REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL APPEAL NO. 28 OF 2019

MOSES MUTEMBEI MBAE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 771 of 2018 in the Senior Resident Magistrate's Court at Chuka delivered by Hon. J. M. Njoroge (C.M.) on 6th August 2019)

J U D G M E N T

Introduction

1. On 6th August 2019, **Moses Mutembei Mbae** (the Appellant herein) was convicted in *Criminal Case No. 771 of 2018 (Chuka)* of the offence of **handling stolen property** contrary to **Section 322(2)** of the Penal Code (Chapter 63 of the Laws of Kenya) and was sentenced to pay a fine of Kshs. 100,000/= and in default to serve imprisonment for three (3) years imprisonment.

2. In the main charge, the Appellant was accused of stock theft contrary to Section 278 of the Penal Code. The particulars of the main charge were that on the night of 10/07/2018 at Magundu village in Karimba location within Tharaka Nithi county, the Appellant jointly with **Pasquale Nyaga M'Ndaka** stole two sheep and two goats valued at Ksh. 30,000/= the property of **Mbae Joblat Mwirabwa**.

3. The Appellant was alternatively charged with the offence of handling suspected stolen property contrary to Section 322(2) of the Penal Code. The particulars of the alternative charge were that on 16/07/2018 at Keriani village in Kariani location in Tharaka Nithi county, otherwise in the course of stealing, jointly with **Pasquale Nyaga M'Ndaka**, were found in possession of two sheep and one goat knowing or having reason to believe them to be stolen property.

4. This appeal is based on the Appellant's conviction and sentencing on the alternative charge.

5. The Appellant filed an undated Petition of Appeal on 23/10/2019 raising four grounds of appeal. He however abandoned these grounds and chose to rely on the grounds raised in his Amended Supplementary Grounds of Appeal filed on 06/10/2020. Accordingly, this appeal is based on the following grounds:

- THAT the learned trial magistrate erred in both law and fact by sentencing the Appellant to serve 3 years without considering the facts adduced before the court.
- THAT the learned magistrate erred in both law and fact by failing to note that the investigation was shoddy since I.O. did not seek to confirm some allegations made by the prosecution witnesses.
- THAT the learned magistrate failed to note that this case (No. 771 of 2018) was a duplicate of case No. 896 of 2018.
- THAT the learned trial magistrate erred in both law and fact by rejecting the Appellant's defence and that of defence witness without giving cogent reasons.

6. The Appellant that prays for the conviction be quashed and the sentence be set aside. The court ordered that the appeal be disposed off by way of written submissions and the Appellant filed his written submissions on 06/10/2020 while the Respondent filed his written submissions on the 17/11/2020.

Submissions

7. The Appellant submitted that the evidence tendered by the prosecution was not enough to sustain a conviction. He questions the truth of

PW1's testimony stating that the dates he gave indicate that the animals were recovered on (01/07/2018) which is a date that is before the date when the offence is alleged to have happened (10/07/2018). He faulted the policemen who took photographs of the goats recovered for not including the accused persons in the photograph to prove that they were really found with the said goats. The appellant alleges that PW2 gave contradictory evidence which raised doubt as to where the goats were recovered from. The Appellant further faulted the trial magistrate for failing to note that the trial case, being Criminal Case no. 771 of 2018 (Chuka), was a duplicate of Criminal Case no. 896 of 2018 (Chuka). Finally, the Appellant faults the Learned Trial Magistrate for rejecting his defence which he alleges contained weighty facts to support his acquittal.

8. The appeal was opposed by Mr. Momanyi, the prosecution counsel. Learned Counsel submitted that the investigation was properly conducted and that the evidence that was adduced by the prosecution was clear, consistent, and well corroborated and hence sufficient to find the accused person guilty as charged. Learned Counsel further submitted that the trial case being case no. 771 of 2018 was not a duplicate of case no. 896 of 2018 as alleged by the Appellant because the two cases had different complainants and the facts forming the charges in the two cases were not part of the same transaction. In any case, the Learned Counsel submitted that the separation of the charges did not occasion any prejudice on the Appellant. In the end, Learned Counsel submitted that the prosecution had proved its case to the required standard.

Issues Arising for Determination

9. It is my view that the issues that arise from the grounds of appeal and submission of the parties can be summarized as follows:

- Whether the prosecution proved the case of stealing to the required standard;
- Whether the Appellant was rightly sentenced; and
- Whether the trial case [being Criminal case no. 771 of 2018 (Chuka)] was a duplicate of Criminal case no. 896 of 2018 (Chuka)

Analysis of Issues

A. Whether the prosecution proved its case to the required standard

10. Grounds of Appeal Nos. 1, 2, and 4 are dealt with under this head.

11. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."**

12. From the onset, it is my very considered view that this court takes notice of the trial court's confusion in part of the judgment whereby it referred to the Appellant as the 1st Accused yet he was the 2nd Accused and referred to the Appellant's co-accused as the 2nd Accused yet he was the 1st Accused. The said error apparent from the trial court's judgment starts from page 3 of 7 of the said judgment. Lines 3 and 4 of page 3 of the judgment reads as follows:

> "The DW2 in his defence testified to have bought the 6 goats at Kathwana market and sold one to the 2nd accused."

13. I take note of the fact that DW2 was the 2nd Accused in the trial court and is the Appellant herein. It therefore seems that the trial court was meant to refer to the 1st Accused in the above extract, that is, DW2 sold one goat to the 1st Accused. From that point of the record of proceedings, I also note that that the trial magistrate kept referring to the 1st Accused as the 2nd Accused and the 2nd Accused as the 1st Accused. This confusion appears to have a bearing on the trial court's conviction and sentencing of the Appellant, which is the subject of this appeal. Be that as it may, the noted error apparent does not detract this court's duty to re-evaluate the evidence on record and reach its own independent conclusion.

14. That notwithstanding, this court has been called upon to make its own findings and draw its own conclusion as the court in **Okeno v. R** (Supra) stated: -

> **"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."**

15. The Court of Appeal in the case of **DAVID NJUGUNA WAIRIMU V – REPUBLIC [2010] eKLR**, cited with approval the decision in **Okeno v. R [1972] EA. 32** in which the Court of Appeal for East Africa laid down what the duty of the first appellate court is and set out the principles that should guide the first appellate court as follows:

> **"The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as**

those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

16. In **Okeno v. R** (Supra) the Court said:-

"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."

17. In **Mbatha Kange'the v Republic [2015] eKLR**, the Court of Appeal in finding that the conviction and sentence on the alternative charge is untenable where a conviction is returned on the main count stated as follows:

"Conviction can only be entered on an alternative charge upon acquittal on the main charge. This would be the case even where a court quite properly goes as far as to make a finding that the alternative charge was proved beyond reasonable doubt. It may do so but cannot convict. See OBANDA Vs. REPUBLIC [1983] KLR 507."

18. The Appellant was convicted and sentenced on the alternative charge of handling stolen property. It is was imperative that the trial court's judgment should have stated concisely that the Appellant was not guilty of the main count of stock theft and that he was therefore acquitted accordingly but was convicted on the alternative count of handling stolen property. In the interest of justice and in line with the foregoing, it is my view that the substantive anomalies in the trial court's judgment will be cured in this appeal by considering whether the ingredients of the of stock theft were proved beyond any reasonable doubt and if not, whether the ingredients of the offence handling stolen property were proved beyond any reasonable doubt.

Proof of Stock Theft

19. Stealing is defined in the Black's Law dictionary 8th Edition as:

"To take (personal property) illegally with the intent to keep it unlawfully".

20. The definition of stealing as found in Section 268 of the Penal Code is:

"A person who fraudulently and without claim of right takes anything capable of being stolen on fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property."

21. The evidence led by the prosecution before the trial court through some 5 witnesses was that the complainant (PW1) found his two goats and two sheep missing in the morning of 10th July 2018. He reported the matter to the sub area and area chief. It was PW1's testimony that on 15th July 2018, he heard that PW2's goats had also been stolen. PW2 corroborated PW1's evidence that they later went to Chuka at the home of the Appellant's co-accused where they recovered 2 sheep and 1 goat. PW1 positively identified the animals. PW3 and PW4 corroborated PW1's and PW2's evidence that the complainant's animals were recovered from the Appellant and his co-accused and hence their arrest.

22. The appellant questioned the evidence relied by the prosecution specifically the dates when the animals were recovered. He submitted that the PW1 cannot allege to have recovered his animals on 1st July 2018 (as per page 6 line 10 of the proceedings) if the same were stolen on 10th July 2018. From a perusal of the original proceedings recorded in court, the issue of conflict of dates raised by the Appellant appears to be typo errors. The original script reads that the animals were recovered on 15/07/2018 and not 01/07/2018. This court should therefore take notice of the said typo error in the typed proceedings. The impugned date reading 01/07/2018 in the typed proceedings was intended to be 15/07/2018 which error is merely technical and not substantive. In the interest of doing justice to the parties, it is therefore my view that the typo error is curable by invocation of Article 159 (2)(d) of the Constitution which provides that:

"159. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) justice shall be administered without undue regard to procedural technicalities"

23. The Appellant's co-accused gave a sworn statement that there was a graduation ceremony at his home and the Appellant, who was a visitor at the said home, had told him that he would provide the animals. DW3 corroborated DW1's evidence that the Appellant had 6 goats and the co-accused bought one goat from the Appellant.

24. The Appellant also questioned why he was not photographed with the animals that Pw1 alleged to have recovered from the Appellant in the home of his co-accused. This claim, in my view, aims to attack the evidence that he was found with the alleged animals. PW2's testimony corroborated the PW1's testimony that the photographed animals were found in the home of the Appellant's co-accused. On cross examination by the Appellant, PW1 stated that they found the animals with Appellant. That notwithstanding, it is my view, that the issue of whether the Appellant was found in possession of the animals does not arise as it was the Appellant's own admission that he came in possession of animals after purchasing them.

25. The Appellant explained that he bought 6 goats from the market at Kathwana. The animals recovered included sheep and the Appellant did not give any believable explanation as to how he came to be in possession of those animals. The defence was not plausible.

26. In my view, the ingredients of the offence of stock theft had been sufficiently proved in that PW1 owned goats and sheep that went missing and the Appellant was found in possession of the said animals at the home of the Appellant's co-accused who is also the Appellant's brother-in-law.

27. The prosecution had to prove its case beyond reasonable doubt. Denning J explained what reasonable doubt is in the case of ***Millier – V-Minister of Pensions [1947]*** by stating as follows:

> **"It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is as strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the lease probable." the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

28. Bearing the above in mind, it is my view that the prosecution proved its case beyond reasonable doubt. It has produced convincing and credible evidence of stock theft perpetrated by Appellant. It is thus my view that the facts of the case shows that the Appellant is guilty of the offence of stock theft as charged in the main count.

29. As stated by the Court of Appeal in **Mbatha Kange'the v Republic [2015] eKLR** (supra):

> **"Once a conviction has been returned on the main count, it is not open to a court to proceed to enter a conviction on the alternative count."**

30. In an appeal from a conviction by a subordinate court, as is in this case, **Section 354(3)(a)** of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) gives the High Court powers to dismiss the appeal if it considers that there is no sufficient ground for interfering or to:

> **i.** reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or
>
> **ii.** alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
>
> **iii.** with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

31. It is therefore my view that this court should alter the finding of the trial court by quashing the conviction of the Appellant on the alternative count of handling stolen goods and substitute it with a conviction for stock theft contrary to Section 278 of the Penal Code.

Sentencing

32. On sentence, the Appellant was fined Kshs. 100,000 or in default imprisonment for 3 years out of the maximum 14 years for the offence of handling stolen goods. It is my view that the appeal on sentence succeeds only to the extent that it should be guided by the law on the offence of stock theft as opposed to handling stolen goods.

33. Section 354(3)(b) of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) gives the High Court powers to increase or reduce the sentence or alter the nature of the sentence in an appeal against sentence by a subordinate court.

34. The case of **Wanjema v. Republic (1971) EA 493** dealt with principles upon which a first appellate Court may act on in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence the trial court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

35. The sentence which was imposed on the applicant reads as follows:-

> "***The second accused is fined Kshs.100,000/- in default to serve 3 years imprisonment."***

The second accused was convicted on the alternative charge of Handling suspected stolen property contrary to Section 322 (2) of the Penal Code. The section provides:

> ***" (2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years."***

36. Section 26 (3) of the Penal Code provides as follows:-

> ***" A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment provided that-***

"Where the law concerned provides for minimum sentence of imprisonment, a fine shall not be substituted for imprisonment."

37. In this case, there was no minimum sentence provided under **Section 332(2) of the Penal Code** (Supra) and the magistrate could impose a fine. It then follows that once the trial magistrate opted to give the option of a fine, the default cause had to be within the confines of **Section 28(2) of the Penal Code** which sets the parameters for the default clauses based on the fine imposed. The Section provides:

> ***" In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale- Amount Maximum period***
>
> ***Not exceeding Sh. 500 ... ... 14 days***
>
> ***Exceeding Sh. 500 but not exceeding Sh. 2,500 ... ... 1 month .***
>
> ***Exceeding Sh. 2,500 but not exceeding Sh. 15,000 ... ... 3 months.***
>
> ***Exceeding Sh. 15,000 but not exceeding Sh.50,000 ... ... 6 months.***
>
> ***Exceeding Sh. 50,000. ….. ……. …. 12 months***

38. The default clause must therefore be as provided under this section unless the law applied provides specifically for the fine and the default sentence

39. In view of the above provisions the sentence imposed by the trial magistrate was wrong as the default sentence exceeded the sentence provided under **Section 28(2) of the Penal Code.** The fine imposed ought to have attracted a term of imprisonment which was not exceeding twelve (12) months- **Section 28 (2) of the Penal Code** is couched in mandatory terms. My view is that the rationale for this provision is that where the court has opted to impose a fine which is essentially a none custodial sentence a person should not languish in jail for exceedingly long period if he cannot afford the fine.

40. In this case the trial magistrate failed to take into account a relevant fact as it imposed a default clause which is not provided under the law. I therefore have reason to interfere with the discretion of the trial magistrate in sentencing.

41. The powers of this court on appeal are provided under Section **354 (3) (b) Criminal Procedure Code**, (Supra) that, the court in an appeal against sentence, it may increase or reduce the sentence or alter the nature of the sentence.

42. The Appellant submitted that the learned trial magistrate failed to note that the trial case (No. 771 of 2018) was a duplicate of Case No. 896 of 2018 as the witnesses in the two cases are the same and that they gave similar claims in both cases. It was the Appellant's view that the trial magistrate ought to have consolidated both cases failure to which caused the Appellant unnecessary suffering.

B. Whether there was a duplicity of cases

43. Ground of Appeal no. 3 is dealt with under this head.

The section does not provide for an opinion of a fine but where provision states that a person is ***"liable"*** to imprisonment, the trial magistrate has discretion to give the option of a fine apart from where a minimum sentence of imprisonment is provided.

44. In response to this contention, the Respondent submitted that the two cases had different complainants and that the facts forming the two charges were not part of the same transaction hence it was not possible to have the two independent offences consolidated into one. The Respondent further submitted that in any case, the separation of the charges did not occasion any prejudice on the Appellant as the same would not have led to a different finding by the trial court as to his guilt. The Respondent averred that if the charges would have been consolidated in one file, the sentences in each of the proved charges would have run consecutively as the offences were committed on different days and reported by different complaints hence they were not facts of one transaction.

45. From my perusal of Criminal Case No. 896 of 2018 (Chuka), I note that the accused persons therein are the same accused persons in this case save that the Appellant's co-accused is referred to as **Pasquale Nyaga M'Ndaka** in this case but as **Basco Nyaga M'takaa alias Bascwari** in the Criminal case no. 896 of 2018 (Chuka). In addition, the two accused persons therein face similar charges of stock theft contrary to Section 278 of the Penal Code in the main charge and handling suspected stolen property contrary to Section 322(2) of the Penal Code in the alternative charge. Distinctively though, the Complainant therein is one **Joyline Karemi Nyaga** and offence took place on the night of 14th to 15th July 2018 and was in respect of 3 goats that belonged to the said **Joyline Karemi Nyaga**. In contrast, the complainant herein is **Mbae Joblat Mwirabwa** and the offence took place on the night of 10th July 2018 and was in respect of his 2 sheep and 2 goats.

46. I agree with the submission by the Respondent that the offences which form the basis of the two criminal cases are not founded on the same facts and did not arise in the cause of the same transaction. Although committed in a similar manner, the offences are totally different in time and scope. In any case, as correctly submitted by the Respondent, the separation of the charges would not have led to a different finding as to the Appellant's guilt and hence it did not occasion any prejudice on the Appellant.

47. It is my view that each offence stands on its own depending on when and where it was committed. The offence committed by the Appellant on the night of 10th July 2018 cannot be said to be part of the same transaction that led him to commit the separate offence on the nights of 14th to 15th July 2018. It is further that even though the witnesses in both cases are the same, the cases are independent of each other and were rightly treated as such.

Conclusion

48. In view of the foregoing, I find that the appeal on conviction lacks merits and is dismissed.

1. The conviction of the lower court is quashed and substituted with a conviction for stock theft contrary to **Section 278 of the Penal code**.

2. The sentence of a fine of **Kshs.100,000/-** in default **3** years imprisonment is substituted with a fine of **Kshs.100,000/-** in default **one** year imprisonment. The appeal on conviction is dismissed.

Dated, signed and delivered at Chuka this 4th day of March 2021.

L.W. GITARI

JUDGE

4/3/2021

The judgment has been read out in open court.

L.W. GITARI

JUDGE

4/3/2021