



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 2 OF 2013

From original conviction and sentence in Principal Magistrate's Courts at Mwingi Criminal Case No.505 of 2012 (I. W. Gichobi, RM)

MUTHUIKITHEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Muthui Kitheka, the appellant before this court, was arraigned before the Resident Magistrate at Mwingi to face two charges of stock theft contrary to section 278 of the Penal Code and two alternative counts of handling stolen goods contrary to section 322 (2) of the Penal Code.

The particulars of the charge read that on 3rd of September 2012 at Imwamba village, Nuu Location in Mwingi District, Kitui County he stole one bull valued at Kshs 40,000 the property of Josephine Wanza Kilonzi and one heifer valued at Kshs 25,000 the property of Josephine Mbithe Kavithe. Alternatively, the appellant is alleged to have on 8th September 2012 handled the said bull and heifer at Kanzui Location in Mwingi District otherwise than in the course of stealing while knowing or having reason to believe them to be stolen goods.

The prosecution called four witnesses. From their evidence, the bull belonging to Josephine Wanza Kilonzo, PW1, was stolen from the grazing fields when her son and grandson who were looking after the cattle left them grazing and went home for lunch. This was on 3rd September 2012 at Ngaani Sub-location Nuu Location. The bull was white in colour and had been branded by PW1 with letter 'H' on the right thigh. That same day, at night, Josephine Kavithe Mwinzi put her two cows in the boma for the night. She found one missing in the morning and after looking for it and failing to find it she reported to the chief on 5th September 2012. Her cow had a brand of letter 'Y' put by her on the right shoulder.

On 8th September 2012 both women received information that the bull and cow had been found. PW1 told the court that she found her bull at Mwingi Police Station while PW2 told the court that she found her cow at Nguni Police Post. The two animals were recovered after the appellant was arrested with them by members of the community policing.

According to the evidence of Nicholas Munywoki Mwasa, PW3, the Chief of Kanzui Location, he received information that the appellant had been arrested with a bull and a cow suspected to have been stolen. PW3 told the court that the appellant claimed that the animals belonged to him.

Corporal Tunoi Keitan, PW4, of Nguni Police Post investigated the matter and found that the two animals

had been stolen at Imwamba village in Nuu and that the appellant had been arrested with the animals and detained at Mwingi Police Station.

The appellant gave a sworn statement. He told the court that he was arrested by three young men he met as he walked home on 7th September 2012 at around 10.30pm. He named one of the three as Musyoka whom he claimed beat him and claimed that he had stolen a bull and a cow which had been tethered near where they were with no owner. He told the court that when he was handed over to the police he admitted he stole the animals because the police officer threatened him.

The trial court analyzed the evidence and was convinced that the case was proved and convicted the appellant on the two main counts of stock theft. The court fined him Kshs 50,000 in default to serve 18 months and Kshs 30,000 in default to serve 1 year imprisonment.

The appellant is dissatisfied with the conviction and sentence and has come to this court on appeal. He has prepared four grounds of appeal. I have understood the accused to be stating that the people who arrested him did not testify; that there was no proof that he had stolen the bull and the cow; that he had been threatened by the police and this made him admit to the police that he had stolen and that the trial court did not consider his alibi defence. He made brief submissions in support of his grounds of appeal.

The respondent opposed the appeal and submitted that the appellant did not tender proof that he had been threatened by the police; that a fact can be proved by evidence of a single witness and that the prosecution was not mandated to call all the persons who assisted in the arrest of the appellant; that it was not mandatory for the prosecution or the court to summon Musyoka who was one of the persons who arrested the appellant and that the appellant did not offer a defence of alibi.

Counsel for the respondent further submitted that the doctrine of recent possession is applicable in this case and urged the court to be guided by **Criminal Appeal No. 18 of 2012 Ranshi Ali Idris v Republic** and **Criminal Appeal No 74 of 2005 Francis Ndungu Warari v Republic** to find the appellant guilty by virtue of the doctrine of recent possession.

I have read the record from the lower court. I have examined and evaluated the evidence afresh. I have no doubt that PW1 and PW2 lost their animals as stated in evidence. I have no doubt that the appellant was arrested and charged in connection with the said animals. However, I note that PW3 found the appellant already arrested by what he called members of the community policing. One such member is said to be Musyoka Muthusi. In my view the evidence of Musyoka Muthusi or other members of community policing is crucial to the prosecution case. It is not lost to this court that this was on 7th September 2012, three days after the animals were stolen. The circumstances surrounding the arrest of the appellant and the alleged recovery of the animals with him required proof beyond reasonable doubt. This court is alive to the legal principles that the accused person never assumes the burden of proof in a criminal case. There are doubts in my mind surrounding the manner in which the appellant was arrested and the evidence of those who arrested him before PW3 arrived at the scene is crucial.

Secondly, the trial court made mistakes during the trial. This has not been raised by the appellant but it is not lost to this court that the trial court did not comply with section 211 of the Criminal Procedure Code. After the prosecution closed its case, the trial magistrate made a brief ruling to the effect that **“The accused person has a case to answer and is put to his defence.”**

The appellant proceeded to give his evidence under oath. There is no indication whether section 211 was explained to him and the manner he chose to defend himself. After the appellant finished giving his testimony, the court gave a date for judgement without indicating whether the appellant had closed his case or whether he wished to call any witness. Section 211 is worded in mandatory terms and a trial court must ensure its provisions are complied with. This confirms to a court sitting on appeal that the accused person's rights to a fair trial have been protected.

Before concluding this matter, I wish to state for the record that I agree with counsel for the respondent that the appellant did not offer any alibi defence. He did not claim to have been at a different place than

the scene of crime.

In conclusion, it is my finding, after analyzing this case afresh that there is a missing link in evidence on the circumstances surrounding the manner in which the appellant was arrested and how the animals were allegedly recovered from him. This makes it unsafe to convict the appellant. Coupled with the errors of the trial court as stated in this judgment, lack of proof beyond reasonable doubt that the appellant is the person who stole the bull and the cow belonging to PW1 and PW2 respectively or was found in possession of the same animals leads me to make a finding, which I hereby do, that it was not safe for the trial magistrate to convict the appellant. I will and do hereby give the benefit of doubt to the appellant and allow this appeal.

The conviction is hereby quashed, the sentence set aside and the appellant set free forthwith. He shall be set at liberty unless for any other lawful cause he is held in custody. I make orders accordingly.

Dated and delivered this 15th January 2014

S.N.MUTUKU

JUDGE