



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 20 OF 2017

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 17 OF 2017

JAMES MUNYOKI NGUI.....1ST APPELLANT

NELSON MWANZIA KIRUNYA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence in Kyuso Principal Magistrate's Court Criminal Case No. 249 of 2016 by John Aringo R M on 30/03/17)

J U D G M E N T

1. **James Munyoki Ngui** (1st Appellant) and **Nelson Mwanzia Kirunya** (2nd Appellant) were jointly charged with the offence of **Stealing Stock** contrary to **Section 278** of the **Penal Code**. Particulars of the offence were that on the **1st day of September, 2016** at **Madongoi Sub-Location, Kavaani Location** in **Kyuso Sub-County** within **Kitui County** jointly stole **19 cows** and **3 bulls** valued at **Kshs. 580,000/=** the property of **Shukri Duboko**.

2. In the alternative they were charged with the offence of **Handling Suspected Stolen Property** contrary to **Section 322(1)(2)** of the **Penal Code**. Particulars of the offence were that on the **4th day of September, 2016** at **Kakongo Sub-Location**, in **Kyuso Sub-County** within **Kitui County** jointly otherwise than in the course of stealing received or retained **19 cows** and **3 bulls** knowing or having reasons to believe them to be stolen or unlawfully obtained goods.

3. Facts of the case were that on the **1st day of September, 2016** **PW2 Mahat Mohamed Farah** an employee of **PW1 Shukri Duboko** was herding his 23 heads of cattle when they went missing. He reported the matter to **PW3 Sammy Kinyua**, an elder on the **3rd day of September, 2016** who went in search of the animals and found them at midnight in a certain homestead. He alerted the police who went and arrested some two (2) suspects, the Appellants herein hence the case.

4. When put on their defence the Appellants opted to tender unsworn statements. The **1st Appellant** stated that on the **2nd September, 2016** he was at home at midnight when he heard his dogs barking. He went out to check on what was happening only to find cows which had grazed and destroyed his crops. Having failed to get the owner he decided to take them to **Kyuso Agricultural Office**. He was arrested while on his way to the **Agricultural Office**.

5. The **2nd Appellant** stated that on the **3rd day of September, 2016** he had the duty of sinking a well. He got about twenty (20) people who were assisting him. They worked until **4.00 p.m.** He slept and at midnight he heard noise. The police arrested him and asked him about the cows that were at the roadside. His Co-Accused had already been arrested and he told him that he found the animals grazing on his crops. They called witnesses. **Kimwele Kabura** told the Court that he was one of the persons who were digging the well, work they did until **4.00 p.m.** Similarly **Peter Vundi Mutua** stated that he was one of the individuals who were assisting the **2nd Appellant** to dig a well.

6. The learned trial Magistrate considered evidence adduced and was of the view that the **1st Accused** did not deny possession of the 22 animals at the time of his arrest. That the account given by the **1st Accused** that he was on his way to report the matter to the **Agricultural Officer** did not make sense since he was arrested at night and he had not reported to the **Administration** the presence of the animals and the destruction of his crops. He dismissed his defence and reached a finding that he stole the animals.

7. With regard to the **2nd Appellant**, it was the Court's finding that he sought to distance himself from the fact that animals were found in his

homestead evidence adduced by the Prosecution was that the 1st Appellant was found sleeping outside the house while he (2nd Appellant) was inside the house. The learned trial Magistrate dismissed his denial and found that indeed he retained the animals knowing or having reason to believe that they were stolen. He found the 1st Appellant guilty of the principal charge and the 2nd Appellant of the alternative charge and sentenced both of them to **Seven (7) years imprisonment.**

8. Aggrieved by the conviction and sentence thereof both Appellants appealed.

9. The 1st Appellant's grounds of appeal were that the learned trial Magistrate did not appreciate that the animals destroyed his crop and he only moved to take them to the Agricultural Officer and that the sentence meted out was harsh and excessive.

10. The 2nd Appellant on the other hand stated that: Evidence adduced did not connect him with possession of the stolen livestock as the 1st Appellant told the Court that he was the one in possession of the animals as he was to hand them over to the Kyuso Agricultural Officer; and his alibi defence was not considered.

11. It was the oral submissions of the 1st Appellant that the animals grazed on his crop and when he encountered the police they arrested him without giving him a hearing, and his Co-Appellant was arrested afterwards. That the owner of the animals, a Somali requested to go and see the damage done by animals but they returned to him his animals.

12. The 2nd Appellant canvassed the Appeal by way of written submissions. He urged that the defence put up by his Co-Appellant clearly vindicated him as he stated that he was alone while taking the livestock to Kyuso Agricultural Office. Per the evidence tendered by Prosecution witnesses he was found sleeping in the house while his Co-Accused was outside with the animals.

13. Further, he urged that his constitutional rights were violated. That his right to freedom and security were violated since he was convicted and sentenced which was degrading to him. That he was not accorded the opportunity of cross examining his Co-Accused. Animals having been found near his home did not mean that he was connected, therefore finding otherwise was misdirection on the part of the Court. Citing the case of **Kipkering Arap Koskei vs. Republic** he argued that it was a case of suspicion and this could not sustain a conviction. That the alibi defence he put up was not dislodged by the Prosecution as required by the case of **Karanja vs. Republic (1983) KLR 507** where it was held that:

“It is trite law that the burden of proving the falsity, if at all of an accused defense of alibi lies on the prosecution.”

14. That the Court failed to consider the doctrine of possession of the handled stolen property. He relied on the case of **Maingi vs. Republic (1989) KLR 225**, where it was held that:

“By the application of the doctrines, the burden shifts from the prosecution to the Accused to explain his possession of the item complained about, the prosecution has proved certain basic facts. Firstly that the item he has in possession has been stolen. Either 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 (people) person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a presumption that is why the accused is called upon to offer an explanation in rebuttal which if he fails to do so an inference is drawn that he either stole or was a guilty receiver.”

15. He concluded by stating that the explanation he gave was reasonable.

16. The State through learned State Counsel **Mr. Mamba** opposed the Appeal. He reiterated evidence adduced by witnesses and urged that if indeed the 1st Appellant intended to take the animals to the police he could have done it on the 1st day. That the homestead where the animals were found belonged to the 2nd Appellant therefore conviction was in order and the sentence imposed was appropriate.

17. This being the first Appellate Court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusions with that in mind. **(See Okeno vs. Republic (1973) EA 32).**

18. The 1st Appellant was convicted of **Stealing Stock** contrary to **Section 278** of the **Penal Code (The Act)** that provides thus:

“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 not exceeding fourteen years.”

Section 268 of the **Act** defines stealing thus:

“(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;

and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(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) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move."

19. Prior to the animals going missing they were in possession of PW2, the herdsman. In his testimony PW2 stated that the cows got lost while he was herding them. He did not disclose how the animals strayed and got out of his sight as he was herding them. On cross examination he denied having seen the Appellants. None of the witnesses who testified saw the livestock being taken by the Appellants. Therefore evidence against them was not direct.

20. PW3 **Sammy Kinyua**, got a report from PW1 about the missing animals on the **3rd September, 2016**. At about **6.30 p.m.** as he continued grazing his animals PW4 **Musili Maithya** of **Malooni** called him and said that he had seen about 22 cows passing by. He reported the matter to the Assistant Chief and proceeded to the area. It was the testimony of PW4 **Musili Maithya** that on the **3rd September, 2016** he was at the 2nd Appellant's home assisting him to dig a well and they worked until **4.00 p.m.** While leaving his home he encountered cows being escorted by a male. When he was asked by PW3 about cows he told him about the animals that he had encountered. Ultimately when the police arrived they followed hoof prints that led them to the home of the 2nd Appellant. They reached the home at midnight and found the livestock outside the compound. The 1st Accused was sleeping outside and the explanation he gave was that the livestock had entered his land and destroyed crops and he was taking them to Kyuso. On cross examination he stated that the animals were not in a shade.

21. PW5 **No. 65517 P C Kennedy Kimathi** stated that when they found the animals, there was the 1st Appellant sleeping outside. They woke him up and arrested him. They also arrested the owner of the home the 2nd Appellant. It was his testimony that the owner of the home should have sought to know why the animals were there. On cross examination he denied having investigated the case of illegal grazing.

22. The 1st Appellant having not been seen taking the animals, the learned Magistrate should have considered the applicability of the doctrine of recent possession. In the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No. 272 of 2005 (UR)** it was stated that:

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof:

i) that the property was found with the suspect;

ii) that the property is positively the property of the Complainant.

iii) That the property was stolen from the Complainant;

iv) That the property was recently stolen from the Complainant.

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

23. It is not in doubt that the animals were found with the 1st Appellant. PW1 identified marks that were on the animals. Each animal had straight lines with two (2) dots on the right rear leg. In the circumstances the identification of the animals was positive. It is questionable if the animals were stolen from the Complainant. He left them in custody of PW2 his herdsman who did not explain how the animals left him.

24. In the case of **Malingi vs. Republic 1989 KLR 275 at Page 227 Bosire J.** (As he then was) stated that:

“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 have 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 the possession; that the lapse of time from the time of his 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 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 it or was a guilty receiver.”

25. The 1st Appellant gave an explanation at the outset, before he was arrested. According to PW4 he did explain that the animals had entered his land and illegally grazed thereon whereby they destroyed crops. The Investigating Officer dismissed the allegation without carrying out any investigations. The 1st Appellant was found sleeping at midnight amidst all the animals that went missing. His conduct did not suggest that he had stolen the animals. The circumstances that prevailed did not suggest any criminal mind on his part. The Investigating Officer should have carried out investigations for purposes of rebutting the defence that was put up by the 1st Appellant.

26. The 2nd Appellant on the other hand was inside his house asleep when the animals were found outside. He was alleged to have received or retained 19 cows and 3 bulls knowing or having reasons to believe they stolen.

27. **Section 322(1)** of the Act provides thus:

“(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.”

28. No evidence was adduced to suggest that by the time the 1st Appellant was arriving with the animals near the house of the homestead of the 2nd Appellant there was any communication between them. Prior to rebutting evidence adduced by the Accused, the Prosecution was duty bound to prove the occurrence of theft of the animals. It was the evidence of PW3 that the animals were known to him as he used to graze with PW1. This meant that they were pastoralists, who are mobile hence moved from one place to another in search of pasture. PW4 was with the 2nd Appellant digging a well until **4.00 p.m.** He later encountered the animals. Later, he saw the animals at midnight outside the compound of the 2nd Appellant. None of the witnesses could tell how the animals reached that particular place and whether it was within the knowledge of the 2nd Appellant that the animals were there and if they had been stolen or unlawfully obtained. Therefore there is no evidence to disapprove the defence put up by the 2nd Appellant that he slept only to be woken up by the police who were making noise, who asked him about the animals.

29. The 2nd Appellant alleged that by being convicted and sentenced his rights were violated. The law is clear. When a person is arraigned before Court and he denies the charge, a trial must follow which results into the Accused person being convicted or acquitted. In a case where the Court returns a verdict of guilty, this must be followed by a conviction and subsequently sentencing. In the premises this was not a violation of his constitutional rights.

30. From the foregoing it is apparent that there was a misdirection on the part of the learned trial Magistrate as the conviction was not safe.

31. In the circumstances, the Appeal succeeds. The conviction is quashed and the sentence meted out in respect of both Appellants is set aside. They will be set at liberty unless otherwise lawfully held.

32. It is so ordered.

Dated, Signed and Delivered at Kitui this 13th day of November, 2018.

L. N. MUTENDE

JUDGE