REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 85 OF 2017

JAMES MWAKISACHI MWADIME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 46 of 2017

in the Senior Resident Magistrate's Court at Wundanyi delivered

by Hon N. N. Njagi (SPM) on 7th September 2017)

JUDGMENT

INTRODUCTION

1. The Appellant herein, James Mwakisachi was jointly charged with Munyao Nzuki Kimotho and Omar Dube (hereinafter referred to as "the Appellant's Co-Accused") on several Counts.

2. Count I was in respect of the offence of stealing stock contrary to Section 278 of the Penal Code Cap 63(Laws of Kenya). The particulars of this charge were that on 6th February 2017, at an unknown time at Mbale Ranch in Mwatate Sub-County within Taita Taveta County, jointly with others not before the court, they stole twenty four (24) cattle bearing identification marks "MBL" all valued at Kshs 840,000/=, the property of Beatrice Mkanyika Mwabili (hereinafter referred to as "PW 5").

3. In respect of Count I, they were charged with an alternative charge of handling stolen goods contrary to Section 322(1) of the Penal Code. The particulars of this charge were that on 6th February 2017 at around 8.00 am at Kamtonga area in Mwatate Sub-location within Taita Taveta County, jointly otherwise than in the course of stealing dishonestly retained eight (8) bulls with identification marks "MBL" knowing or having reason to believe them to be stolen goods.

4. Count II was also in respect of the offence of stealing stock contrary to Section 278 of the Penal Code. The particulars of this charge were that on6th February 2017, at an unknown time at Mbale Ranch in Mwatate Sub-County within Taita Taveta County, jointly with others not before the court, they stole nine (9) cattle bearing identifiable marks "GSM" all valued at Kshs 360,000/=, the property of Gregory Sylvenous Mwakanondo .

5. In respect of Count II, they were also charged with an alternative charge of handling stolen goods contrary to Section 322(1) of the Penal Code. The particulars of this charge were that on 6th February 2017 at around 8.00 pm at Kamtonga area in Mwatate Sub-location within Taita Taveta County, jointly otherwise than in the course of stealing dishonestly retained five (5) cattle knowing or having reason to believe them to be stolen goods.

6. Count III was also in respect of the offence of stealing stock contrary to Section 278 of the Penal Code. The particulars of this charge were that on6th February 2017, at an unknown time at Mbale Ranch in Mwatate Sub-County within Taita Taveta County, jointly with others not before the court, they stole a cow black in colour bearing identification mark "PMT" valued at Kshs 30,000/=, the property of Patrice Mghanga Teka (hereinafter referred to as "PW 4").

7. In respect of Count III, they were also charged with an alternative charge of handling stolen goods contrary to Section 322(1) of the Penal Code. The particulars of this charge were that on 6th February 2017 at around 8.00 pm at Kamtonga Village in Mwatate Sub-location within Taita Taveta County, jointly otherwise than in the course of stealing dishonestly retained a cow black in colour knowing or having reason to

believe them to be stolen goods.

8. In Count IV, they were jointly charged with the offence of conveying suspected property contrary to Section 323 of the Penal Code. The particulars of this charge were that on7th February 2017, at around 1.30 pm at Kamtonga Village in Mwachabo Location within Taita Taveta County, jointly **(sic)**having been detained by No 40936 Sgt Samuel Samkul (hereinafter referred to as "PW 7") as a result of the exercise of powers conferred by Section 26(1)(c) of the Criminal Procedure Code had in possession sixteen (16) heads of cattle reasonably suspected to have been stolen or unlawfully obtained.

9. After hearing the matter, the Learned Trial Magistrate Hon N.N. Njagi, Senior Principal Magistrate acquitted the Appellant and his Co-Accused on Counts I, II and III as the Prosecution did not prove beyond reasonable doubt that they actually stole the cattle. He, however, convicted them on the alternative Charges of Counts I, II and III and sentenced them to nine (9) years imprisonment plus hard labour. He also convicted them on Count IV and sentenced them to two (2) years imprisonment. He directed that the sentences were to run consecutively.

10. Being dissatisfied with the said judgment, on 17thOctober 2017, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time, which application was allowed and the Petition of Appeal deemed to have been duly filed and served. He relied on four (4) Grounds of Appeal. While his Written Submissions were filed on 18th January 2018, those of the State were dated 20th February 2018 and filed on 21st February 2018.

11. When the matter came up on 21st February 2018, both the Appellant and the State asked the court to deliver its judgment based on their respective written submissions. The judgment is therefore based on the said written submissions.

LEGAL ANALYSIS

12. 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".**

13. After perusing the Appellant's and the State's Written Submissions, this court was of the view that the issues that had been placed before it for determination were as follows"-

> **A. Whether or not the Prosecution proved its case beyond reasonable doubt; and**
>
> **B. Whether or not the sentence was harsh, severe and manifestly excessive in the circumstances of the case herein.**

14. This court therefore deemed it fit to address the two (2) issues under the distinct and separate headings shown hereinbelow.

I. PROOF OF THE PROSECUTION'S CASE

15. Grounds of Appeals Nos (2), (3) and (4) were dealt with under this head.

16. Although in his submissions the Appellant had argued that the Prosecution ought not to have shifted its burden of proof to him but ought to have provided cogent, consistent and credible evidence, he nonetheless admitted that he was found in possession of the cattle. It was his averment that he did not know the owner of the animals he was conveying and that had he known that the same were stolen, he would never have gone near them.

17. He stated that he was aged seventeen (17) years and had dropped out from school due to financial difficulties. He added that he was a first offender and a layman in matters of law and therefore urged this court to consider his plight.

18. On its part, the State argued that the doctrine of recent possession was proved in this case because the Appellant was found in possession of the cattle. It relied on the case of **Malingi vs Republic (1989) KLR 225 at pg 227**where Bosire J (as he then was) rendered himself as follows:-

> **"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain the possession after the prosecution have proved certain basic facts. Firstly, that the item he had in his possession had been stolen a short period prior to the possession, that the lapse of time from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of a fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which is he fails to do an inference is drawn that he either stole it or was a guilty receiver."**

19. This was the same holding in the cases of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs Republic [2006] eKLR** and**Reuben Nyakango Mose & Another vs Republic [2013] eKLR** where the Courts of Appeal affirmed that the aforesaid circumstances must exist before doctrine of recent possession could be invoked.

20. A perusal of the evidence that was adduced in the Trial Court showed that neither John Kibwanga Kibongoso (hereinafter referred to as "PW 1") nor Kenneth Nyange Mwawasi (hereinafter referred to as "PW 2") nor No 7257 Corporal Hassan Maalim (hereinafter referred to as "PW 3") nor PW 4 nor PW 5 nor PW 7 tendered any evidence that pointed to the Appellant and his Co-Accused having stolen the cattle.

21. This court therefore agreed with the conclusion that the Learned Trial Magistrate arrived at to the effect that the Prosecution did not prove the offence of stealing stock contrary to Section 278 of the Penal Code and that he had acted correctly when he acquitted them of the said offence.

22. Turning to the alternative charge of handling stolen goods, this court found that there was no value in this court analysing whether or not the doctrine of recent possession could be invoked herein or if the Prosecution proved its case against him beyond reasonable doubtbecause as was seen hereinabove and in his sworn evidence, the Appellant had admitted to having been found in possession of stolen cows. In fact in his evidence, he told the Trial Court that he called his Co-Accused Munyao Nzuki Kimotho and informed him of having been found with stolen cows. This was a clear admission of the offence of handling stolen property.

23. In the circumstances, this court found that his Grounds of Appeal No (2), (3) and (4) were not merited and the same are hereby dismissed.

II. SENTENCE

24. Ground of Appeal No (5) was dealt with under this head.

25. The Appellant submitted that because he had readily admitted to having been found in possession of the cattle, the Learned Trial Magistrate ought to have considered that fact while sentencing him.

26. On its part, the State pointed out that the maximum sentence under Section 322(2) of the Penal Code was fourteen (14) years and that the Learned Trial Magistrate therefore acted within his discretion when he sentenced the Appellant and his Co-Accused to nine (9) years imprisonment on the three (3) alternative Charges.

27. It referred this court to the case of **Gabriel Simiyu vs State [2003] eKLR** where the High Court reduced a sentence of seven (7) years imprisonment with fourteen (14) strokes to five (5) years where the appellant therein had been charged with theft of two (2) goats.

28. It also placed reliance on the case of **Sammy Munyao Wambua vs State [2015] eKLR**where the High Court affirmed a sentence of four (4) years imprisonment where the appellant therein had been charged with the theft of one (1) goat.

29. However, it pointed out that the Learned Trial Magistrate erred when he directed that the sentences for the three (3) alternative charges would run consecutively since the animals were found at the same time. It was its submission that the sentences that were meted upon the Appellant and his Co-Accused ought to have run concurrently.

30. It added that the Learned Trial Magistrate also erred when he failed to take into consideration that the Appellant herein was a minor, having been aged seventeen (17) years at the time he was arraigned in court, a fact that was also indicated in the Probation Report that was presented to him at the time of sentencing.

31. It therefore submitted that the sentence of twenty nine (29) years that was imposed upon the Appellant by the Learned Trial Magistrate was unlawful taking into account the circumstances of the case and the mitigating factors of the Appellant's age.

32. It was its further averment that the Learned Trial Magistrate erred when he sentenced the Appellant to serve his sentence in a Maximum prison as this was clearly in contravention of the Constitution of Kenya which mandates that if a child is to be sentenced, then he can only be detained for the shortest appropriate period of time.

33. In this regard, it referred this court to the case of **DPP Kwa Zulu Natal vs P 2006 (1) SACR 243 (SCA)** where the court therein stated as follows:_

> **"Having regard to Section 28(1)(g) of the Constitution and the relevant international instruments already indicated, it is clear that in every case involving a juvenile offender, the ambit and scope of sentencing will have to be widened in order to give effect to the principle that a child offender is not to be detained except, as a measure of last resort and if detention is unavoidable, this should be "only for the shortest appropriate time."**

34. In addressing the question of appropriateness of the sentence the Appellant herein was given, this court considered the following issues:-

> **a. Whether convicting and sentencing the Appellant for the two (2) offences of handling stolen property and conveying stolen property amounted to double jeopardy;**
>
> **b. Whether the sentence that was meted upon the Appellant by the Learned Trial Magistrate was harsh, severe and excessive in the circumstances of the case;**
>
> **c. Whether the sentences that were meted upon the Appellant by the Learned Trial Magistrate ought to have been consecutive or concurrent.**

35. Section 322 (1) and (2) of the Penal Code provides as follows:-

1. A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

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. Notably, Section 322 (3) of the Penal Code provides as follows:-

"Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code (Cap. 75) and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour."

37. Section 26 of the Criminal Procedure Code stipulates as follows:-

1. A police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain—

a. any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or

b. any aircraft, vessel or vehicle which there is reason to suspect has been used or employed in the commission or to facilitate the commission of an offence under the provisions of Chapters XXVI, XXVIII and XXIX of the Penal Code (Cap. 63); or

c. any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

38. Although a defence in a case of handling of stolen goods may be that the possessor of the goods did not know that the goods he was found in possession of were stolen, the Prosecution was not required to prove that the Appellant knew that the cattle were stolen as contemplated in Section 322(4) of the Penal Code that provides as follows:-

"it shall not be necessary to allege or prove that the person charged knew or ought to have known of the particular offence by reason of which any goods are deemed to be stolen goods"

39. Indeed, the facts of this case pointed to the possibility of the Appellant having known that the cattle were stolen. This is because his sworn evidence was inconsistent, hazy and contradictory. At one point, he said that he was a herdsman of the said Munyao Nzuki Kimotho and that he had been employed by him in January 2017.

40. In the same breathe, he stated that he did not know the said Munyao Nzuki Kimotho and that he was not working for him in February 2017, which was the period he was found with the stolen cattle. He then changed his evidence and stated that he was sacked in March 2017. This baffled this court more so when he told the Trial Court that when he was arrested with the stolen cows, he called the said Munyao Nzuki Kimotho that he had been arrested with stolen cows. He did not elaborate why he found it necessary to call and inform the said Munyao Nzuki Kimotho that he had been arrested with stolen cows.

41. Appreciably, the inconsistencies in the Appellant's evidence may have been attributable to the fact that he was a minor. However, from his inconsistent and hazy evidence, this court formed the opinion that he may have withheld crucial information to his detriment.

42. To exonerate himself from the offence of handling stolen property on account of not having known that the animals were stolen, he ought to have at least disclosed to the Trial Court who had hired him to drive them because it was evident from his evidence that that person was not Munyao Nzuki Kimotho who he had said was his employer.

43. Accordingly, in the absence of any evidence as to how he came to find himself in possession of the cattle, this court concluded that he was guilty of handling stolen property. The Appellant handled and conveyed the stolen goods at the same time. There was an element of double jeopardy in the charging of the Appellant for the two offences of handling stolen property and conveying stolen goods. For the offence of conveying stolen property to be sustained, the prosecution has to prove handling stolen property. The Prosecution therefore ought to have decided which charges it wished to prefer against the Appellant and his Co-Accused herein.

44. This court also took the view that Section 322(3) of the Penal Code was also not applicable in the circumstances of this case because the Appellant and his Co-Accused Omar Dube were arrested by PW 3. A critical ingredient of the offence of conveying is a search that must have conducted by an authorised officer and yield presence of stolen goods, which was missing in this case.

45. In this case, PW 7 did not need to search the Appellant and his Co-Accused because that they were driving away cattle which were visible to the naked eye and that in any event, the cattle were taken to the police station without a search having been conducted. It was thus the view of this court that in the circumstances of the case herein, Count IV could not be sustained herein.

46. Going further, this court also found and held that the Learned Trial Magistrate erred when he directed that the sentences for the offences of handling stolen goods and conveying stolen goods would run consecutively. This is because he did not demonstrate that there were

exceptional circumstances that prevailed so as to direct that the sentences would run consecutively.

47. Section 14 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

> **"(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.**
>
> **(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.**
>
> **(3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences:-**
>
> > **(a) of imprisonment which amount in the aggregate to more that fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less; or**
> >
> > **(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose."**

48. Section 7 (1) of the Criminal Procedure Code stipulates that:-

> **a. a subordinate court of the first class held by a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court.**
>
> **b. a resident magistrate may pass any sentence authorizedunder section 278, 308(1) or 322 of the Penal Code or under the Sexual Offences Act, 2006**
>
> c. In the case**Peter Mbugua Kabui Vs Republic[2016] eKLR** (Supra), the Court of Appeal addressed its mind to the question of concurrent and consecutive sentences when it stated as follows:-
>
> > **"In the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice. As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."**

49. In the said case, the Court of Appeal found that the appellant therein had committed different offences on different dates and as a result, Achode J who heard the appeal was correct in upholding the Trial Court's holding that the sentence the Appellant was to serve was to run consecutively.

50. In the case of **George Mwangi Chege & 2 others v Republic [2004] eKLR** , Khamoni J (as he then was) rendered himself as follows:-

> **"….where more than one sentence of imprisonment are imposed without specifying whether the sentences will run consecutively or concurrently, Section 333(2) of the Criminal Procedure Code will apply so that every one of those sentences is-**
>
> **"deemed to commence from, and to include the whole of the day of, the date on which it was pronounced" with the result that:-**
>
> (**a) If the sentences are in one trial and are pronounced on the same date, they definitely run concurrently.**
>
> **(b) If the sentences are in different trials and are pronounced on the same date, they also run concurrently.**
>
> **(c) If the sentences are in one trial but are pronounced on different dates, the sentences will run concurrently only to the extent of the balance of the formerly pronounced sentence is yet to be served so that if at that time the latter pronounced sentence is longer than the remainder of the formerly pronounced sentence, then the latter pronounced sentence, following the end of the formerly pronounced sentence, will be served consecutive to the formerly pronounced sentence.**
>
> I**n other words, the prison sentences will run concurrently only to the extent of the duration of service of the two sentences coinciding.**
>
> (**d) If the sentences are in different trials and are pronounced on different dates, the prison sentences will run concurrently**

only to the extent of the duration of service of the two sentences coinciding. Otherwise the sentences will run consecutively."

51. This principle was also expounded in the cases of **Ng'ang'a vs Republic (1981) KLR 530** and **Ondiek vs Republic (1981) KLR 430** where the common thread was that concurrent sentences should be awarded for offences committed in one criminal transaction unless exceptional circumstances prevail.

52. It was therefore the considered view of this court that the cumulative sentences and the imposition of hard labour that were meted upon the Appellant by the Learned Trial Magistrate were too punitive, harsh, severe and excessive in the circumstances of the case herein.

53. After carefully considering this matter, this court found and held that the consecutive sentence with hard labour that was meted upon the Appellant by the Learned Trial Magistrate was clearly unconstitutional and unlawful because he was a minor.

54. Appreciably, on 29th March 2017, the Learned Trial Magistrate directed that the Appellant's age be ascertained and a Probation Report be filed in court to establish whether or not he was suitable to being released or not. The Probation Report that was dated 19th April 2017 indicated that the Appellant herein was seventeen (17) years having been born in 2000.

55. The State pointed out this factto this court when it was hearing the Appeal herein. This court called for a Birth Certificate that showed that the Appellant was born on 24th May 2000 and he was currently aged seventeen and a half (17½) years. It therefore directed that he be transferred from Manyani Maximum G K Prison where he was mixing with adults who had been convicted with serious crimes to Shimo La Tewa Prison Borstal Section.

56. In ascertaining what would be a suitable punishment for the Appellant herein, this court had due regard to the provisions of Article 53(1)(f) of the Constitution of Kenya, 2010 that stipulates as follows:-

"Every child has the right-

(f) not to be detained, except as a measure of last resort, and when detained, to be held-

i.for the shortest appropriate time;

ii. separate from adults and in conditions that take into account the child's sex and age.

57. Going further, Section 191 of the Children Act, 2001 provides as follows:-

"In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—

a. By discharging the offender under section 35(1) of the Penal Code (Cap. 63);

b. by discharging the offender on his entering into a recognisance, with or without sureties;

c. by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);

d. by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

e. if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

f. by ordering the offender to pay a fine, compensation or costs, or any or all of them;

g. in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

h. by placing the offender under the care of a qualified counsellor;

i. by ordering him to be placed in an educational institution or a vocational training programme;

j. by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);

k. by making a community service order; or

l. in any other lawful manner.

58. The Appellant herein had already been in custody for a year, having first been arraigned in court on 8th February 2017. He had since been

incarcerated in a maximum prison for adults for about five (5) months having been convicted on 7th September 2017. This must have been a harrowing experience for a young child of seventeen and a half (17½) years.

59. However, as he failed to exonerate himself from handling stolen goods, this court has no option but to direct that he serves some time under a Community Service Order (CSO) as has been provided under Section 191 (k) of the Children Act.

DISPOSITION

60. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 17thOctober 2017 was only successful in respect of the sentence only as he did admit that he was found in possession of the cattle. The convictions in respect of the alternative Charges are hereby upheld as the same were lawful and fitting. However, the conviction under Count IV is hereby quashed and the sentence meted thereon set aside as it was not lawful and fitting.

61. The consecutive sentence that amounted to twenty nine (29) years imprisonment that was meted upon the Appellant by the Learned Trial Magistrate was also unlawful and the same is hereby set aside and/or vacated.

62. In its place, it is hereby directed that the Appellant be released to the Probation Office Wundanyi forthwith for him to serve a Community Service Order (CSO) for three (3) months.

63. It is so ordered.

DATED and **DELIVERED** at **VOI** this **7th** day of **March** 2018

J. KAMAU

JUDGE

In the presence of:-

James Mwakisachi Mwadime-Appellant

Miss Anyumba for State

Susan Sarikoki– Court Clerk