



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO 43 OF 2013

SAMUEL KIMANZI MUSYOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

APPEAL FROM THE ORIGINAL CONVICTION AND SENTENCE BY

THE PRINCIPAL MAGISTRATE AT KYUSO (MR. B.M.
MARARO, PM) IN CRIMINAL CASE NO 1 OF 2012.

Judgement

The appellant, Samuel Kimanzi Musyoka, was charged with stealing stock contrary to section 278 of the Penal Code. It is alleged that on the night of 20th and 21st December 2011 at unknown time at Ndoos Location Kyuso District in Kitui County he stole one male goat valued at Kshs 4,500 the property of Esther Mukola Mwathe.

The facts are that on 20th December 2011 Esther Mukola, PW1, returned goats to the boma for the night but found one goat missing the following day. She started searching for it. She decided to go to Mwingi because it was a market day. She found the goat among what she referred to as Somali goats. She identified it by its mark and the Somali man with the goat showed her the appellant as the man who had sold the goat to Kyuso Police Station where these charges were preferred against him.

The appellant gave his defence to the lower court that on 20th December 2011 he went to Kamuw'ongo market and on 21st December 2011 he went to Mwingi market; that on 22nd December 2011 he went to Kiambere market and returned home on 24th December 2011; that he was arrested later at Kamuw'ongo. He said he was taken to the Administration Police. He stated that while there Philip Mutua Mwanza, PW2, was called and went to the AP Camp. He was asked if the appellant was the one and PW2 said it was him after which he was taken to Kyuso Police Station with a goat he did not know about.

The trial court found the case proved and convicted the appellant. He sentenced him to three year's imprisonment.

In his petition of appeal, the appellant has raised five grounds of appeal but to my understanding all the grounds challenge the evidence of the prosecution witnesses. He claims that the Somali man who is alleged to have pointed out to the appellant as the persons who sold him the goat was not summoned to testify; that the evidence of PW1 and PW2 is untruthful because the appellant was not arrested at Mwingi but at Kamuw'ongo; that the evidence of the three witnesses does not corroborate each other and that the trial magistrate did not consider the appellant's defence of alibi.

The appellant submitted in support of the grounds of appeal that the alleged Somali man was not called as a witness; that he was not arrested at Mwingi; that PW1 mentioned one Kimanzi and one Mutiso who had been mentioned by one Komo in connection with the stolen goat and that the said Komo was not summoned to testify. He further submitted that the case was investigated by PW2 who is PW1's son and therefore the two, mother and son could have fabricated this case.

The appeal was opposed by the state. The learned state counsel Mr. Orwa submitted that the appellant admitted to stealing the goat after he was confronted by PW2 and they started negotiating in order to reconcile; that the appellant has not challenged that evidence. He submitted that the prosecution proved the case beyond reasonable doubt and the trial magistrate was correct in convicting and sentencing the appellant.

I have carefully examined this evidence critically. From the evidence of PW1 it appears that the appellant was arrested at Mwingi after the Somali man the appellant is alleged to have sold the goat pointed at him. PW1 told the court that when she went about looking for her goat, she met a man known as Komo who informed her of people who had went on a motorcycle with a goat and that man, Komo, told her that the people were Kimanzi and Mutiso. Who is Kimanzi and who is Mutiso? The evidence of Komo is crucial to this case, yet he was not summoned as a witness.

Secondly the alleged Somali businessman who is alleged to have been found with the goat is also a crucial witness. He is said to have pointed out at the appellant yet it is not shown in evidence that the appellant was arrested at Mwingi.

From the evidence of PW2, it is clear that the appellant was not arrested at Mwingi. He says the appellant was arrested after he brought the number of the OB containing the report of the theft from Kyuso Police Station. This is when the appellant was arrested. PW2 said he was told the appellant is the one who had stolen the goat but he did not identify who told him.

On my own evaluation, the evidence in this case is not clear. From the charge sheet it is clear that the appellant was arrested on 29th December 2011. The person who arrested him is not disclosed. The arresting officer's evidence was crucial to ascertain the circumstances under which the appellant was arrested and who identified him to the arresting officer.

I find that the evidence of crucial witnesses, namely, the Somali man who is alleged to have bought the goat from the appellant; the person named as Komo who is said to have seen two men carrying a goat on a motorcycle and the arresting officer were not summoned to testify. Their evidence would have been valuable to prosecution case.

As far as this court is concerned, I do not find any evidence connecting the appellant with the offence. PW3 did not tell the court who informed him that the appellant fled when he saw PW1. The record does not show this evidence coming from PW1. Her evidence was as follows:

“I took a motorcycle to Mwingi and found it among Somali goats. I said it was mine. I showed them my mark. He said he shows me the seller (sic). He was arrested by the public. I took my goat. Komo told me it was Kimanzi and the other Mutiso (sic). It was a market day at Mwingi and I therefore decided to go to Mwingi. The Somali told me he saw the person who sold him the goat. When my son came he continued investigating and negotiating.”

I have read the judgement of the lower court and I find the trial magistrate in error in finding that the appellant and another person were arrested after the Somali man identified them as the people who had sold the goat to him. There is no such evidence from the PW1. The trial magistrate is also in error in finding that the evidence of PW1 is corroborated by that of PW2. This is not true. Again it is not true that the prosecution evidence is consistent or overwhelming.

I have highlighted the shortcomings in this case and omission to call crucial evidence to connect the appellant with this offence. I find I have doubts in my mind and I find the evidence insufficient to prove

beyond reasonable doubt that the appellant stole the goat.

I will, and do hereby, give the benefit of doubt to the appellant and allow this appeal. The conviction is quashed and sentence set aside. He is to be set free forthwith unless for any other reason he is held in custody. I make orders accordingly.

Dated, signed and delivered this 4th day of December 2013.

S.N.MUTUKU

JUDGE