



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 21 OF 2013

STEPHEN GITONGA DOMIANOAPPELLANT

versus

REPUBLICRESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 24 OF 2013

NAHASHON KANYI NYUGUTOAPPELLANT

versus

REPUBLICRESPONDENT

*(Arising from the judgment of Hon. V. Nyakundi Resident
Magistrate, Nyeri in Criminal Case No. 517 of 2012)*

JUDGMENT

1. The appellants herein STEPHEN GITONGA DOMIANO and NAHASHON KANYI NYUGUTO were charged with the offence of stealing stock contrary to section 278 of the Penal code the particulars of which were that on 7th June 2012 at Solio Ranch Farm Ltd in Kieni West District within Central Province jointly stole one sheep valued at Ksh. 6000/- the property of Solio Ranch Farm Ltd.
2. The second Appellant NAHASHON KANYI NYUGUTO faced an alternative charge of handling stolen property contrary to section 322 (1)(2) of the Penal Code the particulars of which were that on the 7th day of June 2012 at Solio Ranch along Mweiga Nyahururu High Way in Kieni West District within Central Province otherwise than in the course of stealing dishonestly handled one sheep knowing or having reasons to believe it to be stolen property.
3. They pleaded not guilty to the said charges, were tried and convicted the 1st appellant on count 1 of stealing stock and the second appellant of the alternative charge of handling stolen property and sentenced to two (2) years.
4. Being aggrieved by the said conviction and sentence each of the appellant filed their separate appeals which appeals were consolidated for purposes of trial and determination.

5. The first appellant in his home grown grounds of appeal stated that the trial court erred in law and in fact by failing to hold that nothing was found in his possession that no witness connected him with the alleged offence and that the prosecution case was not proved as required in law.
6. The first appellant on 25th March 2013 through the firm of Maitai Rimita & Co Advocates filed amended petition of appeal as follows:

1. The learned trial magistrate erred in law and in fact in convicting the appellant on a charge which was defective.

2. The learned trial magistrate erred in law and in fact in convicting the appellant on a charge he did not understand and allowing the use of a language not understood by the appellant.

3. The learned trial magistrate erred in law and in fact in that he convicted the appellant on a charge that had not been proved on the required standard.

4. The learned trial magistrate erred in law and in fact in failing to consider or sufficiently consider the appellants defence and admitting inadmissible evidence and misconstruing section 25A and 111 of the Evidence Act.

5. The conviction of the appellant is against the weight of evidence and bad in law.

6. The learned trial magistrate's sentence is bad in law, harsh and excessive under the circumstances.

1. The second appellant in his grounds of appeal stated that he was convicted on contradictory prosecution evidence no proof of possession was made and that the case not proved as required in law.
2. When this matter appeared before me for hearing Mr. Rimita appeared for the 1st appellant and replied upon his written submissions. Mr. Mwaura appeared for the 2nd appellant and Mr. Cheboi for the State in opposing of the same.

SUBMISSIONS

3. On behalf of the 1st appellant it was submitted that they had filed an amended petition of appeal to the effect that the charge sheet was defective, the trial was conducted in a language the appellant did not understand, the trial court did not sufficiently consider the appellants defence admitted inadmissible evidence and passed a sentence that was excessive and harsh.
4. It was submitted that the appellant did not understand the language since he understands Kimeru while the plea was taken in Kiswahili and Kikuyu contrary to Article 50(2) of the constitution. It was submitted that the appellant alleged confession was taken contrary to section 25 A of Evidence Act it was submitted that the said confession was not admissible. It was further submitted that the trial court did not consider that the security men PW2 and PW3 had robbed the 2nd appellant Ksh. 6000/- mobile phone and identity card and that was the reason for framing up the appellants.
5. It was submitted that the sentence was bad in law, harsh and excessive since the same did not take into account mitigation, failed to consider that the appellants were first offenders and none of the appellants benefited from the crime since the sheep was recovered. Reliance was made on the case of WILSON KIMUTAI KORIR v R NAKURU HIGH COURT CRIMINAL APPEAL NO. 57 OF 2005.
6. Mr. Mwaura for the 2nd appellant submitted that the 2nd appellant was convicted on contradictory evidence and that the trial court shifted the burden of proof to the appellants. It was submitted that the prosecution case was not proved beyond reasonable doubt and that this court relied upon the statement of P.W 2 and P.W.3 who stated that confession was made by the 2nd appellant which was contrary to section 25 of the Evidence Act.
7. It was further submitted that the sheep that was brought to court was a different one and that

- whereas the sheep were counted more was found stolen. It was therefore submitted that the prosecution case was full of contradictions.
8. Mr. Cheboi for DPP submitted that the 1st appellant did not indicate that he did not understand the proceedings and that P.W.1 gave his evidence in Kiswahili and the appellant was able to cross examine the same. He submitted that the case was proved beyond reasonable doubt in that the 2nd appellant was found with the sheep and stated that it was sold to him by the 1st appellant who admitted selling the same to the 2nd appellant.
 9. It was submitted that the trial court concluded that section 25 A was not complied with but by virtue of section 111 of the Evidence Act the burden of proof is placed upon the appellant to explain facts within their knowledge. It was submitted that the sentence was not harsh since the appellants were sentenced to two (2) years while the sentence provided for is 14 years .

EVIDENCE.

10. This being a first appeal this court is required to reevaluate the evidence tendered before the trial court and to come to his own conclusion on the same though taking into account the fact that it did not have the advantage of hearing and seeing witnesses.
11. It was the prosecution case that on 7th June 2012 at 11 am P.W.1 was called by the General Manager and informed that a sheep belonging to Solio Ranch had been found by the security being led out of the ranch and that when he went to check he found the 2nd appellant having been arrested and upon checking they found that one sheep was missing and that the stolen sheep had been mistaken for sale.
12. P.W.2 JOANSIO MUKALIA 's evidence was that they followed the second appellant who had a sheep and when he was asked where he had obtained the sheep from he stated that the 1st appellant who when called to the office admitted that having sold the sheep to the 2nd appellant and produced Ksh. 2500/- from the bush where he had hidden it. This evidence was confirmed by P.W.3 CHARLES NDERITU MBOGO PW.4 CPL EVANS MURIMI and P.W.5 pc SULTAN TOO.
13. When put on their defence the 1st appellant stated that on 7th June 2012 he was informed by the foreman to release sheep from the shelter and when they were counted they were 190 in number. At around 10.30 a.m the 2nd appellant was arrested for allegedly being in possession of a sheep belonging to Solio Ranch and that they sought to be allowed to recount the sheep but it was rejected. He further stated that the sheep the 2nd appellant was arrested with had no paint mark.
14. The 2nd appellant testified that on the material day he passed through the ranch when he was arrested and his Ksh. 6000/- ID Card and cell phone taken from him and was subsequently arrested by GSU officers.
15. From the submission herein and the proceedings I have identified the following issues for determination.

a) Whether the charge sheet was defective.

b) Whether the prosecution case was proved beyond reasonable doubt.

c) Whether the sentence herein was harsh and excessive.

d) Whether the 1st appellant understood the proceedings

16. On the issue of proceedings, the court record shows that plea was taken on 6th August 2012 and interpretation was Kiswahili Kikuyu and both appellants pleaded not guilty. As submitted by Mr. Cheboi on 28th August 2012 P.W.1 Geoffrey Kamenchu testified in Kiswahili and the appellant were able to cross examine the same. P.W.2 Joanisio Mukalia and all the present witnesses testified in Kiswahili language and the appellant was able to cross examine them effectively. It is clear from the proceedings that one witness testified in Kikuyu language and the 1st appellant did not state that he was unable to understand Kiswahili. I therefore find that the appellant was not prejudiced in the use of Kiswahili language.
17. On the issue of the defect on the charge sheet no defect has been pointed out by the 1st appellant

herein and I therefore find that the charge sheet was not defective. On the issue of the sentence as submitted by Mr. Cheboi, the appellants were sentenced to serve two (2) years imprisonment whereas the one sentence provided for under the offence they were convicted of is a period of not exceeding fourteen years for each of the appellants. The sentence of two (2) years in respect of the same offence herein can therefore not be said to be harsh and excessive the fact that the appellants were first offenders notwithstanding.

18. On the issue of whether the prosecution case was proved beyond reasonable doubt, whereas the court ruled that the confession alleged to have been made by the 1st appellant was inadmissible, it is clear from the evidence of the prosecution witnesses that the 2nd appellant was found with the sheep belonging to the Ranch and he stated that the same was sold to him by the 1st appellant.
19. I therefore find that in the absence of the confession by the 1st appellant the prosecution was able to prove the case against the appellants beyond reasonable doubt and therefore the conviction of the appellants was safe.
20. I therefore find no merit on the appeal herein which I hereby dismiss.

Dated signed and delivered at Nyeri this 30th day of May 2014.

J. WAKIAGA

JUDGE

Court: Judgment is read in the open court in the absence of the 2nd appellant and his advocate.

Warrant of arrest issued against the 2nd appellant to complete the remaining part of his sentence.

J. WAKIAGA

JUDGE

30/5/2014