



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 77 OF 2017

MUNYAO NZUKI KIMOTHO.....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, Munyao Nzuki Kimotho was jointly charged with James Mwakisachi 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 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 nine (9) cattle bearing identifiable marks "GSM" all valued at Kshs 360,000/=, the property of Gregory Sylvenus Mwananondo .
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 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 a cow black in colour bearing identification mark "PMT" valued at Kshs 30,000/=, the property of Patrice Mghanga Tekka (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 good.
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 on 7th 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 2nd October 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. His Written Submissions were filed on 18th January 2018. The State did not file its Written Submissions on the ground that it was conceding to the Appeal herein.

11. It submitted orally in court that the offence of handling property in respect of the Appellant herein was not adequately proved. It stated that the Appellant's Co-Accused James Mwakisachi merely stated that he had been the Appellant's employee but that he did not confirm if the Appellant herein sent him with the cattle or that the cattle belonged to the Appellant. It added that in his evidence, the Appellant's other Co-Accused, Omar Dube, also stated that he did not know the Appellant herein.

12. It further pointed out that the Appellant was arrested after he went to the scene of the incident after he was called by James Mwakisachi and the ingredient of possession against the Appellant herein was not proven. It therefore contended that Count IV could not be sustained against the Appellant herein without the element of possession having been proven.

LEGAL ANALYSIS

13. Despite the State conceding to the Appeal herein, this court found it prudent to consider if the reasons it gave for conceding to the appeal were fair and reasonable. Appreciably, an appellate court should consider the facts of a case even where the State has conceded to an appeal to establish if such a concession should be granted.

14. In the case of **Mwanguo Gwede Mwarua vs Republic [2015] eKLR**, the Court of Appeal made a similar observation when it stated as follows:-

“The concession notwithstanding, it is still our duty as a second appellate Court to consider the issues of law raised by the respondent as grounds for conceding the appeal in order to determine whether the said concession is merited.”(See **NORMAN AMBICH MIERO & ANOTHER VS REPUBLIC, CR.APP.NO.279 OF 2005 (NYERI)**.)”

15. 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.

16. 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.

17. PW 3 and PW 7 were the only witnesses who adduced evidence relating to the offences of handling and conveying of the stolen cattle by the Appellant and his Co-Accused. The Scenes of Crime Officer, No 93081 PC Shem Asher (hereinafter referred to as “PW 6”) only tendered photographic evidence of the stolen cows.

18. In his evidence, PW 3 testified that on 6th February 2017 at about 8.00pm, he was on patrol with three (3) police officers between Mkuki and Kamtonga when they saw three (3) men driving cattle. He stated that when they demanded to know who the cattle belonged to, James Mwakisachi Mwadime informed them that the cattle belonged to the Appellant herein who was at Kamtonga at the material time.

19. He said that he called the Appellant who came to the scene. On interrogating him, the Appellant told him that the cattle belonged to him but failed to give any identification marks to prove that the cattle belonged to him. Consequently, he arrested the Appellant herein. During his Cross-examination, PW 3 admitted that he did not find the Appellant with any cattle.

20. On his part, PW 7 testified that on 6th February 2017, the Appellant and his Co-Accused were taken to Mwatate Police Station by PW 3. He interrogated the Appellant who told him that the cattle were his and that he was transporting them from Kamtonga to Koled Ranch. He said that when he interrogated James Mwakisachi Mwadime, he informed him that he was the Appellant's casual employee while Omar Dube informed him that the Appellant had employed them to drive the cattle.

21. In the course of his investigation, PW 7 stated that he established that the Appellant had no land for grazing cattle as he stayed at Kamtonga Trading Centre and that when he checked, the cattle they had been branded as “MBL”, “PMT” and ‘GSM’. He was categorical that the Appellant herein did not challenge the ownership of the cattle by the Complainants herein.

22. In his unsworn evidence, the Appellant herein denied that he owned the cattle. He testified that James Mwakisachi Mwadime called him to the scene at Kamtonga where he was arrested. He did not say why James Mwakisachi Mwadime called him. James Mwakisachi Mwadime

confirmed that he called the Appellant to the scene and informed him that he had been arrested with stolen cows but did not say that the Appellant owned the cattle.

23. Notably, the sworn evidence of James Mwakisachi Mwadime was inconsistent, hazy and contradictory. At one point, he said that he was a herdsman of the Appellant herein and that he had been employed by him in January 2017. In the same breathe, he stated that he did not know the Appellant 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. In his further evidence, he stated that he did not know to whom the cattle belonged or where he was taking them but that he told the Appellant that he had been found with stolen cows. He also denied having been found with the stolen cattle.

24. This inconsistency baffled this court more so when he told the Trial Court that when he was arrested with the stolen cows, he called the Appellant and informed him that he had been arrested with stolen cows. He did not elaborate why he found it necessary to call and inform the Appellant herein that he had been arrested with stolen cows.

25. 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.

26. On his part, Omar Dube also adduced sworn evidence. He denied that the cattle he was found with on the road were his. He, however, stated that he did not know who the owner of the cows was. This therefore exonerated the Appellant herein.

27. As was rightly pointed out by the State, the said James Mwakisachi Mwadime did not state or infer that the stolen cows belonged to the Appellant herein. The PW 3's and PW 7's assertions that James Mwakisachi Mwadime informed them that the cattle belonged to the Appellant herein was a case of their word against that of the Appellant and his Co-Accused.

28. Indeed, PW 3's and PW 7's evidence of who was the owner of the cattle was watered down by the evidence of the Appellant's Co-Accused persons who said that they did not know who the owner of the cattle was. They were in a better position than PW 3 and PW 7 to have told the Trial Court whether or not the cattle belonged to the Appellant herein.

29. Indeed, PW 3 stated that the Appellant came to the scene after he was called by James Mwakisachi. This court therefore attached more weight to the evidence of the Appellant's Co-Accused regarding the non-participation of the Appellant herein in the handling of the stolen cattle.

30. Notably, the Learned Trial Magistrate therefore erred in his judgment when he stated that the Appellant's Co-Accused told the Trial Court that the cattle belonged to the Appellant herein. It was also not correct as the Learned Trial Magistrate found that the Appellant's Co-Accused testified that they had been employed by the Appellant herein. It was also not correct as the Learned Trial Magistrate stated that the Appellant was also found in possession of the cattle.

31. These erroneous factual conclusions by the Learned Trial Magistrate is what may have led him to conclude that the Appellant had stolen the cattle which he had admitted were not his and had distinctive identification marks.

32. Accordingly, having considered and weighed the evidence on record and the reasons the State relied upon to concede to the Appeal, this court formed the opinion that no evidence was tendered before the Trial Court to link the Appellant to the stolen cattle. The Prosecution did not prove its case against the Appellant herein beyond reasonable doubt and consequently, the Learned Trial Magistrate erred both in law and fact when he convicted the Appellant on the alternative charged to Counts I, II and III.

33. As was also rightly pointed out by the State, Count IV could not be sustained as the alternative charges of handling stolen property that had been preferred against the Appellant herein were not successful. In view of the fact that this court found that the Prosecution did not prove its case against the Appellant herein to the required standard in criminal matters, which is proof beyond reasonable doubt, all his Grounds of Appeal were therefore successful.

34. In view of the foregoing, the Appellant's Ground of Appeal in respect of the harshness, excessiveness or severity of the sentence that was imposed upon him by the Learned Trial Magistrate was therefore rendered moot. There was therefore no need for this court to address its mind to this issue.

DISPOSITION

35. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 2nd October 2017 was successful and there was merit in the State conceding to the said Appeal. The same is hereby allowed.

36. This court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

37. It is so ordered.

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

J. KAMAU

JUDGE

In the presence of:-

Munyao Nzuki Kimotho - Appellant

Miss Anyumba - for State

Susan Sarikoki - Court Clerk