



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT VOI
CRIMINAL APPEAL NO 47 OF 2016

MAYIANI OLE ONINGOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 576 of 2015 in the Senior Principal (sic) Magistrate's Court at Wundanyi delivered by Hon Orange K. I. (SRM) on 31st March 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Mayiani Ole Oningoi, was tried and convicted by Hon Orange K. I., Senior Resident Magistrate for the offence of stealing stock contrary to Section 268(1) as read with Section 278 of the Penal Code Cap 63 (Laws of Kenya). He was sentenced to serve five (5) years' imprisonment. He had also been charged with the offence of handling stolen property contrary to Section 322(2) of the Penal Code.

2. The particulars of the main charge were as follows :-

“On the 8th day of December 2015 at Lualenyi Ranch of Mwatate District within Taita Taveta County jointly with others not before the court, jointly (sic) stole 9 cattle all valued at Kshs 540,000/=, the property of Abdullahi Nuno.”

ALTERNATIVE CHARGE

“On the 8th day of December 2015 at Lualenyi Ranch of Mwatate District within Taita Taveta County otherwise than in the course of stealing dishonestly retained Nine bulls knowing or having reason to believe them to be stolen goods.”

3. Being dissatisfied with the said judgment, on 16th September 2016, the Appellant filed a Notice of Motion application seeking leave to file an Appeal out of time. The said application was allowed and the Petition of Appeal was deemed to have been duly filed and served.

4. Although the Appellant alluded to seven (7) Grounds of Appeal in his Written Submissions, the only Grounds of Appeal this court was able to identify from his Petition of Appeal were as follows:-

1. **The learned trial magistrate erreded (sic)in law and facts by considering the collaborated (sic)evidence adduced by the prosecution witness.**

2. **The learned trial magistrate erreded (sic) in law and facts by not considering his plea of not guilty and defence.**

5. The Appellant's undated Written Submissions were filed on 15th November 2016. The State's Written Submissions were dated 13th December 2016 and filed on 14th December 2016. Although on 15th December 2016 this court gave the Appellant an opportunity to respond to the State's Written Submissions, he indicated that he would not do so but instead requested that this court renders its judgment. The Judgment herein is therefore based on the parties' respective Written Submissions which they relied upon in their entirety.

LEGAL ANALYSIS

6. As this is a first appeal, this court analysed and re-evaluated 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”.

7. It appeared to this court that the issues that werereally before it for determination were:-

a. **Whether or not the Prosecution had proven its case beyond reasonable doubt;**

b. **Whether or not the Learned Trial Magistrate considered the Appellant's defence before convicting him.**

8. The court therefore dealt with the issues under separate heads shown hereunder.

I. PROOF OF THE PROSECUTION'S CASE

9. Ground of Appeal No 1 was dealt with under this head.

10. The Appellant submitted that one Ibrahim Abdhoo who had been named in the Charge Sheet as a witness did not testify in the case herein. He added that the Complainant, Abdullahi Nuno (hereinafter referred to as “PW 1”) and Barre Hashim Mohamud (hereinafter referred to as “PW 2”) did not corroborate each other's evidence.

11. He pointed out that PW 1 told the Trial Court that his cows had been stolen while PW 2 said that he was at the ranch when they lost the cows. In addition, he averred that PW 1 did not testify how he was arrested and that PW 2's evidence in respect of footprints was not corroborated by PW 1 and the Investigating Officer, No 40936 Sgt Stephen Samkul (hereinafter referred to as PW 3”).

12. He also contended that although PW 1 had stated that the cows were at Maungu Ranch when they were stolen, PW 3 said that the cows had been stolen at Lualenyi, which he averred, corroborated the details in the Charge Sheet. He argued that the tendering of the photographs of the cows as evidence was unfair as the same were taken at the scene in his absence.

13. It was his submission that because PW 1, W 2 and PW 3 did not corroborate each other's evidence, this court ought to set aside both his conviction and sentence and instead consider him for a Community Service Order (CSO). He added that he had suffered, repented and become a preacher in prison after getting “saved” and that the period he had spent in police custody and prison had taught him a big lesson.

14. On its part, the State submitted that Section 143 of the Evidence Act provides **“that no particular number of witnesses shall in the absence of any provision to the contrary be required to prove a fact.”**

15. It argued that the said Ibrahim Abdhoo was not a relevant witness in the Prosecution’s case despite having been mentioned in the Charge Sheet and that none of the Prosecution Witnesses had mentioned him in their testimonies. It was its submission that in any event, the Appellant had not demonstrated the importance of the said witness’ evidence in the trial.

16. It also contended that the Charge Sheet had complied with the provisions of Section 134 of the Criminal Procedure Code in that it had clearly indicated that the owner of the livestock was PW 1, which the Appellant denied belonged to him but were found in his possession, as a result of which the doctrine of recent possession became applicable herein. In this respect, it placed reliance on the case of **Isaac Ng’ang’a Kahiga alias Peter Ng’ang’a Kahiga vs RNYR CA Criminal Appeal No 272 of 2005** but did not attach a copy of the same.

17. It was also emphatic that the only witness who could testify where the theft occurred was PW 2 as he was the one who informed PW 1 of the said theft which rendered the Appellant’s arguments about the Ranch from where the livestock was stolen irrelevant. It added that there was no proviso of the law that required that an accused person be photographed with a stolen item. Although this court noted its submissions regarding the date of the theft, this was not an issue that had been raised by the Appellant herein. This court did not therefore consider the said submission as it was not an issue that was placed before it for determination.

18. It therefore submitted that the Prosecution had proved its case beyond reasonable doubt and that bearing in mind that the penalty for stealing stock of fourteen (14) years provided in Section 278 of the Penal Code, the sentence that was meted upon the Appellant was fair in the circumstances of the case. It thus urged this court to dismiss the Appeal herein as there was no illegality in the sentence that was imposed upon him.

19. Upon perusing the proceedings of the Trial Court, it was clear that PW 1 testified that his livestock was found at the Appellant’s home, a fact that was confirmed by PW 2. He identified the said livestock from the photographs that had been taken by No 93081 Shem Asha (hereinafter referred to as “PW 4”) at Lualenyi Ranch.

20. It was also evident that there was a contradiction of what the Appellant told PW 2 and PW 3 regarding how he came to find himself with PW 1’s animals. PW 2’s testimony was that after he traced the footprints to the Appellant’s homestead where he found the nine (9) animals, the Appellant told him that he had bought the livestock. On his part, PW 3 testified that when he found the Appellant within the forest area, the Appellant informed him that he was taking the livestock to Tanzania.

21. While it could be argued that it was the Appellant’s evidence against that of PW1, PW 2 and PW 3, this court noted a gap in the Appellant’s evidence. After his testimony but before his Cross-examination, he told the Trial Court that he was herding when he saw cows belonging to the “Somali”. He said that he kept them in his home but that he was only found with one (1) animal. He was silent as to what became of the other animals that he had taken to his home. This contradicted his unsworn evidence that he took all the animals to the “Somalis” who were his neighbours the following day on 9th December 2015.

22. Evidently, the Appellant knew to whom the livestock belonged. He, however, failed to proffer a plausible reason to explain why he did not take them to the “Somalis” on the same day. His failure to do so and to explain where the eight (8) other animals went led this court to make an inference that he had actually stolen the said livestock and that his defence that he was arrested as he was taking the livestock to the “Somalis” was an afterthought that was intended to portray himself as a good Samaritan.

23. The mere fact that he was found in possession of the said livestock, even if it was only one (1) animal as he had contended rendered his averments regarding contradictions in PW 1’s vis-a-vis PW 2’s and PW

3's evidence as to the Ranch where the livestock was stolen from irrelevant and immaterial in the circumstances of the cases herein.

24. In addition, failure by the Prosecution to call the said Ibrahim Abdhoo did not deal a fatal blow to its case because as was rightly submitted by the State, there is no legal requirement that the Prosecution has to call a particular number of witnesses to prove its case as clearly stipulated in Section 143 of the Evidence Act Cap 80 (Laws of Kenya). It was evident that the Prosecution had proved its case to the required standard.

25. In that respect, Ground of Appeal No 1 of the Appellant's Petition of Appeal was not merited and the same is hereby dismissed.

II. APPELLANT'S DEFENCE

26. The Appellant adduced unsworn evidence. Although he had a right to adduce such evidence, the same had no probative value. The Learned Trial Magistrate considered the same when he concluded that the livestock was found in the Appellant's homestead. Having said the above, there could not have been a clearer reflection of the Appellant's guilt than his averments in his Written Submissions to this court that he had learnt his lesson and that he had reformed man and become a pastor in prison.

27. This court did not therefore find any merit in Ground of Appeal No 2 in the Appellant's Petition of Appeal and the same is hereby dismissed.

III. SENTENCE

28. Section 278 of the Penal Code Cap 63(Laws of Kenya) provides as follows:-

"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."

29. The import of the penalty is that a Trial Court cannot sentence a person convicted to the offence of stealing stock to imprisonment to not more than fourteen (14) years.

30. Before the Learned Trial Magistrate read out the sentence herein, the Appellant said the following in mitigation:-

"I pray for a lenient sentence. I am the eldest son"

31. The Learned Trial Magistrate then recorded the following:-

"The offence is serious. To be sent to prison for five (5) years. 14 days (sic) right of appeal explained."

32. In determining whether or not the Learned Trial Magistrate had meted the Appellant a sentence that was manifestly excessive as to warrant interference by this court, this court considered the value of the stolen livestock. The same was Kshs 540,000/=.

33. This court made a similar consideration in the cases of Muktar Shogolo vs Republic [2016] eKLR, Mohamed Hassan vs Republic [2016] eKLR and Katana Ali vs Republic [2016] eKLR where it reduced the sentence of ten (10) years' imprisonment to five (5) years' imprisonment in respect of each of the three (3) appellants therein for the theft of livestock that was valued at Kshs 150,000/=.

34. It was therefore clear to this court that the Learned Trial Magistrate exercised his discretion judiciously when he sentenced the Appellant to five (5) years' imprisonment for the reason that the penalty was actually lower than what this court had given in the cases of Muktar Shogolo vs

Republic(Supra), Mohamed Hassan vs Republic(Supra)and Katana Ali vs Republic(Supra).

CONCLUSION

35. Accordingly, having considered the Appellant’s and States’ submissions and the case law in support thereof, it was clear that the evidence that was adduced by the Prosecution was overwhelming, consistent and that the same had proven the case beyond reasonable doubt. As the Learned Trial Magistrate thus acted correctly and/or exercised his discretion judiciously when he sentenced the Appellant to five (5) years’ imprisonment, this court was not persuaded to interfere with the conclusion he arrived at.

36. Substituting the aforesaid sentence with a non-custodial sentence as the Appellant had urged this court to do was untenable as that was only within the jurisdiction of the Committee of Community Service Orders.

DISPOSITION

37. For the foregoing reasons, this court hereby affirms the conviction and sentence that was imposed upon the Appellant herein as the same was lawful, proper and fitting in the circumstances of the case herein.

38. The upshot of this court’s Judgment was that the Appellant’s Appeal that was lodged on 16thSeptember 2016 was not merited and the same is hereby dismissed.

39. It is so ordered.

DATED and DELIVERED at VOI this 15th day of February 2017

J. KAMAU

JUDGE

In the presence of:-

Mayiani Ole Oningoi..... Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk