



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL NO.16 OF 2016
DAVID MWALATI KAITOLI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

From original conviction and sentence in Criminal Case No.770 of 2014 at Butali Senior

Resident Magistrate's Court (Hon M.L. Nabinya S.R.M) dated 12th February, 2016.

JUDGMENT

1. The appellant, **David Mwalati Kaitoli** was charged before the **Senior Resident Magistrate's Court at Butali** with the offence of stealing stock contrary to **section 278** of the Penal Code. Particulars of the charge were that on the 30th September, 2014 at **Shikutse Sub-location** in Kakamega North District within Kakamega County, stole one cow valued at Kshs.32,000/-, the property of **Isaack Injendi**.
2. The appellant pleaded not guilty to the charge and after a trial where 4 prosecution witnesses testified and the appellant's defence, the trial court convicted the appellant and sentenced him to a fine of Kshs.40,000/-, in default, to serve 3 years imprisonment.
3. Being aggrieved with both conviction and sentence, the appellant lodged this appeal and raised four grounds of appeal as follows:-
 1. ***That the learned trial magistrate erred in law and facts by adopting the prosecutor's case based on a defective charge sheet.***
 2. ***The learned trial magistrate erred in law and fact by disregarding the appellant's defence that the prosecution's case is grounded on vengeance.***
 3. ***The learned trial magistrate erred in both law and facts by failing to evaluate evidence on record as a whole thus arriving at a wrong conclusion which occasioned miscarriage of justice to the appellant.***
 4. ***The learned trial magistrate erred in law and fact by holding that the prosecution had proved the ingredients of stealing stock beyond reasonable doubt.***
4. At the hearing of this appeal, the appellant, who was unrepresented, relied on his written submissions,

while **Mr Oroni**, learned State Prosecutor, argued the appeal orally. The appellant argued that according to PW1's statement, the cow, the basis of the charge, was handed to him which means the appellant did not steal it. The appellant further submitted that whereas the offence was allegedly committed on 30th September, 2014, he was not arrested until 18th November, 2014, and no explanation was given for that or why the offence was not reported immediately. The appellant took issue with the prosecution for failing to call witnesses. He submitted that whereas **Johnson Okoth** had been listed as a witness, he was not called to testify, instead, people who were not listed were called as witnesses. He also complained that even though he was arrested by Assistant Chief, the Assistant Chief never recorded a statement or called to testify. The appellant submitted that this was a family dispute, a matter that should have been settled at home since it related to land. He also pointed at the discrepancy in the evidence of PW2 and PW3 as to how much an "**animal chaser**" is paid.

5. **Mr Oroni**, on his part, opposed the appeal and relied on the evidence on record, namely, that of PW1 who found the appellant with the animal at the appellant's home which was direct evidence. That evidence, according to learned counsel, was corroborated by the evidence of PW2 and PW3. PW4 investigated the case and charged the appellant based on **direct** evidence. In **Mr Oroni's** view, the prosecution proved its case beyond reasonable doubt.

6. I have considered this appeal, submissions by parties on both sides and perused the record. This being a first appeal, it is the duty of this court to re-evaluate the evidence, analyse it itself and draw its own conclusion on whether the findings of the trial court should stand, of course bearing in mind that this court neither saw nor heard the witnesses testify, and give due allowance for that. See **Okeno v Republic** [1972] EA 32. That duty was aptly stated in the case of **David Njuguna Wairiu v Republic** [2010] eKLR. The Court of Appeal, while referring to **Okeno v Republic** (supra), stated:-

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court."

7. And in the case of **Joseph Njuguna Mwaura & 2 others v Republic** [2013] eKLR, the same court observed thus:-

"It is common place that the first appellate court is mandated to re-consider and re-evaluate the evidence on record bearing in mind that it did not see or hear the witnesses, before making a determination of its own."

8. The evidence before the trial court as told by PW1, **Isaac Injendi**, was that on 30th September, 2014, PW1 asked the appellant to take his cow to the market with instructions that he could sell it if he found a buyer. PW1 later left for the market and while on the way, he saw the appellant on a motor bike and although he tried to call him on cell phone, the appellant did not answer his call. PW1 later went to the appellant's home in the evening but was chased away by the appellant. He reported the matter to the clan who tried to mediate without success. Thereafter a report was made to the police and the appellant was arrested and charged in court.

9. PW2, **Moses Injendi**, testified that he was present when PW1 asked the appellant to take the cow to the market on that material day (30/9/2014). He knew that the appellant used to be sent by people to take their animals to the market at a commission.

10. PW3, **Joshwa Injendi**, on his part told the court that he also saw the complainant instruct the appellant to escort the cow to the market. **PW4, No.77097 PC Isaac Sudi Koyale**, on his part testified that on 2nd November, 2014, PW1 reported at Kabras Police station that the appellant had agreed to take his (complainant's) cow to the market but failed to return the cow or give the sale proceeds. The report made by the complainant led to the appellant being arrested and charged in court.

11. At the close of the prosecution's case, the appellant was found to have a case to answer and put on his defence. The appellant gave an unsworn statement, and told the court that after their father's burial, he

handed over burial permit and other documents to the complainant and his other brother to keep for him. Later when he asked for the documents they declined to give them back. He reported the matter to the chief who summoned them but they declined to attend. The chief sent him a letter DEx1 dated 21st October, 2014. On 18th November, 2014, he was arrested and to his surprise, he was charged with stealing stock. He produced another letter from the chief as DEx2. The appellant denied committing the offence with which he was charged saying this was all about a family dispute and not stock theft.

The appellant's main issue in this appeal is whether the charge was defective and that the prosecution did not prove its case against the appellant beyond reasonable doubt.

12. In a criminal trial, it is the duty of the prosecution to prove its case against an accused person and the burden of proof is always proof beyond reasonable doubt. In the case of ***Republic v Gachanja*** [2001] KLR 425 the court held:-

“It is a cardinal principle of law that the burden to prove the guilty of an accused person lies with the prosecution. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probabilities.”

13. That principle of law was reiterated by the Court of Appeal in the case of ***David Muturi Kamau v Republic*** [2015] eKLR, stating that it is common ground that ***the burden of proof lies with the prosecution and that proof is beyond reasonable doubt.***

14. The appellant was charged with the offence of stealing stock contrary to **section 278** of the **Penal Code** Cap 63 laws of Kenya. That section relates to stealing stock.

Stealing is defined under **section 264** of the Penal Code as ***fraudulently and without claim of right, taking anything capable of being stolen, or fraudulently converting to the use of any person, other than the general or special owner thereof, any property.*** According to this definition, livestock is a thing capable of being stolen.

The appellant has argued that the charge was defective. The appellant is said to have been tasked by PW1 to take a cow to the market with authority to sell. If that happened and the cow was sold but proceeds not handed over to the owner of the cow, that would amount to conversion which is one of the ingredients of stealing. I therefore find that the charge was proper.

The appellant and the complainant are relatives. The complainant's evidence was that he asked the appellant to take his cow to the market for sale, and even though the appellant took the cow to the market, he neither brought back the cow nor the money. This evidence was supported by both PW2 and PW3. PW4, on his part, told the court that a report of stealing stock was made and based on that report, the appellant was arrested and charged in court.

16 The appellant denied that allegation and told the court that this was case of a family dispute and that his brothers wanted to keep him away so that they could share the land in his absence. The appellant produced DWx1 and DEx2 to show that indeed there was a family dispute. DEx1 is a letter written by the **Area** chief dated 21st October, 2014, summoning the appellant to his office on 22nd October, 2014 at 9.00 a.m., and PEx2 is a letter from the same chief referenced “**succession case**” dated 17th December, 2014 to the Deputy Registrar of this court for purposes of succession proceedings.

17. The offence, according to the evidence on record, was committed on 30th September, 2014, but was only reported to the police on 2nd November, 2014. This is confirmed by the charge sheet which shows the OB No. as 06/2/11/14 and the appellant was charged in court on 19th November, 2014. The appellant was arrested on 18th November, 2014. The appellant has rightly, in my view, questioned why he was not arrested until 18th November, 2014. This is also compounded by the fact that the report of theft of stock

was not made to the police until 2nd November, 2014. Although PW4 said he was one of the investigating officers, he did not explain why it took so long to report the offence and/or arrest the appellant once the report had been made. He did not also explain what investigations, if any, were carried out to establish the truth about this case.

18. The appellant in his defence told the trial court that he was arrested over a different issue only to be charged with stealing of stock. He produced two letters from the area chief to demonstrate that indeed there had been a family dispute and that is why the chief had summoned them.

19. I have perused DEx1 – a letter from the chief summoning the appellant to the chief’s office; That letter does not state what the issue was and why the appellant was required. The letter is dated 21st October, 2014 before the appellant had been arrested, and about three weeks after the offence had allegedly been committed. The second letter, PEx2, is dated 17th December, 2014, about one month after the appellant had been arrested and charged in court. A perusal of DEx2 shows that it is about succession proceedings. The letter is again by the same chief who wrote DEx1.

20. The appellant has also complained that even though the Assistant Chief arrested him, he was never called to testify; and also that other witnesses who had been listed were not called to testify. The appellant has identified, in particular, one **Johnson Okoth** who was listed in the charge sheet as one of the witnesses but who was not called. Instead, people who were not listed as witnesses were called to testify.

21. I have perused the record of the trial court, and it is true that **Johnson Okoth** was listed in the charge sheet as a witness. At the same time the complainant testified that among the people present when he handed over the cow to the appellant, was **Johnson Okoth** but who was not called to testify. The law is clear that there is no particular number of witnesses who must be called to prove any fact. **Section 143** of the **Evidence Act**, Cap 80 Laws of Kenya, provides as follows:-

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

22. The import of **section 143** is that the prosecution is at liberty to call any witness(es) it deems necessary for purposes of proving its case. This legal position is supported by judicial pronouncements. In the case of **Julius Kalewa Mutunga v Republic, Criminal Appeal No.32 of 2005**, the Court of Appeal stated:-

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless for example, it is shown that the prosecution was influenced by some oblique motive.”

23. That position was reiterated in the case of **Benjamin Mbugua Gitau v Republic** [2011] eKLR thus:-

“This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires.”

24. The above position is the general principle of law, but as the Court of Appeal observed in the case of **Julius Kalewa Mukinga** (supra), the court can question the motive of the prosecution’s failure to call certain witnesses in a particular case depending on the circumstances of that case. The court may as well draw a negative inference that a particular witness’ evidence would have been adverse to the prosecution if no explanation is given for failure to call such witness(es). See **Bukenya & Another v Uganda** [1972] EA 594.

25. In this appeal, PW1’s evidence was that after the appellant refused to give him the money, he was reported to the chief, clan chairman, and Assistant Chief. The chief’s tasked the clan chairman to resolve the issue. When was the meeting by the clan held? Was that why the chief had summoned the appellant and was it over the same issue? Secondly, the chief wrote a letter to the Deputy Registrar of this court over succession proceedings and the appellant says that it was all about succession and land. Thirdly,

what is the relationship between PW1, PW2 and PW3? They all share the name Injendi and was it true that they schemed to frame up the appellant for this offence?

26. PW3 admitted in cross examination that the complainant is his brother. Is this the case with PW2? Was this the reason why the appellant says that this was a family dispute? If that was the case, **Johnson** was a material witness because he would be an independent witness as to what exactly happened. Although the issue seems to have been reported to the clan chairman who is said to have failed to resolve it, none of the clan members were called to enlighten the court on what the dispute really was. This would have been important because the allegation of a family dispute appears to have been true taking into account DEx1 and DEx2.

27. This was a case of poor investigation by the police. PW2 also admitted in cross examination that he recorded his statement to the police on 10th March, 2015 long after the appellant had been charged in court, giving an impression that the police were trying to look for evidence after charging the appellant. This raises reasonable grounds to cast doubt in the whole matter.

Had the learned trial magistrate addressed her mind on these issues, it is probable that she would have come to the conclusion that there were doubts in the case before her. And where there are doubts, the appellant should have benefited from those doubts.

28. Having carefully considered this appeal, evaluated the evidence and analysed it myself, I come to the conclusion that this was a poorly investigated case, which left doubts as to the guilt of the appellant. There are reasonable grounds to doubt the guilt of the appellant. For that reason I find that the appellant's appeal has merit. Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 18th day of August, 2016.

E.C. MWITA

JUDGE