



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 22 & 23 OF 2012

(From original conviction and sentence in Criminal Case No. 1301 of 2011 of the Senior Principal Magistrate's Court at Nyahururu, A. B. Mongare, SRM)

WILLIAM KIBOR CHEBII.....FIRST APPELLANT

WILSON MIKISEI CHEMITEI.....SECOND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellants William Kibor Chebii and Wilson Mikisei Chemitei (1st and 2nd Appellants respectively) were charged with the offence of stealing stock contrary to section 278 of the Penal Code (*Cap. 63 Laws of Kenya*). The particulars of the offence were that on the 24th June 2011 at Dam Ndume village in Laikipia West District within Rift Valley Province jointly with others not before the court stole 5 sheep and 2 goats all valued at Kshs. 28,000/= the property of Mary Wangeci Ngayo. They were also charged with an alternative count of handling stolen property whose particulars were that on 26th June 2011 at Kaptagat Village Olmoron Division in Laikipia West District within Rift Valley Province with others not before the court, otherwise than in the course of stealing, dishonestly retained four sheep and one goat valued at Kshs 24,000/= knowing them to be the stolen property of Mary Wangeci Ngayo.

2. The first Appellant was charged with a second count of being in possession of an offensive weapon contrary to section 11(1) of the Public Order Act to which he pleaded guilty and was sentenced to a fine of Kshs. 20,000/= or 2 years imprisonment.

3. In her judgment delivered on 8/2/2012, the trial court convicted both Appellants on counts 1 and 2 and sentenced them to 3 years imprisonment. Aggrieved by this finding, the Appellants appealed to this court by Criminal Appeals Nos. 22 and 23 of 2012 against the conviction and sentence on similar grounds of appeal that-

- 1. the learned magistrate erred in law in not giving any plausible reasons for conviction,***
- 2. the learned magistrate erred in law and fact in disregarding the evidence of identification,***
- 3. the learned magistrate erred in law and fact in disregarding the Appellants' evidence,***
- 4. the learned magistrate erred in law and fact in shifting the burden of proof to the Appellant,***
- 5. the learned magistrate erred in law and fact in relying on inadmissible evidence,***

6. that the sentence of 3 years imposed on the Appellants without the option of a fine was excessive, harsh and draconian and should be set aside

4. The appeal was opposed by the State. Mr. Omutelema, Prosecution Counsel submitted that the complainant positively identified the animals recovered in the Appellant's possession as those stolen from her. Further the Appellants' defence was not believable and did not shake the prosecution's case.
5. The prosecution case was that on the night of 24/06/2011, thieves broke into PW1's homestead and stole 5 sheep and 2 goats. She did not see the thieves as she was inside the main house while the flock was in a shelter outside. The neighbours who answered her distress call tried following the thieves but their efforts were futile. On 26/06/2011 she was informed that the stolen animals had been recovered at Kaptagat. She went to Olmoran Police Station where she identified her 4 sheep and 1 goat. The animals she recovered were not among those photographed in exhibit 1 (a) and (b).
6. PW2, PW3 and PW4 testified that their homes were broken into on 4/06/2011, 4/04/2011 and 24/12/2008 and their flock stolen. Like PW1, they did not see the robbers and could not identify them. They also found their stolen flock among those recovered from the Appellants on 26/06/2012 at Olmoran Police Station. PW2 and PW3 identified their stolen animals among those photographed in exhibit 1 (a).
7. PW5 was No. 81060538 Corporal Duncan Njuki. He testified that on 26/06/2012, he was stationed at Olmoran Police Station as a constable. He received information from Sergeant Rono that several officers had been involved in a fire exchange with stock theft suspects. He proceeded to the scene of the exchange where he found Officer Lessit Mohammed. He was informed that the suspects had managed to get away with half of stock. They followed the suspects to a Manyatta where they found the Appellants. They arrested and took them to Olmoran Police Station.
8. PW6, No. 75078507 Sergeant Solomon Rono, gave evidence similar to that of PW5. He was among the officers who went to the scene of the gunfire exchange and confirmed that exhibit 1(a) and (b) was the photograph of the flock recovered after the exchange of fire with the suspects. He also testified that one of the persons they arrested on that day had an injury from an arrow.
9. PW7 was the investigating officer. He testified that there were over 100 goats and sheep recovered and he took photographs of these animals before they were given back to their owners.
10. The trial court found that the prosecution had established a prima facie case and put the Appellants on their defence. The first Appellant gave sworn testimony while the second Appellant chose to give an unsworn statement. They denied having committed the offences they were charged with and alleged to have been arrested while answering distress calls. The trial court relying on the doctrine of recent possession, found that the prosecution had proved that the Appellants were found in possession of stolen property. She also found that the Appellants had failed to offer sufficient reason as to how the livestock had come into their possession and accordingly convicted them under Section 215 of the Criminal Procedure Code, (*Cap. 75, Laws of Kenya*).
11. I am alive to the requirement that a court sitting on first appeal is under duty to examine and evaluate afresh all the evidence adduced at the lower court with a view to arriving at its own independent conclusion whether or not to uphold the judgment of the lower court. In doing so, the court is alert to the fact that it did not have the advantage of seeing the witnesses testify so as to form an opinion on their demeanor.
12. It was established by the prosecution that on the night of 24/06/2011 thieves broke into PW1's home and stole 5 sheep and 2 goats. She did not see the thieves and was therefore unable to positively identify them. The prosecution led evidence that the stolen property was found in the possession of the Appellants at the time of arrest. The court was thus asked to infer that the stolen property was in their possession because they were in fact the robbers.
13. The principles on the doctrine of recent possession were were laid out by the Court of Appeal in

ISAAC NANGA KAHIGA alias PETER KAHIGA VS REPUBLIC – Criminal Appeal No. 272 of 2005 (U/R) which was cited, with approval in **RICHARD ODUOR ADERA VS. REPUBLIC [2010] eKLR-**

“It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to each of the suspects and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses”.

14. **Firstly** the prosecution must establish that the Appellant was found in possession of property of which they are alleged to have stolen. Section 2 of the Penal Code defines possession as follows-

(a) “be in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

15. Evidence was led by the prosecution that on 26th June 2012, some officers were involved in a gunfire exchange with robbers who had stolen cattle. The officers were unable to contain the situation and the robbers managed to get away with half the flock. PW5 and PW6 testified that on being informed of the fire exchange, they went to the scene where they found those officers and the flock that had been recovered. They pursued the robbers and found the Appellants in a Manyatta where they were arrested. To establish possession from these set of facts the onus was on the prosecution to prove that the Appellants were among the suspects involved in the gunfire exchange where half of the flock was recovered or that half the flock that was recovered was in the Manyatta where the Appellants were arrested and that they had knowledge or consented to the flock being there.

16. The prosecution evidence did not place the Appellants at the scene of the fire exchange. **Firstly**, none of the officers involved in the exchange testified to confirm whether the Appellants were among the robbers that attacked them on that day and who were in possession of the flock recovered at the scene. **Secondly**, PW5 and PW6 who confirmed that they were not involved in the fire exchange, went to the scene after the suspects had fled. It was not demonstrated that they pursued the suspects with half the flock up to the Manyatta. The chain of events from the time of exchange of fire to the pursuit of the suspects and eventual arrest of the Appellants was not continuous as to enable the court to infer that the Appellants were among the suspects engaging the officers earlier.

17. The trial court nevertheless found that the second Appellant was among the suspects involved in the fire exchange with the Police where some flock was recovered as he had a gunshot wound and therefore must have been one of the robbers. The trial court misdirected itself on this fact because the evidence of PW6 was that he had an injury from being shot with an arrow. There was no evidence that bows and arrows were among the weapons used by or against the robbers and I find that the trial court erred in making a finding on this basis.

18. Consequently, it was pertinent for the prosecution to prove whether there was flock recovered at the Manyatta where the Appellants were arrested and on which basis the court could infer that they were among the robbers involved in the fire exchange with the Police Officers and further that they stole the flock at the Manyatta and at the scene of the gunfire exchange. It was not clear from the evidence whether

there was any flock recovered at the Manyatta. PW5 only testified that - **“we went to the Manyatta where the suspects were, and found the 2 people who are before the court.”** He also did not identify exhibit 1 which contained photographs of the flock recovered in order to confirm that indeed they were recovered from the Manyatta. Similarly PW6 did not explain where the animals were recovered from and when asked to identify exhibit I he only stated **“I confirm this is the flock we recovered after the exchange of fire with the suspects”. i.e not at the manyatta** In addition, PW7, the investigating officer who took photographs did not make any distinction, between the flock recovered from both scenes. As a result I am unable to find that the prosecution proved beyond reasonable doubt that the Appellants were found in possession of the flock as alleged.

19. In addition to proving possession, the property must be positively identified by the complainant. The Appellants herein were charged with one count of stealing the 5 sheep and 2 goats the property of Mary Wangeci Ngayo. At the trial PW7, the investigating officer produced photographs he had taken of the animals alleged to have been in the Appellants' possession. PW6 confirmed that the animals photographed in exhibit 1a and b were in fact those recovered after the gunfire exchange.

20. On being shown the exhibit, the complainant testified that her stolen animals **were not** among those shown in the photographs. Although PW2, PW3 and PW4 were able to identify their stock in exhibit 1(a) they were not those of the complainant's in this case and the Appellants had not been charged with stealing or being in possession of their animals. It would be greatly prejudicial to convict the Appellants on the evidence of those witnesses because not only is the evidence contradictory to the particulars of the count, but they would be convicted of offences with which they had not been charged or answered to. Consequently I find that the complainant did not positively identify the animals alleged to have been in the possession of the Appellants and having failed to do so, the court erred in finding that the Appellants were in possession of stolen property and further inferring that they must have been the thieves thereof.

21. I also find that the trial magistrate misdirected herself at page 3 of her judgment that the Appellants were facing 3 counts of stealing stock and convicted the Appellants on 2 counts. From the charge sheet it is clear that the Appellant had been jointly convicted on 1 count of stealing stock and an alternative count of being in possession. They had been only charged with 1 count of stealing stock.

22. Finally the trial court indicated in its judgment that the first Appellant was facing a third count of being in possession of a firearm and acquitted him under Section 215 of the Penal Code for lack of sufficient evidence. Under the charge sheet the first Appellant had been charged of being in possession of an offensive weapon namely a bow and arrows for which he was convicted on his own plea of guilt. The court therefore erred in making a finding on an offence with which the Appellant had not been charged.

23. In addition I find that the First Appellant was wrongly convicted of the offence of being in possession of an offensive weapon, to wit a bow and two arrows in a public place contrary to Section 11 of the Public Order Act (Cap 56, Laws of Kenya). The said section provides-

11. Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any street or public place any offensive weapon shall be guilty of an offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding ten thousand shillings, or to both such imprisonment and such fine

24. Under Section 2 of the Penal Code a public place is defined as -

“any place to which for the time being the public or any section of the public are entitled or permitted to have access whether on payment or otherwise, and, in relation to any meeting to be held in the future, includes any place which will, on the occasion and for the purposes of such meeting, be a public place;”

25. And “under Section 3 of the Streets Adoption Act, (Cap. 406, Laws of Kenya), a “street” means -

“a highway, bridge, road, lane, footway, courtyard, alley, square or passage or any land reserved

therefor, within the area of a local authority, used or intended to be used as a means of access to two or more premises or areas of land in different occupation, whether the public have a right over it or not, and includes all channels, ditches, drains, sidewalks, bridges, culverts and other works appurtenant thereto.

26. The prosecution evidence was that the Appellants were found in possession of the offensive weapons when he was arrested in a Manyatta.

27. A Manyatta is neither a street nor a public place within the said definitions. Though the Appellant pleaded guilty to that count, I must set it aside on the grounds of illegality under Section 348 of the Criminal Procedure Code (*Cap. 75 Laws of Kenya*).

28. For those reasons and with great respect to learned Prosecution Counsel's submissions to the contrary, I find and hold that the prosecution in this case failed to prove its case beyond reasonable doubt. The Appellants were convicted on the basis of insufficient evidence. Consequently the appeals herein succeed the convictions are quashed and sentences set aside. The Appellants shall be released forthwith unless otherwise lawfully held

27. It is so ordered.

Dated, signed and delivered at Nakuru this 21st day of February, 2014

M. J. ANYARA EMUKULE

JUDGE