REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 94 OF 2014

JOSEPH TALAM KIMELI…….....…….APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 423 of 2013 Republic v Joseph Talam Kimeli in the Resident Magistrates Court at Kapsabet by B. Limo, Resident Magistrate, dated 30th May 2014)

JUDGMENT

1. The appellant was convicted for theft contrary to section 268 (1) as read with section 275 of the Penal Code. He was sentenced to six months imprisonment.
2. The particulars stated in the charge sheet were as follows-

> *"On diverse dates between October 2012 and November 2012 at unknown time at Kakiptui village within Nandi County, jointly with others at large stole 100 bags of unshelled maize valued at Kshs 202,500 property of Stanley Kipruto Ngetich."*

3. The appellant has appealed against his conviction and sentence. He raises eight grounds. They can be condensed into five. First, that the charge sheet was defective; secondly, that the trial court shifted the burden of proof to the appellant; thirdly that the trial court erred by relying on uncorroborated and irrelevant evidence; fourthly, that none of the witnesses identified the appellant; fifthly, that the charges were trumped-up; and, sixthly, that the trial court disregarded his defence. In a nutshell, the appellant's case is that the charge was not proved beyond reasonable doubt.
4. At the hearing of the petition, the appellant's learned counsel argued all the grounds together. He submitted that the charge sheet failed to disclose the dates and time of the offence; that PW3 and PW4 contradicted PW1 on the material dates; that the complainant's evidence amounted to hearsay; that the complainant failed to establish he had planted the maize; that the boundary between the appellant's land and that of the complainant was not clear; and, that PW2 did not specify where exactly the maize was being harvested. Learned counsel contended that the conviction was unsafe.
5. The appeal is contested by the State. The case for the State is that the prosecution proved the charge beyond any reasonable doubt. It was submitted that the appellant was positively identified by PW2 and PW3; and, that the six witnesses lined up by the prosecution proved that the appellant

harvested the maize from the property of the complainant. A title deed had been produced at the trial. Learned State Counsel submitted that the value of the maize was also established. I was implored to dismiss the entire appeal.

6. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been very careful because I have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190. *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 (unreported), *Paul Ekwam Oreng v Republic* Eldoret High Court Criminal appeal 36 of 2011 (unreported), *David Khisa v Republic* Eldoret High Court Criminal appeal 142 of 2011 (unreported).
7. From the title deed for Nandi/Kipkarren Salient/565 produced at the trial, there is no doubt that the complainant owned the land. The charge sheet however made no reference to that land. In his evidence PW1 said that the appellant and his children were harvesting maize from his farm at *Celia*. He was very specific that it was on 13th November 2012 at about 3:00pm. That is when he received a call from PW2 that the maize was being harvested. PW2 confirmed the date. He said he saw the appellant and his mother Mary Barngetuny harvesting the maize. PW4 also said the maize was being harvested on 13th November 2012. PW3 on the other hand said the maize was harvested on 16th November 2013. From the evidence of PW1, all the maize had been harvested by 4th November 2012.
8. The charge sheet never specified the dates or time of the offence. It stated generally that the offence occurred "*on diverse dates between October 2012 and November 2012 at unknown time*. None of the witnesses referred to any dates in the month of October 2012. There were conflicting dates given by PW1, PW2, PW3 and PW4. There is thus a clear *variance* between the charge and the evidence. The charge itself was *not* defective; it was curable under section 382 of the Criminal Procedure Code. See *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Criminal Appeal 661 of 2010 (unreported). The point however remains that its particulars were at variance with the evidence.
9. I will now turn to the evidence of identification. The land belonging to the appellant's father was *adjacent* to that of the complainant. The appellant's father is deceased. The appellant did not have letters of administration. PW1 testified that on 13th November 2012, he was at Kapsabet. He got a call at 3:00 pm from PW2 who informed him that Mary Barngetuny and his children were harvesting maize on the complainant's land. He went there the next day and found four acres of maize had been harvested. The shamba was bare. He reported the matter to the village elder and the police. He also reported the matter to the agricultural officer to assess the value of the maize. The report was not made until some weeks later. The charges against the appellant were not made until 22nd February 2013. From that evidence, the complainant did *not* see the appellant harvesting maize.

10. There are two witnesses who said they saw the appellant. The first is PW2. He was at his farm. He said he saw the appellant and Mary Barngetuny harvesting the maize. He confronted the latter who said the maize belonged to her. He called PW4. PW4 went into the complainant's farm. After about 20 meters he met Mary Barngetuny (the appellant's mother) and others harvesting the maize. He said Mary Barngetuny took the maize to her house. Upon cross-examination, he said he never saw the appellant. The second eye-witness was PW3. He said he saw the appellant and his four siblings harvest and take the maize to their house. It is important to keep in mind that the agricultural officer (PW5) estimated there were 100 bags of unshelled maize.
11. Both PW2 and PW3 were neighbours to the appellant. They were not complete strangers. The maize was being harvested in the afternoon. I am thus satisfied that they both identified the appellant. That to me is evidence of recognition; stronger evidence than that of identification. See *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549, *Obwana & Others v Uganda* [2009] 2 EA 333.
12. The next key question is whether they saw the appellant inside the complainant's farm. PW3 in cross-examination said the appellant's property is 10 acres. It had a maize plantation. It bordered the complainant's land. Without a clear boundary between the two maize plantations, it was critical to pinpoint exactly where the maize was being harvested. In his defence, the appellant

denied committing the offence. He said that the complainant forced the deceased to sell him the portion of land. He referred to *three* cases on the disputed land: Eldoret High Court Case 53 of 2003, PMCC 1254 of 2012 and PMCC 97 of 2012. It would appear the High Court case was dismissed; but the appellant said he was not aware. Like I stated, the appellant does not have letters of administration to the estate.

13. From the evidence of PW1, he was told by PW2 that it was the appellant's *mother* and her children who were harvesting the maize. When PW1 went to the farm the next day, the elders told him that the appellant's *mother* and the appellant harvested the maize. PW2 testified that he saw the appellant and the appellant's *mother* harvesting. He said the appellant's *mother* said she *owned* the maize. She took it into *her* home. There were a number of unknown persons harvesting the maize. It would have to be to harvest 100 bags of unshelled maize on four acres of land. It is not clear why the appellant's mother was not charged.
14. PW6 denied that he amended his statement later to include the appellant. He sent for the agricultural officer's report on 29th November 2012. The report by PW5 estimated the value of the harvested maize at Kshs 202,500. The harvested maize was *not* produced as an exhibit. When the complainant was cross-examined, he said he planted H614 brand of maize. He used four bags of fertilizers. He had no documentary evidence. PW2 said he saw the complainant planting the maize in April 2012. The complainant conceded there was *litigation* over the land *pending* in the High Court. He confirmed that the family of the appellant had planted maize on the piece of land. Upon cross-examination, he replied as follows-

> *"I never wanted to dispose[ss] them of the land. The father of the [appellant, now deceased] was staying on that parcel of land for about twenty years. We still have a dispute at the High Court"*

15. All those matters create doubt about the land; the place where maize was planted or where it was being harvested; the true boundaries between the adjacent properties; and, the culpability of the appellant. Such doubt must be interpreted in favour of the appellant. The appellant contends that the charges were fabricated to mask the simmering land dispute. PW2's evidence was also tainted. He was a *complainant* against the appellant's mother in criminal case 1254 of 2012 at Kabarnet Law Courts.
16. The legal burden of proof lay throughout with the prosecution. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported). The appellant had no obligation to fill in the gaps for the prosecution. The point is that he was presumed *innocent*. He was entitled to remain mum.
17. From my analysis and re-evaluation of all the evidence, I am not satisfied that the charge and all its elements were proved beyond reasonable doubt. It follows as a corollary that the conviction was *unsafe*. The upshot is that the appeal succeeds. The conviction and sentence against the appellant are hereby set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 17th day of November 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant.

Mr. R. Omboto for the appellant.

Ms. R. N. Karanja for the State.

Mr. J. Kemboi, Court Clerk.