant and his Co-accused persons confirmed that they were ready to proceed with the hearing.

15. As was rightly pointed out by the State, at no time did the Appellant show any discomfort in proceeding with the hearing of the case. However, he was a lay person. Indeed, before he was sentenced, the Prosecution requested the Trial Court to treat him as a first offender. It was therefore not unreasonable to conclude that he would not have known that he was entitled to witness statements.

16. Appreciably, the Appellant was not represented by counsel during the trial and may not have been aware of his right to be furnished with the said documentary evidence. In the absence of such counsel, it was the responsibility of the Trial Court to have ordered that he be furnished with the said documentary evidence and for the Prosecution to have furnished him with the same.

17. One may well argue that the evidence that was adduced by the Prosecution witnesses showed that he committed the offence he had been charged with. However, failure by the Trial Magistrate to have ordered that he be furnished with the said documentary evidence was a gross violation of his fundamental right to a fair trial guaranteed under the repealed Constitution of Kenya and occasioned him great injustice and prejudice.

18. Often times, there are differences in what witnesses record immediately after an incident and during trial. Sometimes, there are material contradictions while at other times, the contradictions are inconsequential. It is not uncommon for defence to argue that an accused person ought to be acquitted due to contradictions in such recorded and oral evidence. Whichever way one looks at it, an accused person retains the right to peruse the Witness Statements and documentary evidence that is to be adduced during trial and refer to it same during cross-examination of Prosecution witnesses in arguing his case.

19. In the absence of the Appellant having had no access to the said documentary evidence before and during trial, there is no doubt that the whole trial was a nullity and a mistrial. As the mistake was occasioned by the Trial Court and the Prosecution, it may be argued that the best option would be for the matter to be referred to a Re-trial.

20. However, a re-trial is not ordered as a matter of course. It is not to be ordered to give an applying party a second bite of the cherry or to fill gaps or lacuna in a case. Rather, it is intended to ensure that a fair trial is accorded to a party without causing prejudice to the party against whom such an order is sought to be made.

21. **As was stated in the case of<u>Ahmed Ali Dharmsi Sumar vs Republic 1964</u> <u>E.A 481</u>** and restated in **<u>Fatehali Manji vs The Republic 1966 E.A. 343</u>**:-

> **“In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”**

22. In addressing the question of prejudice to be suffered by an appellant when a matter is to be referred for a re-trial, in the case of **<u>Joseph Ndungu Kagiri v Republic [2016] eKLR</u>**, Mativo J had the following to say:-

> **“As held above <u>under no circumstances should prejudice be caused to an accused person. I therefore find that the entire trial was conducted in total breach of the jealously safe guarded</u>**

constitutional provisions which guarantee a fair trial, and therefore the entire proceedings in criminal case number Nyeri Criminal Case Number 254 of 2011, *Republic vs. Simon Murage Mutahi & Another* are hereby declared to be a nullity and are hereby quashed. I therefore find that this appeal is successful. Accordingly, I hereby allow the appeal, quash the entire proceedings and set aside the orders made in the said case."

23. In the case of**Erick Ochieng v Republic [2015] eKLR**, Sitati J also quashed a sentence of twenty (20) years that the appellant therein had been handed down in a case of defilement where he had not been supplied with witness statements.

24. Notably as was stated in the case of **Ahmed Ali Dharmsi Sumar vs Republic (Supra)** and restated in **Fatehali Manji vs The Republic (Supra)**, in deciding whether a case is suitable for re-trial, each case depends on the particular circumstances. This court therefore analysed the evidence that was adduced in the Trial Court with a view to establishing whether or not this was a suitable case for a Re-trial.

25. The Appellant argued that there were no eye witnesses who saw him steal the goats belonging to the Complainant herein, Danson Warombo (hereinafter referred to as "PW 1"). It was also his submission 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 Hamisi Rashid was the one who killed the goat yet it was found with him.

26. 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. It was also its submission that Ramadhan Musa and Said Musa, who arrested him were crucial witnesses but they were not called during trial.

27. 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 the alternative charge. It submitted that the PW 2's evidence that he met his Co-Accused persons 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.

28. It further averred that the Appellant failed to prove his alibi by calling witnesses to prove that they had gone to watch video at the video place. It also added that it was not necessary to call other witnesses as Police Officer, No 85237 Ramadhan Musa (hereinafter referred to as "PW 3") testified that he arrested him from Kioko Kituku's house.

29. 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.

30. 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.

31. According to PW 2, on 17th June 2016, he was coming from a funeral at about 11pm- 12pm when he saw Hamisi Rashid carrying a goat while running. He had held its legs with 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 Hamisi Rashid 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 his Co-Accused persons herein were Baya and Aziz.

32. When they went to Kimwongo's place, the said Kimwongo denied that the goat belonged to him. The persons with the Motorbikes followed Hamisi Rashid and arrested him with the goat he had been carrying while running. In his Cross-examination, PW 1 stated that he did know the Appellant herein. On his part, PW 2 stated that he did not see the Appellant steal on the material date and that he did not know him.

33. In his Cross-examination, PW 3 stated that the Kioko Kituku 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, the Appellant and other people. Kioko Kituku started saying that the goat he had been caught with belonged to PW 3 but PW 3 denied the same. He rescued Kioko Kituku from being lynched by members of the public and took him to Taveta Police Station.

34. His further evidence was that they went to Kioko Kituku's house, they found the Appellant herein and Hamisi Rashid, who he had implicated, with a goat. He added that PW 2 was the one who identified Hamisi Rashid as the one who had the live goat. During his Cross-examination, PW 4 stated that the Appellant and Hamisi Rashid were arrested in the Appellant's house with a goat, a fact that No 91279 PC Vincent Baraza (hereinafter referred to as "PW 6") corroborated.

35. This court noted that PW 3 arrested the Appellant herein merely because he was in the house therein, a submission that the Learned Trial Magistrate took into consideration in finding that the Appellant herein was guilty of the offence of handling stolen goods.

36. This court was not persuaded that just because the Appellant was found in Kioko Kituku's house, he could be charged with the offence of handling stolen property. This is because he may have been visiting him. Assuming he partook of the goat, it could not be said with certainty that he knew where it came from.

37. Having said so, 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 Hamisi Rashid 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.

38. Going further, there appeared to have been inconsistencies in the manner Hamisi Rashid who would have linked the Appellant to the offence herein, 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.

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

40. 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. In view of the fact that Baya and Aziz were not called to corroborate PW 2's evidence linking his Co-accused persons to the goat, this court found that the Prosecution did not satisfy it that 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."

41. 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.

42. 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 doubtthat the Appellant was involved in handling the stolen goat as the Learned Trial Magistrate had concluded.

43. 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

44. 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.

45. 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.

46. It is so ordered.

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

J. KAMAU

JUDGE

In the presence of:-

Simon Nyambu - Appellant

Miss Anyumba - for State

Josephat Mavu– Court Clerk