



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 20 OF 2017

ABDI SALAM ISAAK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 119 of 2015 in the Senior Principal (sic)Magistrate’s Court at Wundanyi delivered by Hon Orange K. I. (SRM) on 17TH March 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Abdi Salam Isaak was jointly charged with Godana Godacha(hereinafter referred to as “the Appellant’s Co-Accused”) on two (2) Counts for the offence of stealing stock contrary to Section 278 of the Penal Code Cap 63 (Laws of Kenya). The particulars of Count I were that on the 1st day of April 2015 at Lualenyi Ranch, Mwachabo Location within Taita Taveta County jointly stole forty (40) heads of cattle valued at Kshs 2,000,000/=, the property of Mohamed Osman Abdullahi.
2. The particulars of Count II were that on the aforesaid date and place, the Appellant and his Co-Accused jointly stole forty two (42) heads of cattle valued at Kshs 2,100,000/= the property of Ahmed Bare Abdi.
3. They were also charged with the alternative charge of handling stolen goods contrary to Section 322(1) (2) of the Penal Code. The particulars of this charge were that on the aforesaid date and place, the Appellant and his Co-Accused person, jointly, otherwise than in the course of stealing, dishonestly received sixty eight (68) heads of cattle knowing or having reason to believe them to be stolen goods.
4. The Learned Trial Magistrate, Hon Orange K. I., Senior Resident Magistrate convicted and sentenced each of them to serve six (6) years imprisonment.
5. Being dissatisfied with the said judgment, on 26th April 2017, theAppellant 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. He relied on five (5) Grounds of Appeal.
6. On 2nd November 2017, the Appellant filed (6) Amended Grounds of Appeal and his Written Submissions. The State’s Written Submissions were dated 17th October 2017 and filed on 18th October 2017.

LEGAL ANALYSIS

7. 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”.

8. It appeared to this court that the only issue that had really been placed before it for determination was whether or not the Prosecution had proven its case beyond reasonable doubt.

9. However, on perusing the judgment by the Learned Trial Magistrate, it was not clear to this court whether the Appellant and his Co-Accused were each sentenced on both Count I and Count II. Indeed, as can be seen hereinabove, they had both been charged with two (2) Counts of stealing stock and an alternative charge of handling stolen property. The said Learned Trial Magistrate was therefore under a duty to specify the offence that had been proven and the sentence meted therein.

10. The Learned Trial Magistrate’s decision merely stated as follows:-

“The offence is serious (sic) each of the offender to be sent to prison for six years.”

11. In view of the fact that this court could not conclusively determine if the Learned Trial Magistrate had sentenced the Appellant and his Co-Accused to three (3) years each on Count I and Count II as sixty eight (68) cattle were recovered, the same created difficulty to this court in rendering a decision on whether the sentence would have been adequate in the event it found the Prosecution to have proved its case beyond reasonable doubt.

12. Indeed, an appellate court ought to restrain itself from making assumptions of what it thinks a trial court intended to say. A decisions which is appealed from ought to be crystal clear to enable such appellate court render itself on the conviction and sentence meted to an accused person.

13. The ambiguity of decisions was dealt with in the case of **Otieno & Another vs Republic (1991) KLR 493** where the Court of Appeal rendered itself as follows:-

“This case would appear to be an authority for the proposition that where the record of the trial court is indecipherable, which is the exact position in the appeal before us, a retrial ought to be ordered, of course bearing in mind whether the appellant has served a substantial part of the sentence and whether in all circumstances, a retrial would be fair.”

14. It was therefore the considered opinion of this court that a Re-trial ought to be ordered herein to enable the subordinate court hear the case afresh with a view to making a concise determination of the offence the Appellant was convicted of, in the event it finds that the Prosecution had proved its case beyond reasonable doubt. This court did not therefore analyse or consider the merits or otherwise of the Appellant’s Appeal herein.

DISPOSITION

15. For the foregoing reasons, the Appellant’s Petition of Appeal filed on 20th March 2015 is hereby allowed to enable a new trial court make a determination on proof of the Prosecution’s case and the sentence to be meted upon him. The conviction is hereby quashed and the sentence set aside.

16. It is hereby directed and ordered that there shall be a Re-trial of the Appellant herein so that the matter can be heard on its own merits. The Appellant shall be arraigned afresh before a different magistrate at the Wundanyi Law Courts to hear and determine this matter.

17. In this regard, it is hereby directed and ordered that the Appellant be produced before the Senior Principal Magistrate Wundanyi Law Courts on 28th December 2017 for purposes of taking a plea and further hearing of this matter. It is the expectation of this court that the new trial court will expeditiously determine this matter.

18. It is so ordered.

DATED and DELIVERED at VOI this 20th day of December 2017

J. KAMAU

JUDGE

In the presence of:-

Abdi Salam Isaak - Appellant

Miss Anyumba - for State

Susan Sarikoki- Court Clerk