



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 94 of 2012

FRANCIS KINYUA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged and convicted of the offence of stealing contrary to Section 278 of the Penal Code (*Cap. 63, Laws of Kenya*), and was sentenced to seven (7) years imprisonment. Aggrieved with both his conviction and sentence, the Appellant came to this court on appeal and raised the following grounds of appeal -

(1) that the trial magistrate did not consider his sworn defence,

(2) that there was no evidence to support the trial court's conclusion that he was the owner of the shamba where the exhibit was found without any document to prove that the shamba was his;

(3) that there was no evidence that the woman who was found with the exhibits was his wife,

(4) that there was no evidence to suggest that he was at the shamba where the exhibit was found,

(5) there was no evidence that he was found with the complainant's land.

And for those reasons the Appellant asked the court to consider his appeal quash his conviction and set aside his sentence.

When the appeal came for hearing before me on 19th March 2013, the Appellant reiterated the above grounds and asked the court to look at the evidence and again denied committing the offence, and stated that there was another person in that area where the stolen cow was slaughtered, and that he was arrested in another farm. The Appellant was also emphatic that nobody found him with the stolen cow and no exhibits were found with him. He prayed that his appeal be allowed.

Ms Idagwa, learned State Counsel did not oppose the appeal. Her submissions were that -

(1) meat was found at a certain house by PW1 and PW2 and the Police PW3 and PW4,

(2) the name of the lady was not obtained and no statement was recorded from her,

(3) there was contradiction in the evidence of PW1 as to where the Appellant was found, near the scene, or near the house where the meat was found,

(4) there was also contradiction as to who the Appellant, PW2, referred to in evidence as Kinyua Kingori, whereas the person charged, the Appellant is known as Francis Kinyua Mwangi,

(5) PW2 testified that he knew where the calf went missing and yet the appellant was charged.

Again for those reasons learned State Counsel asked the court to allow the appeal, quash the conviction and set aside the sentence.

I have considered the submissions by both the Appellant and learned State Counsel. It is however the statutory duty and dictates of precedent that as the first appellate court, this court is bound to reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice, and it is not sufficient for this court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions (**NGUI VS. REPUBLIC, [1984]**

KLR 729).

In this regard, I have considered and re-evaluated the prosecution's evidence and in particular the evidence of PW1 and PW2. I will commence with the evidence of PW2. He was the herdsman for ten (10) people in the area, three of the animals (cows), a cow and 2 calves belonged to PW1.

PW2 testimony was that on 17.01.2012, after grazing the animals, on his way home – returning the animals to various owners he passed by the home of the Appellant, and that two cows were left behind and he went to pick them later and when he found the Appellant with the two cows away from the area where he had left them, and that the Appellant had driven the cows away from where he had left them, and that the Appellant had warned him not to graze the cows in that area.

Even after he had driven away the last cows, he realized that one calf was missing, and he informed the complainant (PW1). They continued the search for the missing calf on the following day 18.01.2012, and PW2 found some animal stomach waste and skin in an open field near the home of one “Kinyua Kingori”. He consequently alerted PW1 and together informed the Police (PW3 & PW4) who on 19.01.2012 mounted a search in the area and found “a lot of meat, skin and hooves” in the house near the open field where the stomach remains and skin of the calf were first reported found by PW2.

According to the evidence of PW1, the Appellant was found near the area and that the Appellant offered her shs 5,000/= **“I told him that the bull was not worth Ksh 5,000/=.** **He told me that we could do an agreement on how he could repay.”**

PW4 testified that when he questioned the Appellant after arresting him, the Appellant said *“that he found the calf dead and he skinned it.”*

Though PW5 contradicted this evidence that upon questioning the Appellant and his co-accused denied having stolen and slaughtered PW1's calf. PW5 also testified that the open field and the house of the Appellant was about 500 m away and 300 m away from that of his co-accused.

When put to their defence the Appellant gave sworn evidence and denied the charges completely. The Appellant's co-accused, Zacharia Kingori gave an unsworn statement and denied the charge.

I have considered the prosecution as well as the evidence of the Appellant and his co-accused and set out on the paragraphs following my opinion and conclusion on the appeal.

The Appellant was charged with the offence of stealing stock contrary to Section 278 of the Penal Code. Stealing is defined by Section 268 of the Penal Code as -

“... any person who fraudulently and without a claim of right takes away anything capable of being stolen, or fraudulently converts to the use any person, other than the general or special owner thereof, any property is said to steal that thing or property.”

And a person -

“.. who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with ... intent permanently to deprive the general or special owner of the thing of it.”

There was no evidence that the Appellant stole the calf. The evidence was that PW1 lost her calf which was being herded by PW1. The next day, PW2 is said to have found a carcass and a skin in an open field, 300 – 500 metres from the house of the Appellant. A report was made to the Police who upon investigations found a lot of meat, the skin and hooves in a house which was being occupied by a woman who was said to be the wife of the Appellant.

The Appellant complains that there was no evidence, such as a marriage certificate, that the woman was his wife. She may or may not have been his wife, and the Police did a poor job of investigations to find out why there was a lot of meat in her house. With the hooves of the calf, it was reasonable to conclude that the meat belonged to the lost calf and not some other animal.

This finding disclosed the commission of another offence, not under Section 278 of the Penal Code. What the evidence disclosed was the killing of an animal with intent to steal under Section 289 of the Penal Code. Section 289 says -

“289.Any person who kills any animal capable of being stolen with intent to steal the skin or carcass, or any part of the skin or carcass, is guilty of an offence and is liable to the same punishment as if he had stolen the animal.”

It was the uncontroverted evidence of PW1, the owner of the lost calf that -

“... we found the 1st accused at the point. When I asked him he said that he had Ksh 5,000/=. I told him that the bull was not worth Ksh 5,000/= ...”.

When cross-examined by the Appellant, PW1 responded thus: -

“You were near the home. We found your wife in the house and you were called. You were not the herder but you are the one who stole. The lady in the house said, she was your wife.”

The Appellant adduced no evidence to controvert that he had asked PW1 to settle the issue at Sh 5,000/= or that the lady in the house was not his wife or at least his companion. PW3 also confirmed the lady found in the house confirmed that the house was their home.

It is thus clear that the Appellant was the person primarily responsible for the slaughter of PW1's calf and hoarding the meat in his house, no doubt awaiting an opportune moment to share it out by way of sale. For those reasons I do not agree with the submissions by learned state counsel.

In the circumstances, I find the Appellant guilty of the offence of killing PW1's calf with intent to steal, and convict him accordingly. As the punishment under Section 289 is same as that for stealing stock under Section 278, that is fourteen (14) years, I will maintain the seven (7) years given by the lower court.

In the premises, I confirm the said sentence and dismiss the Appellant's appeal.

It is so ordered.

Dated, signed and delivered at Nakuru this 26th day of April, 2013

M. J. ANYARA EMUKULE

JUDGE