



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 38 OF 2017

CALEB ANYASI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case

Number 1424 of 2014 in the Principal Magistrate's Court

at Maseno delivered by Hon. P. K. Kiptoo (RM) on 6.7.17)

JUDGMENT

1. On 6th July, 2017; appellant was convicted of two alternative counts of handling stolen property contrary to section 322(2) of the Penal Code and was sentenced to serve 4 years in each count. The sentences are to run concurrently.

Prosecution case

2. The prosecution called a total of 9 witnesses in support of its case. PW1, Lydia Ayiecha Mabwa, the 2nd complainant stated that her cow was stolen in the night and she did not know who stole it. PW2 Moses Abwoka Dishon, the 2nd complainant stated that one of his cows was recovered from the home of the appellant and the hide of another from a butchery where appellant's co-accused was selling meat. PW5 Paul Opiayo Olutili arrested appellant and handed him over to the police. PW6 CPL Esther Awinja and PW9 APC Philip Shiuma Wachira stated that they went to appellant's house on 16.11.17 and recovered a brown cow which the 1st complainant identified as his, and, a black and white cow with calf which the 2nd complainant identified as hers. PW7 APC Kipkorir Bor stated that on 16.11.17, he went to appellant's butchery and recovered hooves and a brown and white hide which the 1st complainant identified as belonging to his stolen cow.

3. At the close of the prosecution case, appellant and his co-accused were ruled to have a case to answer and were placed on their defence. In his sworn defence, appellant denied the charges and stated that he was arrested from a bar. Appellant's co-accused in his sworn defence stated that he was employed to sell meat at appellant's butchery. He stated that he was arrested and a hide recovered from the butchery was alleged to belong to a stolen cow. That he later accompanied police to appellant's house where 2 cows and a calf that were allegedly stolen were recovered.

4. On 6th July, 2017; the learned trial magistrate delivered a judgment in which he acquitted the appellant's co-

accuse. He also acquitted appellant of the 2 main counts of stock theft and convicted him of two alternative counts of handling stolen property contrary to section 322(2) of the Penal Code and sentenced him to serve 4 years in each count. The sentences are to run concurrently.

The appeal

5. Being dissatisfied with the conviction and sentence, appellant lodged the instant appeal. In his petition of appeal filed on 13th July, 2017, appellant raised 6 which I have summarized into 4 grounds of appeal **THAT:**

- 1. He was convicted on a defective alternative charges of handling stolen property**
- 2. He was convicted on the basis of the doctrine of recent possession yet complainant had exonerated him**
- 3. He was denied fair trial, legal representation and recall of witnesses**
- 4. The sentence meted out on him is manifestly excessive in the circumstances**

6. When the appeal came up for hearing on 23rd January, 2018, Mr. Odhiambo for appellant raised new issues that were not in the petition of appeal but which this court has a duty to consider. He submitted that 5 witnesses testified in the absence of appellant's counsel and that an application for recall of witnesses was denied. He also submitted that the photographs were produced by the investigating officer and not by the scenes of crime officer and that the court relied on the evidence of a co-accused to convict appellant. He placed reliance on **Eddie Odongo v Republic [1983] eKLR** which defined handling under section 322(1) of the Penal Code and clarified that there is no miscarriage of justice if conviction of a co-accused is based on other evidence other than the unsworn statement of a co-accused.

Analysis

7. As this is a first appeal, this court is enjoined to consider all the evidence afresh, evaluate it independently and reach its own conclusions having regard to the fact that it neither heard nor saw the witnesses (See **Okeno v Republic [1972] EA 32**).

8. I have carefully considered the evidence on record, the grounds of appeal and oral submissions on behalf of the appellant.

9. There is no dispute that on the night of 15th and 16th November, 2014, the 1st complainant's 2 cows and 2nd complainant's cow and calf were stolen.

10. It is not disputed that one of the 1st complainant's cow and 2nd complainant's cow and calf were recovered from appellant's home while the hide and hooves of 1st complainant's cow were recovered from appellant's butchery.

11. Although appellant denied that the home from where the 1st complainant's cow and 2nd complainant's cow and calf were recovered from was his, evidence by complainants and witnesses who included the area chief who knew appellant confirmed that that was his home. Appellant also denied that the butchery from where the hide and hooves of 1st complainant's cow were recovered from was his but the trial magistrate after considering the evidence on record including the pre-bail report which conformed that appellant owned a series of butchereries rightfully rejected that line of defence.

12. In **KINYUA VS REPUBLIC [2002] 1 KLR 256** the Court of Appeal stated the following on accomplice evidence:-

- i. The firm rule of practice is that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the**

court may convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the aid of assessors, on the dangers of doing so.

ii. Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.

iii. If the Court decides that the accomplice witness' evidence, though credible, requires corroboration, the court must look for, find and identify the corroborative evidence.

iv. The trial judge did not explicitly direct himself and the assessors on the nature of accomplice evidence and the weight to be given to it as required by law. However this omission would not invalidate the trial and the conviction in the circumstances of this case.

13. Appellant did not deny that he had employed his co-accused to work in the butchery from where the hide and hooves of 1st complainant's cow were recovered from. The co-accused's defence was well corroborated by the recovery of 1st complainant's cow and 2nd complainant's cow and calf from appellant's home and hide and hooves of 1st complainant's cow from appellant's butchery and the trial court correctly relied on the said evidence.

14. The trial court found that there was evidence of recent possession of the stolen cows, acquitted appellant of the main counts of stock theft on the ground that no witness saw appellant steal the complainants' cow.

15. The doctrine of recent possession was discussed in the case of **MAHINGI V REPUBLIC (1989) KLR 225**, 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 his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the 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 items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn, that he either stole or was a guilty receiver”.

16. Appellant failed to offer an explanation as to how he had possession of the recently stolen cows. I am in agreement with inference that was drawn by the trial court that appellant was a guilty receiver of the stolen cows.

17. The maximum sentence for handling stolen property is 14 years. Appellant was sentenced to 4 years imprisonment which in my considered view is not excessive.

Disposition

18. From what is stated herein above, I find that the conviction and sentence are safe and find no basis to interfere with them. The appeal is thus disallowed, the conviction affirmed and the sentence upheld. It is so ordered.

DATED, DELIVERED AND SIGNED AT KISUMU THIS 10th DAY OF May, 2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Felix

Appellant - Present

For the Appellant - N/A

For the State - Ms. Wafula