



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 20 of 2007

RAPHAEL MAINA MWANGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence in Kitui Principal Magistrate's Court Criminal Case No. 2028 of 2004 by E.N. Gichangi DM II (Proff) on 25.1.07)

JUDGMENT

1. On 5.11.2004, the Appellant was arraigned before the Kitui Principal Magistrate's Court and charged with the offence of injuring animals contrary to section 338 of the Penal Code. It was alleged that on the "18th day of October 2004 at about 2.00 pm at Kangundu, Village, Kyangunga sub-location, Mulango Location in Kitui District of the Eastern Province, willfully and unlawfully wounded an animal capable of being stolen, namely a cow, the property of Kaindi Mwanzia."

2. The Appellant after his trial was convicted and sentenced to a fine of Kshs. 2,000/= and in default to serve 40 days in prison. He was dissatisfied with both conviction and sentence and he filed this appeal on the following grounds that;-

"i. The learned trial magistrate erred and misdirected himself

in law in finding that there was sufficient evidence to corroborate the evidence of the complainant.

ii. The learned trial magistrate erred and misdirected himself in law and fact in disregarding the case for the appellant and relied on the hearsay evidence of witnesses and the complainant.

iii. The learned trial magistrate's sentence of a fine of Kshs. 2000/= in default 40days in G.K. Prison was harsh, oppressive and unreasonable."

3. As the first appellate court, I am obligated to make my own assessment of the recorded word, subject it as a whole to a fresh, exhaustive examination and reach my own decision as opposed to merely scrutinizing the lower court's judgment and to see whether the decision was right - See Pandya vs Republic [1957] E.A. 336 and Shantilal M. Ruwala vs Republic [1957] E.A. 570).

4. Before turning to my appreciation of the evidence tendered, I deem it prudent to reproduce it as follows:-
5. PW1, Kaindi Mwanzia stated that on 18.10.2004 at 2p.m she was at her home when one, Francis Musyoki Mbuvi came and told her that her cow had been cut by the Appellant who was her neighbour. She went to the scene and found that her cow had indeed been cut on the hind leg. She reported the incident to the village headman and then the sub-chief. Each of them saw the injured cow and then PW1 reported the incident at the local Police Station. A veterinary officer was then contacted to treat the cow and he did so. The appellant was arrested and it was PW1's evidence that the Appellant had previously threatened to harm PW1's family.
6. PW2, Nzuki Mutinduu stated that on 18/10/2004, PW1 reported to him that her cow had been cut by the Appellant. Together, they returned to the scene and PW2 noted that the cow had been cut at the hind leg and it was bleeding. He reported to the sub-chief who advised PW1 and PW2 to report the incident at the local Police Station which they did.
7. PW3, David Mutisya, the Assistant Chief, Kyangunga Location went with PW1 and PW2 to the scene, saw the injured cow and referred PW1 to Kitui Police Station. Later, on instructions from that station, he arrested the Appellant and took him there.
8. PW4, PC Veronica Kavoko was the one who received PW1's report on 30.10.2004 at 2.30 p.m. She asked PW3 to arrest him and when she received a report from the veterinary officer who treated the cow, she charged the accused with the offence for which he was eventually convicted.
9. PW5. Alfred Mutisya, A senior animal health Assistant, Central Division, Kitui District examined the injured bull (not a cow) on 21.10.2004. He found that it had two cuts on the right hind leg and the two were sharp in nature. He treated the injury and then made his report which was produced as Exhibit. 1.
10. When the accused was put on his defence he raised the defence that he was in Nairobi on 18.10.2004 and returned to his home on 20.10.2004. That on 22.10.2004, he was arrested at his home and charged with the present offence. He stated further that PW1 and her family had a grudge against him and constantly harassed him. That their animals were severally allowed to destroy his crops but no action was taken by the local administration. He denied being at the scene on the material date and denied committing the offence. He produced fare receipts showing that he travelled to Nairobi on 18.10.2004 and returned on 20.4.2004.
11. I have carefully perused the evidence on record and I am convinced that the Appellant's conviction was unsafe for the following reasons;
12. Firstly, there cannot be doubt from the evidence of PW1, PW2, PW3 and PW5 that indeed a bull (not a cow) belonging to PW1 sustained injuries on its hind leg on 18/10/2004 prior to 2 p.m when PW1 received the report that it has been injured. However, there is absolutely no evidence that the Appellant was the person who inflicted those injuries. I say so because the evidence tendered pointed to one, Francis Musyoki as the person who informed PW1 that the Appellant had cut the cow. PW1 thereafter told PW2, PW3, PW4 and PW5 that the Appellant had indeed done so. The sad story is that Francis Musyoki was never called to testify and all evidence thereafter became hearsay and inadmissible. The only evidence that remains admissible is that relating to the cow's injury because PW1, PW2, PW3 and PW5 indeed saw the injured bull.. As to who inflicted the injury, there is no answer from the evidence before me and I certainly cannot say that is it the Appellant.
13. Secondly, and as a corollary to the above, the Appellant produced two matatu receipts showing that on 18.10.2004 he traveled to Nairobi and returned to Kitui on 20.10.2004. My view is that once he did so, he raised a strong alibi defence that needed to be dislodged by evidence that would be adverse to him. The burden of proving the case including the alibi never shifts to him. Sir Udo Udoma put it succinctly in Sekitoleko vs Uganda [1967] E.A. 531 when he stated as follows:-

“(i) as a general rule of law the burden on the prosecution of proving the guilty of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else (R vs Johnson[1961] 3 All E.R. 969 applied; Leonard Aniseth vs Republic E.A. 206 followed).”

(ii) the burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected himself.”

14. In the present case, the learned trial magistrate shifted the burden of proving the alibi to the Appellant, and dismissed it because the matatu receipts did not bear the year they were issued although the dates were otherwise consistent with the alibi. I think this was in error because no evidence tendered by the prosecution placed the Appellant at the scene and his defence, however weak was enough to raise doubt in his favour. The other evidence against him failed to dislodge it and the benefit of doubt should be given to him.

15. Lastly, there was a miscarriage of justice in that on 30.11.2006, the learned trial magistrate adjourned the case for a mention on 30.10.2006 for the Appellant to call further evidence. On 30.10.2006 without recording whether or not the Appellant was prepared to close his case, a date for judgment was given. Clearly, where the court fails to accord a party the right to call all necessary evidence before closing his case, the fundamental right to a fair hearing and right to tender a defence under section 77 (2) of the Constitution is violated.

16. It may well be that PW1 and the Appellant have a neighbourly grudge; it may well be that PW1's cows stray into the Appellant's shamba and destroy his crops; it may well be that the Appellant reacted by cutting PW1's bull ; it does not matter; the evidence before me cannot sustain a conviction.

17. The Appeal is allowed and the Appellant who is at liberty shall remain free. The conviction is quashed and the sentence set aside.

18. Orders accordingly.

Dated and delivered at Machakos this 15th day of **May 2008**.

ISAAC LENAOLA

JUDGE

In the presence of: Appellant in person

No appearance for Republic

ISAAC LENAOLA

JUDGE