



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 126 OF 2015

JAMES ABOGO LOTIANG.....1ST APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 54 OF 2016

EBONGA EKAWA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 786 of 2014 by Hon. F. W. MACHARIA Principal Magistrate on 25th May 2015).

JUDGMENT

1. **JAMES ABOGO** the first appellant and **EMBONGA EKAWA** the second appellant were charged before the Nanyuki Chief Magistrate's Court with the **offence of stealing stock contrary to section 278 of the Penal Code**. The second appellant during the trial before that court changed his plea and pleaded guilty to the charge. He was sentenced to serve 7 years imprisonment. The 1st appellant pleaded not guilty to the charge but after trial was convicted and sentence to serve 7 years imprisonment. The first appellant has filed his appeal against conviction and sentence while the second appellant has filed his appeal against sentence.

2. This is the first appellant court. The duty of this court is to analyse and evaluate the trial court's evidence and come to its own conclusion on that evidence bearing in mind that this court has neither seen nor heard the witnesses testifying. See the case of **OKENO VS REPUBLIC (1972) EA** where the court held:-

“The court must however, remind itself that unlike the trial court, it did not have the benefit of hearing and observing the demeanor of the prosecution witnesses as well as the department of the appellants as they testified and must therefore make due allowance for that.”

3. The prosecution's evidence was that **JOHN MORUA LELGONA (PW 1)** had employed the second

appellant as a herdsman. On second August 2014 PW 1 received information that the second appellant had disappeared with his ten goats. After reporting that loss at Nanyuki Police Station PW 1 went to Nanyuki air market where he found two of his goats with **Jeniffer Lokupe (PW 2)**. PW 2 was a livestock seller at that market when PW 1 inquired she said that she had purchased the two goats from both the appellants who were accompanied by another person identified as Kiragu. PW 2 said that it was the second appellant who was selling goats to her while the first appellant received the money. When she requested them to produce their national identity card the first appellant took out from his pocket 3 identity cards but again returned them into his pocket. The identity card was produced by Kiragu to PW 2. PW 2 said that it was the first appellant who was bargaining with her the price of the goats. It was also the first appellant who paid the council tax and retained the receipt that was issued. It was PW 2 who informed pw1 that she overheard the appellant, who was speaking in Turkana language, say that they were going to Ngareng'iro. Both appellants were arrested at Ngareng'iro. First appellant on being put to his defence gave a sworn testimony. In his defence he said that he worked as a casual labourer at markets in Nairobi, Doldol, Ngareng'iro and Nanyuki. His work involved painting animals for identification and also involved loading of livestock into trucks. He said that in this regard as he was doing his job one of his customers gave him a note of Kshs.1000. His customer requested him to look for change. He said he approached the second appellant who gave him two notes of kshs.500. On 4th August 2014 he said that two people came to him at Ngarengiro market while he was doing his work. Those people requested him to accompany them to the police station. He was later charged with the present offence.

4. The second appellant in his evidence corroborated the first appellant testimony and confirmed that he gave him change of a note of kshs.1000. Second appellant stated that apart from that transaction the first appellant was not known to him before and nor was he involved in the selling of the goats to PW 2 which the second appellant admitted having stolen from PW1.

5. The learned trial magistrate after analysing the evidence found the first appellant culpable of the offence of theft of stock. The learned trial magistrate in analysing the evidence stated that the first appellant defence which as corroborated by the second appellant was demolished by the evidence of PW 2. The trial court found that the evidence of PW 2 incriminated the first appellant because it showed that the first appellant was an active participant of the sale of goats to PW 2. The court noted that the first appellant according to the evidence of PW 2 assisted in the bargaining of price; produced ID cards; and received the sale money. The trial court concluded that the doctrine of recent possession was applicable in the case of 1st appellant.

6. In my view having equally analysed the trial court's evidence and trial courts analysis and conclusion I find that the trial court cannot be faulted. The conclusion that the trial court reached is supported by the evidence on record. The complainant stated that his goats went missing from 2nd August 2014. On the same day PW 2 purchased 2 goats from the appellants which later PW 1 was able to positively identify as part of his herd. PW 1 said that he identified those goats from the way their ears were cut and from their colour. Identification of stolen goats is one of the components of the doctrine of recent possession. The principal to be followed in the case where the doctrine is being applied was set out in the case **ARUM VS. REPUBLIC Court of Appeal at Kisumu Criminal Appeal No. 85 of 2005 where it was held that the doctrine of recent possession is applicable where the court is satisfied that the prosecution have proved the following:-**

- a) *that the property was found with the suspect;*
- b) *that the property was positively identified by the complainant;*
- c) *that the property was stolen from the complainant;*
- d) *that the property was recently stolen from the complainant.*

7. The Court of Appeal in **Criminal Case No. 108 of 2003 MATU VS REPUBLIC 2004 (1) KLR**, it observed:-

“That the appellant had been in possession of goods stolen from the complainant kiosk and he would not offer any acceptable explanation on how he had come by that property. The inevitable conclusion, therefore was that the appellant had participated on the robbery (sic)..... I find the evidence of PW3 as credible and absolutely worthy of believing.”

8. In my view the prosecution adequately proved the case against the first appellant and accordingly his appeal against conviction does fail.

PW 1 identified the two goats as this being part of the stolen herd. The second appellant did not offer a reasonable explanation of his possession of those two goats. The inevitable conclusion is that he was the thief of PW 1’s goats.

9. Although the first appellant’s appeal was both against conviction and sentence he did not however submit in support of his appeal against sentence. Having considered the facts of the prosecution’s case and the mitigation of the first appellant I find that there is no basis to interfere with the trial court’s sentence against the first appellant.

10. Second appellant’s appeal against his sentence is based on the submissions that he is now remorseful; that he sold the goats of PW 1 to enable him provide for his family; and that he was a first offender.

11. The second appellant pleaded guilty to the offence before the trial court. I believe that his plea of guilty should have led the trial court to sentence him to a jail term dissimilar to that of first appellant who did not plead guilty. Accordingly the court will interfere with the second appellant’s sentence.

12. The judgment of the court is:-

a. The appeal by James Abongo Lotiang against conviction and sentence is dismissed.

b. The appeal by Ebonga Ekawa against sentence does succeed. His sentence is hereby set aside and the appellant is sentenced to serve 5 years jail term which term shall commence from the date of his conviction.

DATED AND DELIVERED THIS 19TH DAY OF DECEMBER 2016.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant.....

Appellants: James Abongo Lotiang.....

Ebonga Ekawa.....

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE