



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 160 OF 2000

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 256 of 2000 – N. M. Kiriba (S.R.M.)

JOSEPH WANJOGU KUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Joseph Wanjogu Kungu, was charged with the offence of being cruel to an animal contrary to **Section 3(1)(K) of the Prevention of Cruelty to Animals Act (Cap 360 of the Laws of Kenya)**. The particulars of the offence were that on 18th of January 2000 at Nyandarua Farm, Nakuru the appellant was found being cruel to an animal, namely a dog by killing it, the property of Christopher Njoroge Kimani. The appellant pleaded not guilty to the charge.

After a full trial the appellant was found guilty as charged. He was sentenced to pay a fine of Kshs 300/= or in default he was to serve one month's imprisonment. The appellant was aggrieved by the said conviction and sentence and filed an appeal before this court.

The appellant raised five grounds of appeal faulting the judgment of the trial magistrate. The appellant was aggrieved that the trial magistrate had believed the evidence of PW4 whilst disregarding the evidence offered by the appellant in his defence. The appellant was aggrieved that he had been convicted on contradictory evidence adduced by the prosecution. He faulted the trial magistrate for convicting him after the said trial magistrate had shifted the burden of proof to him. At the hearing of the appeal, Mr Gumo, Learned Assistant Deputy Public Prosecutor conceded to the appeal. He submitted that there was no direct or circumstantial evidence linking or connecting the appellant with the offence. Mr Kiburi, Learned Counsel for the appellant did not have anything useful to add in view of the concession of the appeal by the State. I will revert back to the submissions made after briefly setting out the facts of this case.

On the 18th of January 2000, PW1 Christopher Njoroge, the complainant in this case, was informed by PW4 Joseph Ekai, his employee that his dog had been killed by the appellant. He testified that he went to the scene and saw that the dog had a wire on its neck. PW1 also saw that a wire trap had been set at the fence of the appellant's compound. PW1 testified that he went to see the appellant in his house after seeing his dead dog. He inquired from the appellant who had killed the dog. The appellant denied that he had killed the dog. PW1 testified that he was certain that it was the appellant who had killed his dog even though he did not see the appellant actually kill the dog.

He suspected that it was the appellant who had killed the dog because the trap which had caught the neck of the dog fatally injuring it had been set up at the farm of the appellant. PW1 was however not sure who had set up the trap that killed his dog. He conceded that the trap could have been set up by the children of the appellant. PW3 Joseph Makori Oseko testified that on the 18th of January 2000 at about 1.00 p.m., as he was coming from the river, he saw the dog belonging to PW1 having been cut near the fence of the appellant's farm. He informed PW1, his employer.

PW4 Joseph Ekai, an employee of PW1 testified that on the 18th of January 2000, at about 3.00 pm, he heard a dog whimpering. He went to investigate. He saw the appellant lift up a panga and cut the dog. He also saw the children of the appellant stone the said dog. When he was cross-examined, PW4 appears not to be certain on the exact date that the dog was allegedly killed by the appellant. He testified that the appellant killed the dog on the 1st of January 2000. The police took the photographs of the dead dog including the wire trap which was laid at the fence of the appellant. The photographs were produced in evidence by PW5 Corporal Harrison Muli. When the appellant was put on his defence, he denied that he had killed the dog. He raised an alibi defence. He testified that on the material day he had sought permission from the school where he was teaching to go to hospital as he was not feeling well. On the 18th of January 2000 he was at Banita Health Centre from 11.00 a.m. to 5 p.m. It was his testimony that he could not therefore have been at his residence at the time that he was alleged to have killed the dog as stated by PW4. The appellant testified that PW1 had destroyed his fence twice although their respective parcels of land were not bordering each other. The appellant's evidence was corroborated by the evidence of DW2 Peter M. Mugo a nurse at Banita Health Centre, who testified that he attended to the appellant on the material day.

This is a first appeal. As the first appellate court in criminal cases, this court is mandated in law to look at the evidence adduced before the trial magistrate afresh, reevaluate it and reach its own independent conclusion whether or not to uphold the conviction of the appellant by the trial magistrate. In reaching its determination, this court has to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to give any finding as to the demeanour of witnesses (*See Njoroge –versus- Republic [1987]KLR 19*).

In the instant appeal, the appellant was charged with the offence of cruelty to an animal contrary to **Section 3(1)(K) of the Prevention of Cruelty to Animals Act**. The said section provides as follows:-

“3(1) A person shall be guilty of an offence of cruelty if he- (k) hunts, kills or destroys an animal in such a manner as to cause that animal more suffering than is necessary,”

. The prosecution was mandated to prove that the appellant had with cruelty, killed the dog belonging to the complainant. The only eye witness account which was offered by the prosecution is that of PW4. He testified that on the material day at about 3.00 pm, he saw the appellant cut the dog using a panga. The children of the appellant were also stoning the dog. PW4 testified that he witnessed the appellant and his children kill the dog. PW4 however contradicted himself when in his testimony he gave a different date that he alleged to have seen the appellant kill the dog. While the other witnesses testified that the dog was killed on the 18th of January 2000, PW4 testified that the dog was killed on 1st of January 2000. The evidence of PW4 is further contradicted by the evidence of PW3 who testified that he found the dog having been killed at about 1.00 p.m. PW4 testified that the dog was killed at 3.00 p.m.

The appellant, when he was put on his defence, denied that he was at his home at the time that he is alleged to have killed the dog. He offered an alibi defence. He testified that he was not feeling well on the material day and had gone to Banita Health Centre to be treated. He was away from home from about 11.00 a.m. to 5.00 p.m. The appellant's evidence was corroborated by the evidence of DW2 Peter Mugo a nurse at Banita Health Centre who attended him.

I have re-evaluated the evidence adduced both by the prosecution and the defence. It is not disputed that the dog belonging to the complainant was killed. The issue for determination by this court is whether the prosecution established beyond any reasonable doubt that it was the appellant who had killed the dog. The sole eye witness account is that of PW4. His evidence was however contradictory, both as to the date

when the killing of the dog is alleged to have occurred and also as to the exact time that the dog was killed. The narration of events as stated by PW4 is not supported by the evidence of the other witnesses.

While PW4 testified that the appellant chased after the dog and killed it near the road, the evidence adduced by PW1, the complainant and the photographs taken of the dog clearly shows that the dog was killed after it had its neck tied by a wire which had been set as a trap. PW4 does not mention this fact. It is doubtful whether in fact PW4 saw the appellant kill the dog. It cannot also be ruled out that PW4 could have been set up by the complainant to testify that he saw the appellant kill the dog. From the evidence of the appellant, there appears to have been a grudge between the appellant and the complainant over the destruction of a fence. It is most likely that the complainant saw an opportunity to “*teach*” the appellant a lesson when his dog was found dead near the fence of the appellant’s farm. All these factors raises reasonable doubt that PW4 infact saw the appellant kill the dog. Further the appellant offered an alibi defence which further supports his case that he was not present at home when the dog was killed. The alibi defence by the accused was not challenged by the prosecution on cross-examination.

For the reasons stated hereinabove, the appeal filed by the appellant has merit.

The State did not support the conviction. The same is hereby allowed. The conviction of the appellant is quashed and the sentence imposed set aside. The fine paid by the appellant is hereby ordered refund.

DATED at NAKURU this 9th day of May 2005.

**L.
JUDGE**

KIMARU