



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 92 OF 2012

(From original conviction and sentence in Criminal Case No. 2194 of 2011 of the Senior Principal Magistrate's court at Nyahururu – L. M. WACHIRA, PM)

JOHN LOKTANO ERENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This is an appeal by John Loktano Ereng from the decision of L.M. Wachira, Principal Magistrate, Nyahururu dated 26/4/2012. He was found guilty and convicted of the offence of stealing stock contrary to **Section 278** of the **Penal Code** and he was sentenced to five years imprisonment. He was acquitted of the alternative charge of handling stolen property contrary to **Section 322(2)** of the **Penal Code**. Aggrieved by the conviction and sentence, the appellant preferred this appeal. The appeal is premised on the following grounds:-

- 1. That the prosecution failed to call two material witnesses;**
- 2. That no investigations were carried out;**
- 3. That the prosecution failed to produce the exhibit.**

The appeal was opposed by Mr. Chrichir, the Learned Counsel for the State. Mr. Chrichir submitted that the appellant was found in possession of the 4 stolen goats which had been stolen on 2/11/2011; that the appellant was trying to sell them to PW2 who became suspicious because the appellant was selling them at a very low price of Kshs.7,000/- instead of Kshs.14,000/- and PW2 had heard of a theft of goats the night before. PW2 informed the complainant (PW1) who went to the police station where the goats were and she identified the goats to be hers; that the appellant was found in possession of the goats on 3/11/2011 and was therefore in recent possession of the said goats; that the court considered the defence and rightly rejected it. Counsel defended the sentence meted on the appellant because the offence is rampant.

Brief facts of the case before the trial court are as follows: Rose Kemei (PW1) is a resident and farmer in Kaptitu, she keeps both goats and cows. On 2/11/2011, her herdsman reported to her that her two goats, a brown one and another one white and black had been lost when out grazing. She reported to the Administration Police and they went in search of the goats. Her goats had marks on the ears. Later, her neighbour (PW2) called to inform her that he had seen a goat with marks on the ears like hers, being sold

at Rumuruti. She rushed to Rumuruti, found the neighbour who had called her had reported to police and the person who was found with the 4 goats had been arrested. She identified the person who was arrested as the appellant. She identified the goats from the marks on the ears.

PW2, Haron Ruto, a livestock farmer in Three Point told the court that on 3/11/2011, he was walking to Rumuruti Livestock Market when he met the appellant with four (4) goats which the appellant wanted to sell. They negotiated and the appellant asked for Kshs.7,000/- for all of the goats. PW2 became suspicious because the price was too low. He noted that the ears of the goats were trimmed and he was aware that PW1's goats had been reported missing and PW1's goats had trimmed ear lobes. He called PW1 and informed her of what he had seen. He got help to take the appellant to the police station with the goats. PW1 later went to the police station, identified the goats and they were photographed.

PC Mohamed Diba of Rumuruti Police Station was at the station on 3/11/2011 about 9.00 a.m. when PW2 went there accompanied by the appellant and members of the public who alleged that the appellant was trying to sell goats which were suspected to be stolen. Later, PW1 came to the station and identified the goats as hers. The goats were photographed and he produced the photographs as PEx.1.

The appellant was called upon to defend himself and in his unsworn defence, said that he went to Rumuruti Livestock Market, where one Wachira takes livestock to him for branding (marking). That Wachira took four (4) goats to him and two people found him with the goats and claimed they belonged to them and took him to the Police Station. The goats were photographed and he was charged.

This being the first appeal, this court is required to consider all the evidence and the law afresh and draw its own inferences and conclusions but always bear in mind that this court did not have an opportunity to see the witnesses testify in order to assess their demeanor or credibility (see **Ajode v Rep 2(2004)**).

I have reviewed both the prosecution and defence evidence. Although the appellant alleges that two witnesses were not called by the prosecution, he did not specify which ones. One person who was mentioned but not called as a witness is PW1's herdsboy, Kibyegon who PW1 said was with the goats when they went missing. He should have been called to explain under what circumstances the goats went missing.

The other person mentioned in the proceedings is Wachira whom the appellant claimed was the owner of the goats. It is the appellant who introduced the name of Wachira in his defence. At no time during the hearing of the prosecution case, did the appellant mention that the goats belonged to one Wachira. It is the appellant who knew Wachira and had he mentioned Wachira at the beginning of the case, the prosecution would have endeavoured to call him. However, I find the introduction of Wachira in the defence is an afterthought and there was no way the prosecution would have called him as a witness.

There is no specific number of witnesses that are required to prove a fact. It can be one witness or more (**Section 143, Evidence Act**). The prosecution is, however, under a duty to call all material witnesses to their case whether or not the evidence will be adverse to their case. In the instant case, the evidence of Kibyegon may not have made any difference to the prosecution because there is no dispute that the appellant was found in possession of the goats. He admits it. The goats were not his. The goats were positively identified by PW1 from the marks on the ears. It is partly because of the marks on the ears that made PW2 got suspicious of the appellant. The appellant's explanation that the goats belonged to Wachira is not plausible or believable for the reason that PW2 said the appellant was trying to sell them at a throw away price. Secondly, the appellant alleged the goats belonged to one Wachira whom he introduced in his defence. That was an afterthought.

The appellant complains that the goats were not produced in evidence as exhibits. The goats were photographed and the photographs were produced in evidence by PW3. In my view, the production of the said photographs by PW3 was irregular because the Scenes of Crime Officer who took them should have testified and produced them under **Section 78** of the **Evidence Act**. If the officer could not be availed without delay, the prosecutor should have sought permission from the court to have photographs produced. There is nothing on record to show that the court's leave was sought. But that

notwithstanding, I find there to be no miscarriage of justice for the failure to have the photographs properly produced in evidence because, the appellant admitted to having been found with those particular goats. Secondly, the appellant never requested for production of the goats in evidence. It is a normal practice for the police to photograph such exhibits and release them to the owners because there is no storage for animals at the police station. If the appellant wanted the actual goats produced, he should have made an application to that effect during the hearing of the case. Besides, it would not have served any purpose for the goats to be produced because the appellant does not lay any claim over them nor did anybody else come up to claim them except PW1.

The appellant did not disclose the nature of the investigation that the police should have carried out. In my view, there was sufficient evidence on record to base a conviction upon because the appellant was found in recent possession of the goats. The goats were stolen on 2/11/2011. The appellant was found with them on the next morning of 3/11/2011 while trying to sell them.

Once it was established that the goats in the appellant's possession had been recently stolen, the burden of proof shifted to him to explain how the goats got into his possession. This is because the facts as to how he came to possess the goats were peculiarly within his knowledge and pursuant to the provisions of **Section 111(1)** of the **Evidence Act, Cap 80**, the appellant had to discharge that burden. The Section stipulates:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemptions from, or qualifies to the operation of the law creating the offence with which he is charged, and the burden of proving any fact especially within the knowledge of such person is upon him.”

In **Hassan v Republic (2005) 2 KLR**, the court held as follows:-

“Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver.”

The appellant's allegation that Wachira had given him the goats to brand or mark is not satisfactory given that that allegation came as an afterthought having not mentioned Wachira to the police or during the hearing of the prosecution case. The defence is a sham and is rejected.

Before I conclude, I must observe that the trial court acquitted the appellant of the alternative charge which is an error. Once the court convicted the appellant on the main charge, the trial magistrate should have left the alternative charge in abeyance so that if on appeal, the court found otherwise, it may have convicted on the alternative charge.

The net result is that the appellant was found in recent possession of the goats. He must have stolen them and the trial court arrived at the correct finding. I confirm the conviction. The maximum sentence under **Section 278** of the **Penal Code** is 7 years. The appellant was sentenced to 5 years, after the court was invited to consider the fact that the offence is rampant. In the circumstances, I find the sentence to be fair and I have no reason to interfere with it. Consequently, the appeal is hereby dismissed

DATED and DELIVERED this 19th day of July, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant in person - present

Ms Idagwa for the State

Kennedy – Court Clerk