REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 175 OF 2008

CONSOLIDATED WITH CRIMINAL APPEAL NO.242 of 2008

LESIIT J.

ROBERT KABERIA.....1ST APPELLANT

LUKA MUTHALIE.....2ND APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in MAUA SRM'S case No. 242 of 2008 – S. Mwendwa (R.M.)

J U D G M E N T

The Appellants Robert Kaberia 1st Appellant and Luka Muthalie were jointly charged with one count of stealing contrary to section 275 of the Penal Code. The particulars of the offence were that the appelants jointly stole miraa valued at Ksh.5000/-
Both were convicted for the offence and sentenced to three years imprisonment. They have since served the sentence but desired to prosecute their appeals. The appeals have been consolidated having come from the same trial.

The appellants have raised similar grounds of appeal which I summarize as follows:

One that the evidence of the prosecution was contradictory and could not sustain a conviction;

Two the learned trial magistrate erred in law and fact in failing to find that the 1st appellant had a claim of right over the miraa the alleged stolen property;

Three the prosecution did not adduce any exhibit or evidence to prove the value of the alleged stolen miraa; and finally that the appellants defence was not considered.

The appeal is opposed.

The facts of the case are that the 2nd appellant was a son of PW4. It is the Prosecution case that PW 4 leased his miraa plants on his farm parcel No. 914 to PW1 to pluck miraa from the said plants for 22 plucking periods. PW 1 paid 220,000/- to PW4 for the lease. That on the evening of 25th January 2008, PW2 and PW3 employed by PW1 to guard the farm caught both appellants and four others plucking miraa from the farm. PW4 stated that the farm was his but that the 2nd appellant, his son had forcefully constructed a house on it. That the 2nd appellant then moved out of the house and 1st appellant moved in to occupy it. PW4 said the land still belonged to him and that he had at one time had given the land to his sons including the 2nd appellant but later revoked the gift.

The 1st appellant's defence was that he bought the land parcel No.6821 from the 2nd appellant. He produced a photocopy of a sale and transfer agreement as proof of the purchase. The exhibit was rejected as original was not availed neither was any explanation given as to its whereabouts.
The 2nd appellant confirmed that he was given land No. 6821 by his father PW4, and that he sold it to the 1st appellant.

As a first appellate court I have re-analyzed and re-evaluated the entire evidence adduced before the trial court while giving due allowance for reason I neither saw nor heard any of the witnesses. **IN OKENO VS REPUBLIC 1972 EA 32**, the Court of Appeal had the following to say of the role of a first appellate court.

"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

Mr. Omayo represented both appellants in this appeal. The learned counsel for the appellants urged that the dispute before the court was over land and that thereof the matter was a civil not criminal matter. Mr. Omayo urged that it came out in evidence that the 2nd appellant had a house on the land. Mr. Omayo urged that PW4 leased the land where the 2nd appellant was living to PW1 as a means of evicting the 2nd appellant from the land. Mr. Omayo urged that 2nd appellant sold the land to the 1st appellant. That at the time in question, the 1st appellant had the miraa in the land harvested and that therefore the issue before the court was of a civil nature not criminal.

Mr. Kimathi for the state urged the court to consider that the complainant in the case was not PW4, because he had rented out the land. He urged that the complainant was PW1 and that the complaint was about miraa stolen from the land he had leased. Mr. Kimathi urged that what the 2nd appellant owned was a house and that no one chased him from it. Learned counsel for the state urged that claim of right could not lie as the miraa in question did not belong to the father, PW4.

The learned trial magistrate considered the issue of what constitutes stealing and whether the 2nd appellant had a claim of right over the miraa the subject matter of the case. He had this to say:-

"Section 268 of the Penal Code defines stealing as fraudulently taking property belonging to the complainant with intention to permanently deprive the said complainant of the use thereof or enjoyment of the same. In this case, miraa is one of the things capable of being stolen. Evidence by both PW2, PW3 and even PW4 clearly shows accused person in company of about 4 others went to parcel No.914/Akirangondu "A" Adjudication section and plucked (took) – miraa of about Ksh.5,000/- belonging to the PW1 – leased. Evidence as to the taking the miraa away after intervention of PW4 is not in dispute. However the law says one cannot steal what he has a claim of right over. In this case, accused 2 said he was given a farm N. 6821 which he sold to accused 1. The defence by accused 1 is that having 'bought' the said land No. 6821 from accused 2, he cannot be said to have stolen his miraa as he has a claim of right over the same. I have carefully considered the evidence of the accused persons as against the evidence of PW1, PW4 and the lease agreement Exhibit 1 herein. The parcel where alleged miraa was planted as per lease agreement and evidence on record is parcel No. 914 and not parcel No. 6821".

The learned trial magistrate correctly directed his mind to the issues at hand and arrived at the correct conclusions. With due respect to the appellants' counsel, the issue before the court was the plucking of miraa by both appellants and others from land leased by PW4 to PW1. The subject matter of the charge was not immovable property, land, but moveable property, miraa.

The learned trial magistrate made a finding of fact that the land the 2nd appellant alleged he sold to the 1st appellant was No. 6821 but that from the evidence before court, the miraa had been plucked from land parcel No. 914.

PExh1, the agreement for lease of miraa produced as evidence by PW1 shows that the lease was over parcel No. 914 Akirangondu "A" Adjudication Section. The learned trial magistrate's findings that parcel in which the miraa leased to PW1 stood was 914 had documentary support. The learned trial magistrate's finding cannot be faulted in the circumstances. I am satisfied that the two appellants entered a parcel of land leased to PW1 by the 2nd appellant's father, and plucked miraa from therein. They were caught in the act by PW2 and 3, the persons employed by PW 1 to guard his interests (miraa) in the land in question.

Mr. Omayo raised the issue that the 2nd appellant had a claim of right over the land or miraa, the subject matter of this case. That right does not arise. The prosecution's evidence clearly establishes that the land on which the miraa stood belonged to PW4. It also clearly established that the miraa was the property of PW1 because he leased the miraa plants on PW4's land and the lease was still running at the time the offence was committed.

Regarding proof of value of miraa stolen. It is clear that PW4 , as did PW2 and 3, saw the two appellants and others pluck miraa from the parcel of land leased by PW1 and carry it away with them. It is true that the value of the stolen miraa was not ascertained to the court. However, the appellants do not dispute that they plucked and carried away the miraa from the land in question. The lack of evidence to prove value was in the circumstances one which the prosecution could not have done anything about. The stolen miraa was carried away before the prosecution witnesses could value it. Nothing turns on this point.

I did consider the learned trial magistrate's judgment and was satisfied that the appellant's defences were duly considered before they were rejected. The trial magistrate's decision to reject the defence by both appellants was the correct one.

The sentence imposed against the appellants has fully been served. That sentence was lawful. I say no more.

Having considered these appeals I find them without merit and dismiss them in total. I uphold the conviction and confirm the sentence.

Dated, signed and delivered this 22nd day of September 2011

J. LESIIT

JUDGE