



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.4 OF 2013

Appeal against conviction and sentence of Resident Magistrate at Mwingi (V.A Otieno, RM) in Mwingi Senior Resident Magistrates Court Criminal Case No. 23 of 2012

NGUI MWANGANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Ngui Mwangangi, the appellant, was initially charged with conveying suspected stolen property to section 323 of the Penal Code. It was alleged in the particulars that on 10th January 2012 at Tyaa area, Mwingi Central Location in Mwingi Central District within Kitui County, jointly with another not before the court, having been detained by No. 65493 CPL Daniel Tallam as a result of the exercise of powers conferred by section 26 of the Criminal Procedure Code were found conveying two female goats reasonably suspected to have been stolen or unlawfully obtained.

The appellant faces a second count of preparation to commit a felony contrary to section 308 (1) of the Penal Code. It was alleged that on the same date and place as in count 1 he was found with a dangerous weapon namely a knife in circumstances that indicated that he was so armed with intent to commit a felony namely theft.

The plea was taken on 11th January 2012 and after a plea of not guilty was entered the case was set down for hearing on 14th February 2012 on which date the prosecutor substituted the charges. The substitution affected the first count only which was substituted with Stealing Stock contrary to section 278 of the Penal Code with count two remaining the same. The particulars read that between the nights of 9th and 10th January 2012 at unknown time at the Mwingi Township, Mwingi Central District within Kitui County jointly with another not before the court stole two female goats valued at Ksh. 6000 the property of Swabah Mohamed.

After a full hearing the trial magistrate found both counts proved, convicted and sentenced the appellant to serve one (1) year on Count 1 and four (4) years on Count 2 both sentences to run concurrently.

The appellant was aggrieved by this sentence and has come before this court on appeal. He has raised the following grounds of appeal:

- i. **The evidence is inconsistent.**
- ii. **The complainant did not know who had stolen his goats.**
- iii. **The evidence was false.**

iv. The appellant's defence was overlooked.

To my understanding the grounds of appeal can be summarized under issue surrounding the evidence against the appellant, his identification as the one who stole the goats and his defence having been ignored by the trial court. He made brief oral submissions in support of the grounds of appeal.

The appeal is opposed by the state. Unfortunately the learned state counsel misapprehended the charges against the appellant. He submitted as though the appellant had been charged with conveying stolen property under section 323 of the Penal Code which required the person so found with conveying such property to give an account to the satisfaction of the court how he came by such property and that under this section the complainant need not be known. This was the initial charge but it had been amended to stealing stock.

The learned state counsel however submitted that the prosecution proved its case in the lower court and urged this court to uphold the conviction and sentence. He submitted that the difference of one hour between the evidence of the two police officers is not fatal to the prosecution case.

Swabah Mohammed Ali, PW1, is the complainant. He locked his goats in at his farm on 9th January 2012 but found three of them, two female and one male, missing the following morning. A neighbour later informed him that his male goat had been spotted. He testified that later his three goats returned home by themselves.

The second witness was Police Constable Tallam, PW2. He told the court that he had been manning the police road block near Tyaa River in Mwingi Town when on 10th January 2012 they met two people, one being the appellants, with goats. They stopped them and asked them to identify themselves and prove ownership of the goats which the two claimed to have bought. After failing to prove ownership the officers detained the goats and arrested the appellant while the other person escaped. On searching him, the appellant was found with a knife which police took into custody. PW2 further testified that on 12th January 2012 the complainant reported theft of his animals and clothes.

Police Constable Patrick Mutuku, PW3, puts the time as 8.00am when he and PW2 spotted two people who looked suspicious with two goats. According to PW3 the knife found on the appellant had blood and goat hair on it.

The appellant puts the date when he was accosted by the police as 13th January 2012. He said that the police asked him where he lived; that he took them home from where they recovered a knife from him and arrested him. On cross examination he admitted to have another case of stealing goats. He denied that he knew the complainant.

I have considered the evidence adduced in the lower court. I propose to examine and evaluate the evidence of the three prosecution witnesses. PW1 did not in his evidence mention reporting the theft of his goats to the police on 12th January 2012 or any other date. All he said is that he found the goat pen open in the morning and found three goats missing. He did not tell the court that he found his goats stolen but missing. The evidence of PW2 that the complainant reported the theft to the police on 12th January 2012 cannot be true unless the complainant decided not to disclose that part of very crucial evidence to the trial court.

Secondly, PW1 did not testify as to how the photographs he identified in court allegedly showing his goats were taken and by whom. Neither did PW2 and PW3 tell the court how the photos were taken and by whom. PW2 and PW3 did not tell the court what happened to the goats. PW2 said they detained the goats but did not say when they released them to PW1. PW1 said the goats returned home by themselves, meaning no one was driving them home. He did not clarify when this was.

The evidence touching on the 1st count does not show that the goats were stolen and if so, whether it is the appellant who was found with them. Given that PW1 told the court that the goats returned home by

themselves, this court doubts the evidence of PW2 and PW3 that they detained the goats because then their evidence would have shown that the goats were photographed, the owner identified and that owner proved ownership of those goats before they were released to him. There is no such evidence.

On count two, the two officers testified to searching the appellant and finding a knife in his trouser. They decided to charge him under Section 308 (1) of the Penal Code. This section provides that:

Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.

The particulars given under count two state that the appellant while not at his place of residence was found armed with a dangerous weapon namely knife in circumstances that indicated that he was so armed with intent to commit a felony namely theft. When someone is found at a place that is not his abode and is found with an article for use in the cause of or in connection with the offences specified in that section he is charged under section 308 (2) of the Penal Code. This shows that the police were not sure what offence, if any, the appellant had committed.

This confusion in the offence the appellant is alleged to have committed leads this court to again doubt the truth in this case. The evidence of the knife is contradictory. PW2 did not mention that the knife had blood and goat's hair on it. That was the evidence of PW3 alone yet both officers are alleged to have been at the same place at the same time.

I find further contradictions in the evidence. PW1 did not testify to losing any clothes to any theft. Yet PW2 testified that PW1 reported the theft of goats and clothes on 12th January 2012.

On my own evaluation of this evidence, I come to one conclusion that the prosecution did not prove their case beyond reasonable doubt. It is true the evidence is inconsistent. I also find it incredible as highlighted in this judgement. There are doubts left in my mind that the events happened as narrated in court by PW2 and PW3.

On the part of the trial magistrate I fault him for flouting procedure. He did not indicate what language the witnesses testified in. He did not indicate whether he complied with section 211 of Criminal Procedure Code and he added his own evidence by stating that the appellant was found with a long knife when no such evidence was given to him. I also fault the trial magistrate for seemingly being influenced by the fact that the appellant had other criminal cases pending before the court. Each case must be handled separately and unless the evidence in one case is relevant to the other, the fact that one has another criminal case in court does not mean they committed the offence under enquiry.

I wish also to comment on the sentences meted out to the appellant. While section 278 of the Penal Code does not give the lower limit of the sentence and therefore one (1) year may seem appropriate, section 308 (1) gives a minimum of seven years and maximum of fifteen years. If this case had been proved, the sentence of four years would have been illegal.

After considering the grounds of appeal and the submissions and after examining and evaluating the evidence afresh I find existence of doubts in this case in both counts. The benefit of these doubts goes to the appellant. Consequently, this appeal must succeed. I hereby allow the appeal, quash the conviction and set aside the sentence. I order immediate release of the appellant from custody unless for any other lawful cause he so held. I so order.

Dated, signed and delivered this 16th day of December 2013.

S.N.MUTUKU

JUDGE