



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 4 OF 2013
CONSOLIDATED WITH CR APPEAL NO.5 OF 2013

ZAKARIA KIUNJURI NYAG.....1ST APPELLANT

BENJAMIN MUYA MURAGE2ND APPELLANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Criminal Case No.8 of 2012 at the Principal Magistrate's Court at Siakago by Hon. A.N. MAKAU - SPM on 4/2/2013

J U D G M E N T

ZAKARIA KIUNJURI NYAGA & BENJAMIN MUYA MURAGE the Appellant was charged with the offence of stealing contrary to section 278 of the Penal Code.

The particulars as stated in the charge sheet were as follows;

ZAKARIA KIUNJIRU NYAGA & BENJAMIN MUYA MURAGE: On the night of 28th and 29th day of December 2011 at Ntarawe sub-location in Mbeere South District within Embu County jointly stole one bull and one goat valued at kshs.19,000/= the property of PETER NDIRANGU IRUNGU.

They denied the charge and the matter proceeded to full hearing. They were convicted and sentenced to serve four (4) years imprisonment each. And being aggrieved by the Judgment they have filed this appeal citing the following similar grounds;

1. *The Appellants pleaded not guilty before the trial Magistrate.*
2. *That the learned trial Magistrate erred in both law and facts when he failed to consider that PW1 did not identify the Appellants at the scene of crime.*
3. *The learned trial Magistrate erred in law and fact when he convicted the Appellants relying on the prosecution evidence which was inconsistent and uncorroborated.*

4. ***The learned trial Magistrate erred in law and facts when he failed to consider the fact that his constitutional rights were violated.***
5. ***The learned trial Magistrate did not give cogent reasons as to why the Appellants' defence was rejected.***

The facts of the case are that on 28/11/2011 he tethered his goats and bulls and a white cow at his home. One bull was white while the other was brown. The next morning he found the white cow and one goat missing. He checked all over for them in vain. He then reported to the area chief. The next day he went to Kiambere market where he saw his bull which he identified by colour. This was on 2/1/2012. PW3 bought the said bull from the two Appellants on 29/12/2012. This was in the presence of PW4. PW3 later sold the bull to one Mbogo who was found with the bull on 2/1/2012. PW5 received a report of theft of a bull and goats on 2/1/2012. The 1st Appellant in his unsworn defence denied the charge. The 2nd Appellant also unsworn denied the charge and explained his moments from the date of the alleged offence upto the finding of the bull.

When the appeal came for hearing the Appellants presented the Court with written submissions explaining their grounds. They have stressed the fact that they were not arrested with the bull.

M/s Aluda for the State opposed the appeal saying PW2's lost bull was found with PW3 who led to the arrest of the Appellants. His evidence was supported by that of PW4. And that the defence of the Appellants was denials.

This is a first appeal and this Court is enjoined to reevaluate all the evidence adduced. I am alive to the fact that I did not see nor hear the witnesses. The Court of Appeal in the case of ***KINYANJUI & ANOTHER –V- REPUBLIC [2004]2 KLR 364*** held;

1. ***On a first appeal in criminal cases, the High Court is also mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment.***
2. ***In reaching its decision, the High Court has to put in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore could not be expected to make any findings as to the demeanour of the said witnesses.***

I have considered the submissions of the Appellants and the State. I have equally considered the grounds of appeal and the evidence on record.

Ground 4

The Appellants were arrested on 5/1/2012 and arraigned in Court on 6/1/2012. I therefore find no violation of their rights. This ground fails.

Grounds 2, 3 and 5 will be considered jointly as the same touch on the evidence adduced in Court. The Complainant has stated that he discovered his missing cow on 29/12/2011. PW3 who sells cattle was on his way to Kiambere market on 29/12/2012 when he met the two Appellants heading to the said market with a bull. He did not know them. PW4 was passing by. He knew them. They negotiated and PW3 bought the bull at kshs.13,500/= from them. They followed him to the market and delivered the bull to him. On 30/12/2011 PW3 sold the bull at Mutuobare market to one Mbogo. Five days later he was informed that the bull he sold to Mbogo was stolen property. Together with Police Officers they went to look for Mr. Kinyua who was arrested and taken to the chief's camp. They found Kiunjuri. They were arrested. PW4 was called to the chief's camp to confirm whether the arrested people were the ones who sold the bull to PW3. In his evidence at page 11 lines 13-14, PW2 states;

“I found the white cow missing and one goat was also missing”

It is also clear that PW2 had tethered two (2) bulls and a cow. He states at page 11 lines 10-11;

“I had tethered three, two bulls one brown and a white one. The cow was whitish”.

It was therefore imperative for the trial Court to get it right from the word go whether what was missing was the white cow or white bull as the two can never be the same. This was not cleared. All that PW2 told the Court was that when he went to the market on 21/1/2012 he found his bull. At page 11 lines 20 – 24;

“At about 1pm while at the market I saw my bull. I knew it by its colour. That was on 2/1/2012. I recognized it myself, I was with my neighbour called Njuki. We told those how the bull that it was ours but he said that he had bought it. “

What made PW2 identify this bull as his or his missing one after saying he had lost a cow? What would distinguish this bull from any other? It is surprising that PW3 could describe the bull he bought. At page 12 lines 21-22 he states;

“The bull was white and had a black spot on the neck”

And even PW4 describes the bull he saw as follows at page 14 lines 15-17;

“The 1st accused was the one negotiating the price, the bull was whitish and some blackish/grey colour on the neck - hump”.

The descriptions by PW3 and PW4 are so distinct from the description by PW2 who is the alleged owner of the same. Infact in his submissions the 1st Appellant stated that the missing animal is not the one in the photos produced in Court. And I agree with him for the following reasons;

1. PW2 said what was missing was a cow. What is in the photos produced is a bull.
2. He also said the missing cow was white in colour. The photo shows a whitish/greyish cow with loud black around its head and neck.

The person who was found with this bull was not a witness before this Court. How could the Court confirm that indeed the said Mbogo had the bull and it was sold to him by PW3.

Finally is the issue of identification. PW3 did not know the 1st and 2nd Appellant prior to this incident. PW4 is said to have known the 1st Appellant and it is him who assured PW3 of safety as he dealt with them. This PW3's evidence at page 13 lines 2-9;

“The following day we went looking for Kinyua whom we found home and he was arrested. We took him to the chief's office where we found Kiunjuri. They were arrested. I had not known the two prior my buying the bull from them. The bicycle rider confirmed to me that he knew them and I should not worry or have a problem transacting with them. I negotiated with 1st accused about the price of the bull. 2nd accused was together with him and was saying that the bull was for 1st accused and he should not have any worries”.

On the other hand PW4 had this to say at lines 14 lines 12-15;

“One of them by name Kiunjuri called me by my name – Nyaga, one person who was a motor cycle was buying. The buyer asked me if I knew 1st accused and I told him that I knew him.”

And in cross-examination by 1st Appellant at page 14 lines 1-3

“I gave the buyer of the bull as Kiunjuri. I know you physically and by your name as Kiunjuri. I did not know how much money you sold the bull at. I stopped because you called me to confirm to Kiunjuri that I knew you”.

From the above extracts one can clearly see that there is a confusion between who Kinyua and Kiunjiri was. PW3 also appears to be a Mr. Kinyua. It's not clear who led to the arrest of Kinyua and/or

Kiunjuri. One thing is however clear that PW4 was called to the chief's office to confirm if both Appellants were the people who sold the bull to PW3. PW3 himself did not know the 2nd Appellant. How did he have him arrested at his home? PW5 who was the investigating officer and arresting officer stated that PW3 in the company of an AP went and arrested the 2nd Appellant and brought them to the Kiambere police station. This cannot be true because PW3 found the 1st Appellant already arrested. My analysis of this evidence clearly confirms that the identification of the stolen animal and of the Appellants was wanting. Secondly the identification of the Appellants was not properly conducted.

I therefore find their conviction to be unsafe. I allow the appeal and quash the conviction. The sentence is set aside. The Appellants to be released unless otherwise lawfully held on separate warrants.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 17TH DAY OF OCTOBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

In the presence of;

M/s Ing'ahizu for State

Appellant

Mutero/Kirong – C/c