



**Mugo v Republic (Criminal Appeal E042 of 2024)
[2024] KEHC 13798 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E042 OF 2024
LM NJUGUNA, J
NOVEMBER 6, 2024**

BETWEEN

BARCHAM NGARI MUGO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. J.N. Githaiga (RM) in the Magistrate's Court at Siakago Criminal Case No. E833 of 2023 delivered on 04th April 2024)

JUDGMENT

1. The appellant was charged with 2 counts. The first was the offence of injuring animals contrary to section 338 of the Penal Code. Particulars are that on 11th October, 2023 at around 1.00 p.m at Matangiri village Siakago in Mbeere North Subcounty within Embu County, the appellant willfully and unlawfully killed an animal capable of being stolen namely Fresian cow valued at Kshs.60,000/= the property of Sospeter Nthiga Ndoro.
2. The second count was the offence of cruelty to an animal contrary to section 3(1)(a) & (k) as read together with section 3(2) & (3) of the [Prevention of Cruelty to Animals Act](#) Cap 360. Particulars are that on 11th October 2023 at around 1PM at Matangiri village Siakago in Mbeere North Subcounty within Embu County, the appellant terrified and killed an animal namely a Fresian cow by chasing it into a deep dam filled with water hence it succumbed to suffocation, the property of Sospeter Nthiga Ngari, valued at Kshs.60,000/=
3. The appellant pleaded not guilty to the charges and the matter was heard and determined. He has preferred an appeal against the conviction and sentence of the trial court on the grounds that the learned trial magistrate erred in law and fact:



1. In failing to find that the animal died of asphyxia which was occasioned by drowning in the well;
 2. In failing to find that asphyxia can be caused by choking, strangling, suffocation, drowning or asthma;
 3. In failing to appreciate that no evidence was adduced linking the appellant to causing the animal asphyxiation;
 4. By relying on hearsay and circumstantial evidence;
 5. In failing to appreciate the evidence of the veterinary officer that the animal's lungs were swollen because of accumulated gas, froth and accumulated fluid in the lumen;
 6. In failing to appreciate the evidence of dw2 who stated that by the time he arrived at the scene, the animal's ears were flapping, a sign that it was still alive and he reported the incident at Siakago Police Station;
 7. In relying on the evidence of the prosecution witnesses which did not link the appellant to the offence;
 8. In relying on the evidence adduced by the complainant and pw4 who are relatives of the appellant and whose evidence was based on malice and was uncorroborated, failing to be cautioned of family rivalry and grudges;
 9. In failing to find ill motive in the complainant's claim for compensation for the animal that strayed into the farm of dw3;
 10. In failing to consider the evidence of the appellant and his witnesses to establish that he did not commit the offence; and
 11. In failing to find that the appellant left the animals on the farm unattended and proceeded to report of the strayed animals to the appellant's father's farm.
4. At the trial, PW1 was Dennis Munyi Muli who stated that he was the complainant's farmhand. That on the day of the incident, he was herding the complainant's cows when 4 of them entered into the appellant's land. the appellant said that the cows ate his kales and for that reason, he threatened to cut him into pieces. He stated that he was afraid so he did not go to remove the cows from the appellant's land and after some time, he noticed that there were only 3 cows roaming the appellant's land.
 5. That soon afterwards, he saw the appellant going towards his house and then he returned with the subarea chief to assess the damage caused by the cows. That he was told to go and collect the 3 cows and that one of them had fallen into a well and had died. The well was inside the accused's farm. He informed his employers about the dead cow. On cross-examination, he stated that the distance between the well and the place where the cows had destroyed the appellant's crops is about 100 meters. That he took about 30 minutes before he returned with the subarea chief.
 6. PW2 was Simon Kianga Munyi, the subarea chief, who stated that on the day of the incident, he was at his farm which is near the appellant's father's farm. That at around 1PM, the appellant called to inform him that complainant's cows had encroached their land. That they called PW1 and told him to take the cows away but he said that one of them had fallen into a well. That he went and confirmed that the cow had fallen into the well and they informed the subarea chief of Riandu. That the appellant only mentioned that the cow had fallen in the well. On cross-examination, he stated that he did not know



- whether the cow that had fallen in the well had injuries. That PW1 could not have known where the well was and that the appellant did not have any issue with PW1.
7. PW3 was Hesbon Nyaga Njeru, the subarea chief of Riandu who stated that the appellant went to his home to report that there were some cows feeding on his Napier grass on his farm. That he visited the scene and found 3 cows which were later taken by PW1. That the appellant told him that there was one more cow but it had fallen in the well. That he accompanied PW1 and PW2 to the well where he confirmed that the 4th cow was inside the deep well, dead. On cross-examination, he stated that the appellant is the one who told him about the cow that was in the well. That the appellant did not have any weapons neither did he cause any chaos. He couldn't tell how the cow had ended up in the well.
 8. PW4 was Sospeter Nthiga Nodoro, the complainant, who stated that he was away in Runyenjes when his sister informed him that his cows had crossed the fence into the appellant's land, and that the appellant had reported the matter to the area chief. That he called PW3 and told him that he will take responsibility for any damage caused by his cows to his property. PW3 told him that he had gone to the appellant's farm and that one of the cows had died. That the authorities had encouraged him and the appellant to settle the matter out of court but since one cow had died, the matter was reported at the police station.
 9. He stated that he went home and PW1 explained to him what had happened before he visited the scene where he found the cow dead with its head in the mud. That the police officers also visited the scene and recommended that the cow be removed from the well by a veterinary officer. The crime scene was processed and photographs taken and at this time, the appellant had fled to his home. He stated that he was informed that the appellant had thrown the cow into the well and its neck was injured because he saw blood around the neck. On cross-examination, he stated that when he entered the appellant's farm, the appellant was not there but his servants were there. That the appellant had sent the subarea chief to warn him that if his cows were found in his farm, he would cry. That the appellant was seen chasing the cow.
 10. PW5 was Dr. James Kariuki Gichohi who testified that he had conducted postmortem on a bovine Fresian cow following a police report. He stated that the animal was discovered in the appellant's well, lying on its left side with the head tilted and submerged in water. That the animal had frothy discharge from the mouth and mucus from the rectum. That there was visible hemorrhage on the right side of the cow's neck, neck muscles and abdominal region.
 11. The postmortem procedure was that the carcass was removed from the water and opened up to find that the trachea was filled with air and froth, lungs were swollen because of accumulated gas and froth, there was accumulated fluid in the lumen and lumen contents and there were myologic lesion bruises on the right neck muscles and the urinary bladder was fluid filled. He determined that the cause of death was due to blockage of the airways and the cow succumbed to asphyxia due to lack of air in the lungs.
 12. PW6 was CPL Geoffrey Kumbu of Siakago Police Station who was the investigating officer. He stated that the incident was reported at the police station and he interviewed PW4 and PW1. That PW1 told him that the appellant prevented him from removing the cows from his property, which is why he left them there but he informed PW4, his employer. That the appellant further chased the cows to his father's property and they passed by 2 wells onto the next property. He confirmed having seen the 2 wells while visiting the scene. He stated that the cow was lying in the 20ft deep well with its neck twisted and it was submerged in the water. That they processed the scene and took photographs which were produced as evidence. That he sought the services of a veterinary to ascertain the cause of death.



- On cross-examination, he stated that the appellant is the one who told the sub-area chief that the cow was inside the well.
13. At the close of the prosecution's case, the appellant was placed on his defense.
 14. DW1, the appellant, stated that his father called to inform him that some cows had encroached his land. That he went to check and he found 3 cows in the miraa farm and his father told him to call their village elder to come and ascertain the damage done on their property by the cows. That when the village elder arrived, they looked and ascertained that the cows had eaten kales and Napier grass and one of them had fallen in the well.
 15. That the village elder told him to call the subarea chief to come and witness the same and then they reported the matter to the police station. On cross-examination, he stated that PW1 was nowhere near the farm when the cows encroached. That the distance between where the 3 cows were and where the well is, is about 100meters. He denied chasing PW1 away from the farm and that PW1 only took the cows away from his farm after the subarea chief arrived. He also denied chasing the cows such that the cow ended up in the well.
 16. DW2 was Vasilio Mugo Ndoro, the appellant's father, who stated that one Muchira called to tell him that there were some cows in his property. That he told Muchira to call another person as a witness and he also called the appellant. After about 30 minutes, he arrived home and went to assess the damage on the property on whose far end there was a well. He stated that he saw the animal in the well and its ears were flapping, thus he proceeded to Siakago Police Station and reported that the animal was still alive.
 17. That the animal was retrieved 3 or 4 days after he had reported the incident. On cross-examination, he stated that he did not know how many animals had entered the property. That he found the animal alive but he did not have the means to remove it from the well although he reported the matter at the police station. That the appellant did not chase the animal and he did not know how the animal ended up in the well. That when he first saw the animal in the well, he was in the company of other people.
 18. This appeal was canvassed by way of written submissions.
 19. The appellant submitted that if the court was to rely on circumstantial evidence, the chain of evidence should be so strong to establish his culpability. It was his argument that none of the prosecution witnesses saw him driving the animals towards the well. That it is highly likely that the cow strayed by itself to the well and fell into it. He argued that the prosecution's evidence leaves a lot of gaps thus breaking the chain of circumstantial evidence. That the prosecution's evidence does not link him to the offence, thus he urged the court to allow the appeal.
 20. In its submissions, the respondent relied on the provisions of sections 388 and 278 of the Penal Code and the meaning of the term 'willful' as defined in the 8th Edition Black's Law Dictionary. It relied on the cases of R v. Kipkering arap Koske & another 16 EACA 135 (1949) and Simon Musoke v. Republic [1958] EA 715 and stated that circumstantial evidence can be drawn from the testimonies of the prosecution witnesses to sustain a conviction. It argued that according to PW3, by the time PW1 and PW2 arrived at the well, the cow had already died. PW4 and PW6 stated that the animal died on the material day while PW5 established the cause of death.
 21. That PW1 noticed one cow missing by the time he went away to call PW2 and this errand took him about 30 minutes. That during this time, per section 119 of the *Evidence Act*, during this 30-minute period, the burden lay on the appellant to prove that he did not cause the cow to fall in the well. That the dead animal falls in the category of animals under section 278 of the Penal Code. It urged the court to disallow the appeal.



22. From consideration of the grounds of appeal the issue for determination is whether the trial court erred in convicting and sentencing the appellant for the offences.
23. This court is duty-bound to consider the evidence adduced at the trial in order to make a finding. In the case of *Okeno vs. Republic* [1972] EA 32 where the Court of Appeal stated as follows:

“An Appellant on a 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 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 Vs. R.* (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 finding and conclusion; 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 vs. Sunday Post* [1958] E.A 424.”

24. The appellant was charged with 2 counts, in essence being the causing the death of a cow by terrifying it and chasing it into a well filled with water. Section 338 of the Penal Code that provides thus:

“Any person who willfully and unlawfully kills, maims or wounds any animal capable of being stolen is guilty of a felony and is liable, if the animal is an animal such as is referred to in section 278, to imprisonment for fourteen years, and, in any other case, to imprisonment for three years.”

25. A cow is indeed one of the animals named under section 278 of the Penal Code. From the evidence adduced, PW1 was herding PW4’s cows when 4 of them strayed and entered the appellant’s land which had a well in it. PW2 and PW3 said that by the time they went to the appellant’s land, they saw 3 cows and the appellant told them that a 4th cow was in the well. DW1 testified that his father, DW2 called to tell him that some stray cows were on his land.
26. DW2 had been informed by Muchangi about the cows and that he decided to call the appellant about the same. DW1 said that as soon as he saw the cows, he went to call PW2 and it took him about 30 minutes. DW1 stated that he saw 3 cows on the farm but when he went to assess the damage, he found the 4th cow in the well. PW1 and DW1 testified that the well is about 100 meters from where the animals were grazing inside the appellant’s land. None of the witnesses saw the accused chasing the animal into the well or being cruel to it.
27. However, even going by circumstantial evidence, it has not been firmly established that the appellant killed the cow, much less terrified it and chased it into the well. PW5 testified about the findings of the postmortem conducted on the cow that was found on the well. The cause of death was due to blockage of the airways and the cow succumbed to asphyxia due to lack of air in the lungs. PW5 and PW6 testified that the animal was lying on its left side with its neck twisted and submerged in the water. Given the cause of death and the testimonies of how the witnesses saw the cow in the well, there is doubt as to the appellant’s involvement in the death of the cow.
28. Therefore, I find that the prosecution failed to prove the elements of both counts beyond reasonable doubt. The appeal has merit and it is hereby allowed. The trial court’s finding on conviction and sentence on both counts are hereby set aside. The appellant to be released forthwith unless otherwise legally held.



29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

