



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. E006 OF 2020

THE REPUBLIC.....APPELLANT

- VERSUS -

DAVID BUNDI RATEMO.....RESPONDENT

{Being an Appeal against the Ruling of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered on the 12th day of August 2020 in the original Nyamira Chief Magistrate’s Court Criminal Case No. 1649 of 2019}

JUDGEMENT

The respondent herein was charged with the offence of stealing contrary to Section 268 (1) as read with Section 275 of the Penal Code. It was alleged that on 12th June 2019 at a village called Bogetutu the respondent stole 5531 feet of timber valued at Kshs. 100,000/=, 310 of what was described as round posts of Chindege valued at Kshs. 27,500/= and 300 off cuts valued at Kshs. 15,000/= all valued at Kshs. 143,792/= the property of Catherine Maunde.

The respondent who was represented by Learned Advocate Mr. Bwonwon’ga pleaded not guilty to the charge and the prosecution proceeded to call four witnesses to prove its case.

The first witness was the complainant Catherine Maunde Nyaboke (Pw1) who testified that on 13th April 2019 she purchased trees whose exact number she could not remember, from one Richard Orina at a consideration of Kshs. 30,000/=. She stated that after paying the deposit of Kshs. 10,000/= through M-pesa she contracted the respondent, David Bundi Ratemo, to cut down the trees and split them into different timber products namely; 431 planks of timber totaling to 5531 feet, 310 round poles and 300 off cuts. She testified that the respondent started the task on the same day and completed it after 2 weeks at a fee of Kshs. 4,000/=. She stated that once he was done the timber was stored at the home of a benefactor, one Wilfred Mongeri Ndemo, an uncle of the respondent. She testified that on 15th August 2019 she sent her son one Wycliffe Onyancha Mogaka to the house of the said Wilfred Mongeri Ndemo to check on the timber only to be told that the respondent had gone for the timber on 12th June 2019 purporting to have been sent by her. She stated that on 15th August 2019 she personally went to Mongeri’s house and confirmed what her son had told her was true. She stated that Mongeri told her that the respondent had gone for the timber using a lorry on the pretext that she had sent him. She stated that the said Mongeri told her that two people had assisted the respondent to load the timber on the lorry and that he had carted away 431 pieces of timber, 310 round poles and 300 off cuts. She contended that the value of the timber the respondent had taken was Kshs. 143,792/=. She stated that she reported the matter to Nyamira Police Station and the respondent was arrested. She contended that she knew the respondent very well but vehemently denied that she had authorized him to cart away the timber. She identified the respondent as the person who stole her timber.

John Nyakundi Orengo (Pw2) testified that he was one of the two people who assisted the respondent to carry the timber from Mongeri’s home on 12th June 2019. He testified that he did so with Thomas Mongeri Kireri (Pw3) and that they arrived at the home at 5am in the morning and loaded the timber in a canter that the respondent had also used to transport them to Mongeri’s home. Pw2 and indeed Pw3 testified that it is the respondent who took them to Mongeri’s home and opened the place where the timber was. After they finished loading the timber which they did on two trips the respondent paid them Kshs. 450 each. They stated that after the second trip they complained the payment was too little and so the respondent got other people to load the rest of the timber in the truck and he left with it. They both claimed to have known the respondent very well having worked with him prior to this incident. They also stated that they did not know the measurements or value of the timber which they assisted the respondent to load and cart away. Thomas Mongeri Kireri (Pw3) told the court that he was present when the complainant purchased the trees. He was not however aware if the complainant had authorized the respondent to cart away the timber. The investigating officer (Pw4) testified that when he received the complaint he formed the opinion that an offence had been committed and once the respondent was arrested he charged him.

After the close of the prosecution’s case, Mr. Bwonwong’a submitted that the prosecution had not established a prima facie case against the respondent as the value of the timber had not been proved with accuracy. Mr. Bwonwong’a submitted that the prosecution should have produced a valuation report to prove the value of the stolen property and further contended that the charge was defective for using the word

“Chindege” which is not an English or Kiswahili word. Counsel also contended that it was apparent that the complainant had given the respondent consent to sell the timber.

On her part, Prosecution Counsel Ms. Mokuia elected not to submit and asserted that she would rely on the evidence adduced.

After considering the evidence before him the trial Magistrate agreed with Mr. Bwonwong’a’s submission that a valuation report should have been produced to prove the value of the stolen timber and that the omission created a gap in the prosecution’s case and for that reason a prima facie case had not been established sufficiently to warrant the court to put the respondent on his defence and acquitted him under Section 210 of the Criminal Procedure Code. After analyzing the evidence, the Learned trial Magistrate stated: -

“

48. It is not disputed that PW2 and PW3 were present when the accused person carted away some timber products from Mongeri's home. However, what needs to be established by the prosecution, is the amount and or value of the timber that the accused carted away.

49. PW1 stated that the value of the timber was Kshs. 143,792/= since it comprised of 431 pieces of 5531 feet, 310 round poles and 300 off cuts. However, no valuation report from the forest department was produced to verify the number and value of the tree products.

50. In addition, PW2 and PW3, who witnessed and took part in loading the canter, did not state the number of timber products that they loaded onto the canter. It is only PW 1 who stated that there were 431 pieces of 5531 feet, 310 round poles and 300 off cuts and yet she was not present when the accused person was loading the truck.

51. Similarly, PW4, the investigating officer, did not inform this court, the alleged number of timber products that the accused person carted away from Mongeri's home. He also did not produce and or cause a valuation report to be prepared indicating the number and value of the' stolen timber products.

52. The question that remains to be answered is who determined how much timber was stolen by the accused person and who ascertained the value of the stolen timber?

53. PW1 attempted to value the stolen timber products but she did not adduce any supporting documents to prove how she arrived at her valuation of Kshs. 143, 792/=. To my knowledge, the forestry department are best placed to value trees and timber products. However, in this case, no report whatsoever was produced in court.

54. Even if this court places the accused person on his defence, his evidence will not fill the gaps in the prosecution's case. In the circumstances and due to the foregoing reasons, I find that the prosecution has failed to establish prima facie to warrant this court to place the accused person on his defence.

55. This court therefore, has no alternative, but to acquit the accused person, pursuant to Section 210 of the Criminal Procedure Code, for the offence of stealing contrary to Section 268 (1) as read with Section 275 of the Penal Code.”

Being aggrieved by that ruling the Prosecution preferred this appeal. The grounds of appeal are: -

- “1. “That the Hon. Trial magistrate erred in law in acquitting the Respondent whereas the prosecution had discharged its burden of proof as required by law.**
- 2. That the Hon. Trial magistrate misdirected himself where he made reference to extraneous issues of costs of the stolen timber despite the offence of theft having been disclosed.**
- 3. That the Hon. Trial magistrate erred in law where he failed to put the Accused to his defense despite the prosecution laying a prima facie case against the Accused.**
- 4. That the Hon. Trial Magistrate misinterpreted the evidence adduced by the prosecution to arrive at an erroneous conclusion.”**

On 24th February 2021 this court gave directions that the appeal would proceed by way of written submissions but it was not until 25th May 2021 that the court received all the submissions.

Mr. Majale, Learned Principal Prosecution Counsel who acted for the appellant in the appeal, submitted that the elements of the offence of stealing were sufficiently proved by the evidence adduced by the prosecution. He submitted that it was clear that the respondent stole the timber in question. He relied on the evidence of Pw1 (the complainant) who told the court that she had purchased the trees and contracted the respondent to cut them into different sizes for a fee but the respondent thereafter took off with the timber products without her authority; that Pw2 also testified that the respondent instructed them to load the timber into a canter. Counsel submitted that failure to produce a valuation report is not reason to conclude there was no theft as it has been proved that timber belonging to the complainant was stolen by the respondent. Mr. Majale urged this court to set aside the ruling of the trial court and substitute it with a conviction or appropriate sentence or any other order the court may deem fit.

On his part, Mr. Bwonwong'a, Learned Advocate for the respondent stated that it was the respondent's case that the prosecution did not adduce any valuation report of the stolen property. That the witnesses who testified did not know the number of stolen property or their value. Mr. Bwonwong'a submitted that the complainant did not witness the respondent stealing the timber. Further, that the owner of the premises where the timber was kept was not called in court to testify. Counsel sought to discredit the complainant's evidence that she could not recall the number of trees meaning that she did not know the sizes of the timber split. Counsel further submitted that if at all the trees and timber were put on the canter as alleged, then none of the loaders knew the size and value of the loaded timber/trees; that, the charge sheet was in any event defective for failing to have an expert assessment with regard to sizes of the timber and their value and also for using the word "**chindege**" which is neither a Kiswahili nor English word. Mr. Bwonwong'a urged this court to uphold the decision of the trial Magistrate and hence dismiss this appeal.

I have considered the grounds of appeal, the evidence in the trial court, the rival submissions in this appeal and the law. The trial court acquitted the appellant under Section 210 of the Criminal Procedure Code and by this appeal this court is urged to reverse that acquittal. The jurisdiction of this court on an appeal against an acquittal is provided at **Section 354 (3) (c)** of the **Criminal Procedure Code** which states: -

“(1) At the hearing of the appeal the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the respondent or his advocate may then address the court.

(2) The court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address.

(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may

.....

(c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit.”

Learned Principal Prosecution Counsel Majale submitted that there was evidence that the appellant in this case carted the timber belonging to the complainant without her permission and that therefore the offence of stealing had been established. He contended that the omission to produce a valuation report which was the reason for the acquittal did not negate that the timber was stolen and that therefore the prosecution had established a prima facie case against the respondent and the ruling of the trial Magistrate should be set aside and replaced with a conviction or appropriate sentence or order. Mr. Bwonwong'a, the Learned Advocate for the appellant contended that the omission to produce the valuation report was fatal and urged this court to uphold the acquittal. However, having considered the facts of the case and the law carefully I am unable to uphold the acquittal. I agree with Prosecution Counsel Majale that in this case the **main issue for determination was whether the ingredients of the offence of theft had been established** and the omission to prove the value of the timber was not itself fatal to the prosecution's case. My finding is fortified by the provisions of **Section 137 (c) (i)** of the **Criminal Procedure Code** which states that: -

“137. The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code –

.....

(c) (i) the description of property in a charge or information shall be in ordinary language, and shall indicate with reasonable clearness the property referred to, and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property.” (Underlining mine).

My finding is also fortified by the decision of the Court of Appeal in the case of **Ogaro v Republic [1984] KLR page 641** where it was held: -

“2. It is not fatal to a charge of stealing under section 280 of the Penal Code (cap 63) to omit to prove the value of the thing stolen.....”

In the above case the Judges of Appeal reasoning was as follows -

“The appellant who was employed in the public service was convicted by the resident Magistrate, Kisumu, of stealing one income tax file value Kshs 1, the property of Kenya Government, contrary to section 280 of the Penal Code. His appeal to the High Court against conviction was dismissed. The prosecution failed to prove the value of the file at the trial. The finding of the appellate judge of the High Court that to support a charge of theft economic or pecuniary loss need not be proved has come under strong attack before us. Under section 267 (1) of the Penal Code, every inanimate thing whatever which is the property of any person, and which is movable is capable of being stolen. A file is capable of being stolen. The

omission to prove the value of the thing stolen is not fatal to the charge inasmuch as section 137 (c) (i) of the Criminal Procedure Code provides that if the property is described with reasonable clearness in a charge or information it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property. We can and do take judicial notice that a file is worth at least Kshs 1.” (Underlining mine).

In the case against the respondent the offence did not depend on any special ownership of property or special value of the property as would be say in a case of stealing money where the exact amount of money would require to be proved and the trial Magistrate therefore acted on a wrong principle of law in acquitting the respondent. The description of the stolen property in a language other than English or Kiswahili is also not fatal as the indigenous language used to describe the tree was an ordinary language in this region and it indicated with reasonable clearness the property referred to as is expected under **Section 137 (c) (i) and (f) of the Criminal Procedure Code.**

Section 354 (3) (c) of the Criminal Procedure Code cloths this court with power to reverse the acquittal and to make an appropriate order. In the circumstances this appeal succeeds and the order of the trial court acquitting the respondent is set aside and it is directed that the case is remitted back to the lower court to be retried by a Magistrate other than Hon. Waswa and the court and the respondent shall be at liberty to determine whether the trial shall start afresh or from where Hon. Waswa had reached. Accordingly, the respondent shall be produced before the Hon. Chief Magistrate’s Court on Monday 5th July 2021 for directions. It is so ordered.

JUDGEMENT SIGNED, DATED AND DELIVERED (ELECTRONICALLY VIA MICROSOFT TEAMS) AT NYAMIRA THIS 1ST DAY OF JULY 2021

E. N. MAINA

JUDGE