



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 24 OF 2015

BETWEEN

JOAKIM ALIMUSA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

The Appellant herein Joakim Alimusia was charged before the principal Magistrate, Kapenguria Law courts vide ***Criminal Case number 1566 of 2014*** with three counts as follows:-

In the first count the charge is of stealing stock contrary to section 278 of the Penal Code. The particulars of this offence are that on the 25th day of August, 2014 at about 1900 hours at Korellach Sub-location in Pokot Central Sub-county, within West Pokot County, the accused jointly with others before court stole 105 cattle valued at kshs.2,625,080/-, 133 goats valued at kshs.399,000/-, 20 sheep valued at kshs.50,000/- the property of Christine Ngaliman.

The second count is of malicious damage to property contrary to section 339(1) of the Penal Code. Particulars of this offence are that on the 25th day of August, 2014 at about 1900 hours at Korrellach in Pokot Central Sub-county within West Pokot County, the appellant jointly with others before court willfully and unlawfully damaged one table, four stools, one box of clothes, all valued at kshs.23,800/- the property of Christine Ngaliman.

The 3rd count is of stealing contrary to section 275 of the Penal Code. Particulars of this offence being that on the 25th day of August 2014 at about 1900 hours at Korellach in Pokot Central sub county, within West Pokot County, the appellant jointly with others not before court stole 15 chicken, 2 mattresses, 2 malts all valued at kshs.7,200/- the property of Christine Ngaliman.

The prosecution called 4 witnesses and their case is that the husband to PW1 in this case was accused by the family members of the appellant of having murdered their relative. He was consequently arrested and charged with murder in Kitale court. On 25.8.2014, the appellant led about 100 persons, mostly his family members to the homestead of PW1. It was at about 6.00pm. The appellant was wearing a jacket and a hat. They chased away PW1 and her family members who include PW3 in this case. The appellant and the group he was in drove away 105 cows and 30 goats. Their action was said by PW4 to be a customary way among the Pokot of having compensation for a murdered person from the family that committed the offence. The said animals were said to be valued about 2 million shillings.

After the said animals were driver away the appellant and his wife returned to the scene and torched

PW1's house. Her sofa set, mattresses, clothes, jembes, sufurias and many other things were consumed in the fire. PW1 and her children were consequently forced to shift from the area. The matter was reported to the police. The animals were not recovered. Some other suspects were arrested and charged in another file. The appellant was arrested 4 months later and charged with the offences as earlier on disclosed.

The appellant in his defence raised an alibi that on 25.8.2014 at 7.00pm he was at Sigor Centre with two of his friends whom he called as witnesses and confirmed the allegation.

The trial magistrate in his judgment found that the appellant was well recognized while leading the family members in commission of the offences he is charged with. He thus convicted him and sentenced him to serve in the first count a jail sentence of 7 years, in count II 3 years and count III 2 years. Sentences to run concurrently.

The appellant dissatisfied with the said conviction and sentences appealed against both through Mr. Kiarie Advocate.

The issues raised by Mr. Kiarie Advocate and which are conceded to by Mr. Mark Nabuyumbu, the state prosecutor are first, of recognition of the appellant during the commission of the offence. Though Mr. Kiarie prefers to call it identification, it should be recognition as PW1, PW2 and PW3 claimed to have known the appellant before the incident as a neighbor. Mr. Kiarie submitted that the offences must have taken place at night. The charge sheet in its particulars discloses that it was at 7.00pm. PW1 did not disclose the time during her evidence-in-chief, but upon cross examination stated it was at 6.00pm. She did not however indicate how she knew of the time. She is contradicted by PW2 who said upon reporting the matter to the area chief and visiting the scene, the chief retreated into the dark, which obviously shows it was dark. PW3 never indicated the time of the offence in his evidence. The three witnesses claimed that they saw the appellant leading a group of his relatives in commission of the said offences. They did not disclose the source of light that enable them see. Mr. Kiarie further avers that the trial magistrate finding that:

“.....the incident having occurred between 6pm and 7pm in the month of August, it is my view that the sky was clear enough for the complainant and her witnesses to see the assailants/leader of the group without difficulties”

is not founded on the evidence adduced by the three eye witnesses and therefore wrong.

Mr. Kiarie argues that the appellant could not have been identified (read recognized) by the three eye witnesses as they claimed as upon their report to the police and recording of their statements its two other suspects namely Peter Lemangura and John Ngorianyang who were arrested and charged with the offences.

The appellant herein was all through available and even stood surety for the said suspects. For a period of 4 months he was undisturbed. It is alleged he was victimized as an afterthought due to his involvement in fighting for justice in the murder case in which PW1's husband is accused, and also for his effort to assist the two initial suspects in the offences he was later arrested and convicted. If he was a suspect from the onset, he would have been arrested with the other two suspects or even earlier but not 4 months after.

PW3 was a minor. The appellant contends that voir dire was not conducted properly. The court did not find of fact that the minor understood the nature and meaning of an oath for him to give sworn testimony.

Last but not least the defence averred that a witness can be honest but mistaken. The three eye witnesses were in a precarious position. They were very apprehensive and terrified according to the appellant. Such a scenario can make them honest but mistaken as to the recognition of the appellant among the group of the assailants. On the foregoing argued points, I am urged to make a finding in favour of the appellant and acquit him of the three counts.

I have evaluated the entire evidence and weighed it against the charges preferred. To start with the three

eye witnesses do not claim anywhere in their evidence that the appellant stole 15 chicken, 2 mattresses and 2 malts all valued at KShs.7,200/-. PW1 alleges he damaged mattresses among other things. PW2 said he ransacked the house and burnt the items. PW3 does not mention about it. The trial magistrate was therefore out rightly wrong in finding that this offence was proved by the prosecution beyond reasonable doubt. There is no evidence whatsoever which was adduced in support of the offence in count III.

On the issue of recognition, I have considered that the time the offences took place was not well fixed by the prosecution. The magistrate in his judgment placed it between 6.00pm to 7.00pm. The evidence by PW2 that the area chief retreated at the scene into darkness, suggests it was dark. The prosecution should then have led the eye witnesses in stating how they were able to see in the dark and recognize the appellant. He was allegedly in a group of about 100 persons, most of them his relatives. We are told he was wearing a coat and hat (white). The white hat was not described as to its type to rule out the possibility of it having covered part of the face (upper face) of which would have made recognition hard. Definitely the witnesses were terrified by the said incident and were not calm by the time they witnessed it. This would have raised the possibility of them making a mistake in recognition of one family member against the other. The law is that when the prosecution is relying entirely on the evidence of recognition or identification, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction. While it is appreciated that recognition may be more reliable than identification of a stranger, it is possible for mistakes in recognition of close relatives and friends, sometimes to be made. (*See Criminal Appeal number 20 of 1989 Wamunga versus Republic KLR [1989] 424.*)

I do agree with the appellant's submissions that a witness can be honest but mistaken. It is clear that the circumstances under which the 3 witnesses claim to have recognized the appellant did not favour positive recognition, that is free from error, and therefore safe to rely on to arrive at a conviction.

There exists reliable possibility that the witnesses picked on the appellant later as a suspect out of mere suspicion or to hit back for the role he played in ensuring that the murder suspect in the case of his relative was brought to book. That could be the reason why he was arrested 4 months after the alleged offence, and after two other suspects had been arrested and charged for the very same offences in a different file. There is ample evidence that the appellant had not gone underground.

The manner in which voir dire was done to PW3 was also raised by the defence. As well stated by the defence, the aim of a voir dire is to establish whether a minor is intelligent enough to offer evidence, and whether he or she understands the meaning and nature of oath. As such, it should be a thorough examination where the trial magistrate puts questions to the minor relevant to the stated issues. The questions put should be recorded and also answers to them. The decision by the trial court should be based on the given answers by the minor. That is not what happened in this case. The trial magistrate only wrote the answers given by the minor and the questions to them are missing. The examination was shoddy; Not showing seriousness at all. It suggests about 6 questions were asked. The finding is not based on the examination. The magistrate states:-

“I am satisfied from look of him that he understands why he is in court and can tell difference between truths from falsehood.”

The magistrate was guided by the looks of the minor, and did not address the question on whether the boy understood the nature and meaning of oath. Failure to carry out a voir dire properly can lead to disregard of such evidence (*see Criminal Appeal number 34 of 2013, Kirevelo Mboloi versus Republic [2013] eKLR*).

The state prosecutor conceded to the foregoing raised grounds of appeal. The bottom line is that the appellant was not rightly convicted of the three counts. The evidence was not properly evaluated against the applicable law. The appeal is therefore allowed on the three counts. The appellant should be released forthwith unless otherwise lawfully held. This court so orders.

S. GITHINJI

JUDGE

23.6.2016

Ms. Chebet holding brief for Mr. Kiarie for the appellant

Mr. Muriuki for the State

Accused – present

Judgment read in their presence this 23rd day of June, 2016.

S. GITHINJI

JUDGE

23.6.2016