



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 108 OF 2019**

**ALI MWANA ALLI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Shanzu Criminal*

*Case No. 691 of 2018 by Hon. D. Odhiambo (SPM) dated 18<sup>th</sup> October, 2019*

**Coram: Hon. Justice R. Nyakundi**

**Mr. Muthomi for the Respondent**

**Appellant in person**

**JUDGMENT**

The Appellant was charged with stealing stock contrary to Section 278 of the Penal Code. The particulars of the offence were that on diverse dates between the 13<sup>th</sup> and 28<sup>th</sup> February 2016 at Mtwapa within Kilifi County, jointly with others not before Court stole eleven cattle and twenty-two goats valued at Kshs. 493,000/- the property of Malombo Robinson.

At the end of the trial, the Appellant was convicted and sentenced to 3 years imprisonment. Aggrieved by the sentence and the conviction of the trial court, the Appellant through his advocate, Mr. Egunza lodged an appeal on the following grounds:

- 1) That the learned trial Magistrate erred in law and fact in proceeding to try, convict and sentence the Appellant based on a defective charge sheet.***
- 2) That the learned trial Magistrate erred in law and fact by proceeding to convict and sentence the Appellant on evidence that was insufficient, contradictory and uncorroborated.***
- 3) That the learned trial court Magistrate erred in law and fact in disparaging the offence offered by the Appellant hence shifting the burden of proof to the Appellant.***
- 4) That the learned trial Magistrate erred in law and fact by proceeding to convict the Appellant when in essence no evidence had been adduced in support of the alleged charge.***
- 5) That the learned trial Magistrate erred in law and fact by failing to reasonably consider the evidence tendered by the Appellant and accord it the weight it deserve hence erroneously making a finding that the complaint had proved his case on a balance of probabilities.***

**Background**

**PW1 Robinson Malombo Onyango**, the complainant told the court that in 2016 he bought several livestock from three people and he produced the Sale Agreement (P.Exh 1, 2 and 3). That after he purchased the livestock he had them delivered to the Appellant's compound. That the Appellant looked for a herdsman to take care of the livestock and the complainant would pay him Kshs 4,000/- every month.

The complainant stated that he knew the Appellant for six years and that he used to run his errands and at one time, he had assisted the complainant in construction of his house. One day, the Appellant demanded Kshs 600,000/- for the work he had done but the complainant

refused to pay. That the Appellant informed the complainant that there would be consequences.

**(PW1)** stated that he asked the Appellant to return his livestock but the Appellant refused. He claimed that the Appellant converted his livestock and slaughtered and sold most of them. That he was only

Able to recover seven cows. The complainant informed the court that he tried talking to the Appellant but he refused to listen forcing the Complainant to go to the police and report the matter.

In cross-examination, **PW1** stated that he had agreed with the Appellant to keep the animals and that they operated on trust. He stated that the animals were delivered by the seller to the Appellant who lived on family land. He further told the Court that he had sent the Appellant to Mbita as a herd man for two years and he would pay him Kshs 30,000/- a month. Also, he stated that they differed in December 2016 or December 2017.

**PW2 Uwe Pfeil**, sold five cows to PW1 for Kshs 105,000/- in 2016. He told the Court that he had delivered them to the Appellant's place. He told the Court that he had known the Appellant for some time.

**PW3 Masha Mrabu** told the Court that he entered into an agreement dated 13<sup>th</sup> February 2016 to sell one cow, two calves and three goats to PW1 for Kshs 60,500/. That on instructions of PW1 he delivered the animals to the Appellant's home. That the Appellant was not at his home so he left the animals with the herdsmen. PW3 stated that he knew the Appellant since childhood.

**PW4 Ernest Mokaya** an Advocate of the High Court informed the Court that he witnessed three Sale Agreements for the sale of the domestic animals between PW1 and PW2; and PW1 and PW3.

**PW5 Salim Seith Karanja**, was the driver for PW1 for many years. He told the Court that on 29<sup>th</sup> January 2016 PW1 instructed him to collect five cows at Muratibu in Voi and deliver them to the Appellant's home at Majengo. He stated that he arrived late to Voi and had to spend the night. The next day he delivered the cows but did not find the Appellant. That when he called the Appellant, the Appellant instructed him to leave them with his wife.

In cross-examination, PW5 told the Court that he knew the Appellant well as he used to be in charge of PW1's house and that he had driven the Appellant to PW1's upcountry.

**PW6 Inspector Ambrose Rono** for DCI Kilifi County was the investigating officer. He stated that the complainant reported the matter on 3<sup>rd</sup> January 2018 and informed him that he had a disagreement over work. That on 12<sup>th</sup> May 2018 **PW1** informed him that he had seen the cows in Mtwapa. He went to Mtwapa where he found two mature cows, a calf and three goats and arrested the Appellant. He told the Court that the Appellant was unable to prove ownership and he decided to charge the Appellant.

In cross-examination, PW6 told the Court that **PW1** had photos of the cows and that he pointed out the cows that were in the Appellant's possession.

At the close of the prosecution case, the trial Court found that a prima facie case had been established and the Appellant was placed on his defence. The Appellant chose to give a sworn statement and called three witnesses.

The Appellant stated that the cows were his having bought them from Raymond Shoboi Munya. He produced a Sale Agreement dated 4<sup>th</sup> December 2013 (D. Exh3). He informed the Court that he worked for the Appellant from 2009 upto December 2017. The Appellant stated that he had constructed houses for the complainant at Mtwapa and his rural home at Rusinga. He stated that the complainant used to pay hi salary in cash, through Mpesa and deposits to his account.

The Appellant told the Court that after he had finished working for the complainant he demanded for Kshs 635,250/- being his salary but the complainant refused. He stated that on 17<sup>th</sup> January 2018 he wrote a letter of complaint to the DPP with regard to his salary. The Appellant stated that sometime later the complainant accompanied with police officers went to his home and took his animals. That as a result the Appellant reported the matter to Kijipwa Police Station.

In cross-examination, he stated that he was a site manager and that the complainant was paying him Kshs 65,000/. He stated that they had a trust relationship where the complainant would send him money. He denied that the complainant had delivered animals to his home.

**DW2 Mohammed Hemed** was the Village Elder at Majengo. He told the Court that on 20<sup>th</sup> February 2014 he witnessed an agreement between the Appellant and Kitsao for three cows.

**DW3 Catherine Kemunto Okeya** was the Appellant's wife. She told the Court that she married him in 2015 and she found him with the cows and the goats. She told the Court that no cows or goats had ever been delivered to her home.

**DW4 Alice Wairimu**, told the Court that the Appellant was his neighbor and that on 4<sup>th</sup> May 2014 she sold him four goats and had an agreement that was witnessed by the Village Elder.

**DW5 Raymond Shoboi** Muya informed the Court that he sold him three goats on 4<sup>th</sup> December 2013 and had an agreement before the Village Elder.

## Submissions

While the Respondent filed its submissions on submissions dated dated 2<sup>nd</sup> June 2020 on the same date, the matter came up for hearing on 3<sup>rd</sup> September 2020 where parties highlighted their submissions.

### Appellant's Submissions

The Appellant filed his submissions undated on 22<sup>nd</sup> July 2020, which he relied on in support of his appeal. Mr. Egunza advocate for the Appellant submitted that the charge sheet was defective as there was a mis-description of the Appellant's name. He stated that the charge sheet referred to the Appellant as Mbwana Ali Mbwana, while in the trial Court's Judgment the name used was Ali Mbwana Ali and on the other hand, **PW1** referred to him as Ali Mburu. He submitted that the error was fatal.

Further, he submitted that the charge sheet referred to cattle which was described in Black Law's dictionary 2<sup>nd</sup> Edition as all domestic animals used by man for labour or food which was a clear mis-description. He relied on the case of **Yongo vs Republic (1983) KLR 319**.

Counsel submitted that the evidence was insufficient and did not support the charges. He submitted that there was an employer-employee relationship between the Complainant and the Appellant which would have supported a charge of stealing by servant rather than the present charge. Additionally, he submitted that no evidence adduced to show that the Appellant was arrested with the said animals. The investigating officer had seen the cows in Mtwapa yet the Appellant resided in Majengo.

Lastly, Mr. Egunza submitted that the trial Magistrate disparaged the Appellant's defence that there was a labour dispute and that the case against him was a smear campaign to disengage claims against the Complainant. He further faulted the trial Magistrate for disregarding DW2 as a character witness and failing to order for asocial report as the norm. Also, he submitted that the presence of the Complainant, an Advocate, at the time of sentencing was an intimidation tactic.

The Appellant submitted that the Mr. Obara for the Appellant submitted that the prosecution never proved its case against the Appellant.

### Respondent's Submissions

Mr. Muthomi for the Respondent filed written submissions dated 24<sup>th</sup> July 2020 on the same date. He submitted that the difference in the Appellant's name in the charge sheet, the appeal and the trial Court's Judgment was not a defect but a typographical error, which did not prejudice the client. Also he submitted that the reference to cattle was clear as the evidence referred to cows. He relied on **Sigilani vs Republic (2004) 2KLR and Mombasa Criminal Appeal No. 121 of 2017 Talal Omar vs Republic**.

Secondly, counsel submitted that the prosecution had proved that the Appellant had converted the livestock of the Complainant fraudulently with an intent of depriving the Complainant of their ownership. He urged that there was sufficient evidence upon which the trial Magistrate convicted the Appellant. He cited the case of **Ketan Somaia & Jason Wellington Oluga vs Republic Criminal Appeal No. 428-429 of 2004**.

Mr. Muthomi submitted that the prosecution had discharged its burden and it was never shifted to the Appellant. That the Appellant had failed to demonstrate how the burden was shifted to him. He quoted the case of **Miller vs Minister of Pension (1974)**.

### Analysis and Determination

This being a first appeal, this Court has a duty to revisit the evidence that was before the trial Court, re-evaluate and analyse it and come to its own conclusions. Further, the Court has to bear in mind that unlike the trial Court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno Vs Republic (1972) EA 32, Eric Onyango Odeng' vs Republic (2014) eKLR**.

I have considered the grounds of appeal, the respective submissions, and the record and the issue for determination is whether the charge sheet was defective and whether the prosecution proved its case.

On whether the charge sheet was defective, Section 134 of the Criminal Procedure Code provides:

***Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

The Court of Appeal in **Benard Ombuna vs Republic (2019) eKLR** pronounced itself thus: -

***"In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respects to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."***

The Appellant submitted that the charge sheet was defective as there was a mis-description in the Appellant's name. However, the Appellant has not provided an identification card to prove that Mbwana Ali Mbwana was not his name; furthermore, the Appellant produced Sale Agreements that showed his name was Mbwana Ali Mbwana. Additionally, even if there was an error in the name of the Appellant, there

was no doubt as to his identify they had an employer-employee relationship between the Complainant and the Appellant. The fact that the Appellant's name was misspelled in the trial Court's Judgment was an error that does not affect the charges before him.

The Appellant further contends that the word cattle was a mis-description. The Cambridge dictionary defines cattle as large farm animals kept for their milk or meat; cows and bulls. The term cattle is commonly used in Kenya to refer to cows, the evidence tendered clearly referred to cows. There was no difficulty for the Appellant to understand the charge before him related to stealing of the Complainant's cows in this ground fails.

The next issue is whether the prosecution proved its case. The offence of stealing is defined under Section 278 of the Penal Code which states that:

***“If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period of not exceeding fourteen years.”***

Stealing is defined under Section 268 of the Penal Code as:

***a) An intent permanently to deprive the general or special owner of the thing of it;***

***b) .....***

***c) .....***

***d) .....***

***e) .....***

***(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.***

***(4).....***

***(5).....***

The undisputed facts in this case are that there was an employer-employee relationship between the Complainant and the Appellant; the relationship was based on trust and; that the Complainant bought livestock. The only contentious issue is whether the livestock that was recovered belonged to the Complainant.

In order for the prosecution to prove its case, it had proved that the livestock was delivered to the Appellant; that the Appellant fraudulently deprived the Complainant of his livestock and that the livestock recovered belonged to the Complainant.

The evidence on record was that after the complainant had bought the animals he directed that they were to be delivered to the Appellant's home. He called **PW2, PW3** and **PW5** who corroborated his evidence. **PW6**, the Investigating Officer stated that on the 12<sup>th</sup> May 2018, he arrested the Appellant who was in possession of two mature goats, a calf and thirteen goats.

Founded on the principle of recent possession, the Appellant was required to prove that the livestock in his possession did not belong to the Complainant. ***The Court of Appeal in Jumane Mohamed Hassan vs Republic (2005) ekr*** stated that: -

***“The conviction of the Appellant was solely dependent on the unaccounted recent possession of the Complainant's goods stolen during the robbery. Where an accused person is found in possession of recently stolen property and in the absence of any reasonable explanation to account for his possession a resumption of fact arises that he is either the thief or a receiver (see ANDREA OBONYO vs. Republic (1962) E.A. 542 at page 549.”***

The Appellant in his defence denied from ever receiving the animals on behalf of the Appellant and claimed that he had bought his own animals and produced Sale Agreements two Sale Agreements in support of his case. He called three witnesses **DW2, DW4** and **DW5** in support of his case.

In its Judgment the trial Magistrate while dismissing the Appellant's defence stated that: -

***“Of keen interest also is the condition of the document almost six years after it was executed. By commonsense a document executed in December 2013 would not be in the same mint condition as the original presented in Court. As much as it is the defence role to create doubt on the prosecution case, it is unethical and an act of desperation for the defence to attempt to deceitful means to create that doubt in the mind of the Court.”***

I do not agree with the trial Magistrate reasoning in dismissing the Sale Agreements. The prosecution did not discredit the Sale Agreements

nor did not prove that the agreements were fraudulent. **DW5** who was one of the people who sold goats to the Appellant was called as a witness and his evidence was not rebutted. The trial Magistrate misdirected himself in dismissing the Appellant's defence without a legal basis.

I have re-evaluated the Appellant's evidence, he produced a Sale Agreement and receipts for the purchase of goats; the evidence was not rebutted by the prosecution and establishing ownership of the goats. This creates doubt in the mind of the Court as to whether the goats recovered belonged to the Complainant.

However, the Appellant has failed to prove ownership of the cows found in his possession. Despite claiming to have bought them from one Kitsao, who was never called as a witness. In addition, he never produced a Sale Agreement for the goats despite calling **DW2**, a Village Elder, who claimed to have witnessed the same. The evidence of **DW2** remained unsubstantiated and of little evidentiary value. I find that the Appellant did not own any cow.

Having reached the conclusion that the Appellant did not own any cows and he was unable to explain the possession of the same, the only conclusion that can be reached is that the cows belonged to the Complainant giving credence to his claim that he had the animals delivered to the Appellant. Nevertheless, the Complainant had a duty to prove that the cows recovered belonged to him.

The Court of Appeal in *Isaac Ng'ang'a Kahiga alis Peter Ng'ang'a Kahiga vs. Republic CA Criminal Appeal No. 272 of 2005 (Nyeri) (Unreported)*, said:

*“It is trite that before a Court of Law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, in other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the Complainant. Thirdly; that the property was stolen from the Complainant; and lastly; that the property was recently stolen from the Complainant....” (Emphasis mine)*

In *Dan Imbiri Agoi & 2 Others vs Republic (2019) eKLR* Musyoka J held that: -

*37. The Court in Elijah Ngugi Kimemia & Another vs. Republic (2010) ECLR addresses the matter of proof of ownership of stolen goods by alleged owners. It was stated that proof of ownership of such goods is determined on the basis of the facts of each case. It may be way of producing receipts or other documentary proof, or by way of showing identifying marks on the items or other features such as initials. It could also be by evidence that the same was gifted to the Complainant or that he had used it for such a long time that it developed features or characters that could be pointed out to aid identification. See also Lawrence Omondi Ojunga vs. Republic (2010) eKLR.*

In the present case, the Investigating Officer in cross-examination stated that the Complainant had identified the cows and that he had shown him photographs of the cows. Unfortunately, none of the photographs were adduced in Court, to prove ownership, the cows were never brought to the Court for identification despite being in possession of the police. The prosecution failed to prove beyond reasonable doubt that the cows belonged to the Appellant.

Having reached a conclusion that the prosecution had failed to prove its case beyond reasonable doubt, I have no option but to resolve the issue in favour of the Appellant. In the final analysis, I find that the appeal is merited and thereby quash the conviction and set aside the sentence of the trial Court. Appellant is at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 9<sup>TH</sup> DAY OF DECEMBER 2020**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

**Mr. Mwangeka for the Respondent**

**Appellant in person**