



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.1 OF 2016

KIBAKI LERANTILE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case No. 108 of 2014 of the Chief Magistrate's Court at Isiolo by Hon. J.M Irura – Senior Resident Magistrate)

JUDGMENT

The appellant, **KIBAKI LERANTILE**, was convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars of the offence were that on 19th February 2014 at Maili Tatu area of Isiolo County jointly with others not before court while armed with a rifle robbed **MUNTU M'ANYUKI** of 19 head of cattle, 45 sheep and 22 goats all valued at Kshs. 490,000 the property of the said **MUNTU M'ANYUKI**.

The appellant was found guilty of the offence and sentenced to death. He now appeals against both conviction and sentence.

The appellant's appeal was argued in court by Mr. Mohama, learned counsel while his grounds of appeal were drawn and filed by Kaumbi and Company Advocates. Six grounds of appeal were raised. The grounds can be summarized as follows:

1. That the learned trial magistrate erred in law and in fact by failing to note that the appellant was not found in possession of the stolen animals.
2. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence.
3. That the learned trial magistrate erred in law and in fact by failing to note the evidence did not connect the appellant to the offence.

The state opposed the appeal through Mr. Namiti, the learned counsel.

The facts of the prosecution case briefly were as follows:

Some robbers struck at the complainant's home and fired several rounds of ammunitions. Thereafter they

left with his livestock. At the time, the complainant did not venture out. He went out after they had left. Later, the complainant joined a search party that tracked the animals to the manyatta where they found the appellant grazing cattle. When the party insisted they wanted to be given their stolen livestock, the appellant called his brother. When the latter arrived, he went aside with the appellant. The duo took them where some goats were grazing. The appellant's brother promised to facilitate the delivery of the stolen livestock.

In his defence the appellant contended that on 21st February 2014, he was grazing cattle. Some people went and asked him about some stolen goats. He informed them where he had seen some goats grazing. When they asked him to take them there, he called his brother Wilson for he could not leave the cattle alone. When Wilson came they both took them there together with the cattle he was herding. These people identified the goats as theirs but declined to take them for they were not all. This party wanted to take their cattle and this is when Wilson decided that they involve the elders.

later he was arrested and taken to Isiolo police station with the recovered goats.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32**.

When the search party had their first encounter with the appellant, they found him grazing cattle. None of the stolen livestock was found in his possession. The incriminating facts were attributed to Wilson, the appellant's brother. According to the evidence of Murithi M'anguka (PW1) Wilson talked privately to the appellant before going to where they were and informed them that the appellant had admitted he had 12 sheep and 4 goats. Wilson then asked for time to gather the livestock. This is what Martha Athe (PW2) testified to except that Wilson asked for three days so that he (Wilson) could get their cows and sheep. On his part Lemuria Yatiri (PW3) testified that after Wilson had talked to the appellant, he told them he was going to assist them to get their livestock. He referred them to Leparua where they found 17 goats.

I must commend the members of the search party for work well done. However, in the same breath I do not have very kind words for the investigating officer. Even after the ground work was done very ably by these members of public, it never occurred to him that the evidence at hand only raised suspicion against the appellant. It is trite law that suspicion however strong cannot be a basis for conviction. Wilson was a very material witness whom the prosecution did not bother to call. Equally were the witnesses who delivered the recovered livestock to Isiolo police Station. Wilson would have shed light on what was attributed to him by the search party. It was very dangerous for the trial magistrate to act on the untested evidence. It must be borne in mind that when he implicated the appellant he was with the search party away from where the appellant was.

The defence tendered by the appellant is very persuasive in light of the inconclusive investigations. All the appellant was expected to do is to raise a plausible defence which he did. There was no direct or circumstantial evidence against the appellant.

The upshot of the foregoing analysis of evidence on record is that I find that the appeal has merit. The conviction is quashed and the sentence set aside. The appellant is set at liberty unless if otherwise lawfully held.

DATED at Meru this 19th day of December, 2016

KIARIE WAWERU KIARIE

JUDGE