



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 58 OF 2019

JULIUS KINYUA MWENDA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence by Hon. G.N Wakahiu CM ON 25/5/2019 in Maua

Cr. Case No. 3220 of 2012)

J U D G M E N T

1. **Julius Kinyua Mwenda ('the appellant')** and two others were charged with the offence of robbery with violence contrary to **section 296 (2) of the Penal Code**. It was alleged that on 6/10/2012 at Kabisero village, Antubetwe Kiongo Location in Igembe North District within Meru County, being armed with dangerous weapons namely, pangas, the appellant with others robbed **Adan Bakaja** 3 bulls and 5 cows all valued at Kshs. 400,000/- and during the time of such robbery used personal violence.
2. The trial court convicted the appellant and sentenced him to life imprisonment.
3. Aggrieved by that decision, the appellant has appealed to this Court against both the conviction and sentence. He raised 15 grounds that can be collapsed into 2; **that the prosecution did not prove its case to the required standard and that the trial court misapplied the doctrine of recent possession and thereby convicted the appellant on unreliable evidence.**
4. This being the first appeal, this Court is duty bound to revisit the evidence tendered before the trial court afresh, re-evaluate and analyze the same and come to its own independent conclusion and findings. However, it must give allowance to the fact that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence. **Okeno vs. R [1972] EA 32.**
5. The prosecution called six witnesses to support its case. **Pw1 Bakaja Wako** told the court that he was the owner of the stolen animals. He recalled that on 6/10/2012, his son **Adan Bakaja** went to graze his cows. At about 3.00 pm, his other son found the body of **Adan Bakaja** under a tree and the cows were nowhere to be seen. He was stood down and was never recalled to finish his testimony.
6. **Pw2 Simon M'Mirianga Maore**, a Senior Assistant Chief of Amwathi location told the court that, on 8/10/2012 he was notified by the Chief of Kabachi that some cows had been stolen. On 10/10/2012, he and others found one cow at the home of the 3rd accused who later passed on.
7. **Pw3 Samuel Kamathi Riberua**, the Chief of Kabachi location was notified about the stolen cows on 7/10/2012. He together with security personnel recovered one cow in Ngija forest on 10/10/2012. Three other cows were later recovered tethered in a forest on 16/10/2012. At the scene, a jacket and black cap were recovered. The appellant and the other accused in the lower court were arrested on 11/10/2012.
8. **Pw4 Joseph M'Thiangeta**, a retired Assistant Chief from Ndoleli sub-location, told the court that on 6/10/2012, he received information that someone had been killed by a buffalo while herding cattle. On 7/10/2012, he was informed that the cows were stolen and he notified **Pw3** of that fact.
9. On 11/10/2012, he learnt that the deceased accused had been arrested as three cows had been found in his possession. Further on 16/10/2012, he was informed that three other cows had been recovered tethered at Ngija forest. Three jackets and a cap which he knew belonged to the appellant were recovered from the scene.
10. **Pw5 Kariuki Michael** a medical doctor stationed at Nyambene Sub County hospital appeared and produced a post mortem report in respect of Adan Bakaja. It revealed that the body had deep cuts on the wrist and the lower limbs. There was a fracture of the skull. The cause of death was opined to be cardiopulmonary arrest due to severe head injury together with multiple cuts leading to shock.

11. **Pw6 PC Boniface Githinji** took over the investigations from Sergeant Alex who had been transferred to Lamu Police Station. A report was made about the robbery on 6/10/2012. Police Officers visited the scene and recovered the body of the deceased. On 11/10/12, the appellant and his co-accused were arrested on suspicion that they were looking for a market for the animals. On 16/10/2012, three more cows were recovered at Ngare forest. Clothes belonging to the appellant and his co-accused were recovered from the scene.

12. In his defence, the appellant told the court that the Assistant Chief had given false evidence. That on 11/10/2012, he was with his friends at Halisi bar. Policemen came with another person who pointed at him. He was arrested and taken to Kiutine Police post where he stayed for 15 days.

13. I have carefully considered the record and the submissions. The first ground of appeal was that the prosecution case was not proved beyond any reasonable doubt. The prosecution proved that the deceased died from multiple cuts. The cows he was herding were taken away and found tethered in some forest.

14. Having proved the cause of death of the deceased to be as a result of a brutal attack, it was upto the prosecution to prove that the appellant was involved. The prosecution case was that eight cows were stolen. Two cows were never recovered. It was not clear whether it was one cow or three that were recovered from the home of the 3rd accused, now deceased. It was however proved that three cows were found tethered in Ngija forest. At the scene three jackets and a cap were found which **Pw4** told the Court belonged to the appellant.

15. It was one of the jackets and the cap that allegedly linked the appellant to the cows that were recovered from the forest. The trial court concluded that the appellant had constructive possession of the animals by virtue of the doctrine of recent possession.

16. Was the prosecution case proved beyond reasonable doubt? In **Republic v Ismail Hussein Ibrahim [2018] eKLR**, the Court said of the burden of proof: -

“To give meaning to this concept of burden of proof of beyond reasonable doubt in criminal cases, the Federal Court of United States in the case of United States v Smith, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing In re Winship, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring) the court stated:

“The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant’s guilt, but it does not mean that a defendant’s guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant’s guilt, after you have weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there’s a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.”

17. In view of the foregoing proof beyond reasonable doubt means that the evidence must be cogent consistent and clearly pointing at an accused. No amount of suspicion can be said to be prove beyond reasonable doubt. The evidence must be satisfactory and leave no doubt in the mind of the court.

18. In the present case, the prosecution relied on circumstantial evidence. In **ABANGA alias ONYANGO V. REP CR. A NO. 32 of 1990 (UR)**, the Court of Appeal held that: -

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”

19. In **SAWE –V- REP [2003] KLR 364**, the Court of Appeal also held: -

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

20. The appellant was arrested on 11/10/2012 on the allegation that he was looking for a market for the animals. The three cows tethered in the forest were found on 16/10/2012, five days later. It was never alleged that the appellant has led to their recovery.

21. The prosecution did not call or identify the person whom the appellant allegedly told he was looking for a market. Even if that was the case, there was no connection between the animals the appellant was allegedly looking for a market with the three cows that were recovered tethered in Ngija forest.

22. The trial Court seems to have put a lot of weight in the evidence of **Pw4** that the jacket and cap found in the vicinity of where the cows were recovered belonged to the appellant. It was not clear how many jackets were found at the scene. From the record and the testimony of **Pw3**, only one jacket and a cap were marked. However, **Pw3** talked of 3 jackets. These were never produced. Only one was produced as Pexh 3. There was no special mark that was pointed out in the jacket to show that the same belonged to the appellant.

23. **Pw4** did not tell the court what made him know that the subject jacket belonged to the appellant and no one else. The mere fact of insistence that he had seen the appellant wear the jacket was not enough. He should have pointed out the special marks that made him believe that fact. He should have also stated how many times he had seen the appellant wear the same for familiarity with the subject jacket. This is so considering that there was nothing unique with the subject jacket that made it the only one of its kind thereby pointing towards it belonging to the appellant and no one else.

24. As regards the doctrine of recent possession, with due respect, the trial Court misapplied the same. That doctrine applies where a person is found to be in possession of an object. In the present case, nothing was recovered from the possession of the appellant. That doctrine was wrongly applied in the circumstances of this case leading to a miscarriage of justice.

25. In the premises, it is doubtful whether the jacket(s) found in the vicinity of the tethered cows belonged to the appellant. That doubt must be resolved in favour of the appellant.

26. Accordingly, I find that the appeal is meritorious and I allow the same. The conviction of the trial Court is hereby quashed and the sentence set aside. The appellant is to be set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED at Meru this 16th day of July, 2020.

A. MABEYA

JUDGE