



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 25 OF 2016

PASCAL MWAKICHWA MCHAWA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 77 of 2015 in the Senior Principal (sic) Magistrate's Court at Wundanyi delivered by Hon Orege K. I. (SRM) on 28th September 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Pascal Mwakichwa Mchawa, was charged with the offence of stealing stock contrary to Section 278 of the Penal Code Cap 63 (Laws of Kenya). He had also been charged with an alternative charge of handling stolen property contrary to Section 322(1) as read with Section 322 (2) of the Penal Code and being found in possession of narcotic drugs contrary to Section 3(1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act No 1 of 1994.
2. The particulars of the main charge were as follows :-

“On the 1st day of March 2015 at about 10.00 am at Sirienyi Village Shingharo Sub-Location in Wundanyi Location within Taita Taveta County stole one he- goat valued at Kshs 4,000/=, the property of DARIUS KIBICHI.”

ALTERNATIVE CHARGE

“On the 1st day of March 2015 at about 11.30 amat Wundanyi Location within Taita Taveta County otherwise than in the course of stealing dishonestly received or retained one he-goat knowing or having reason to believe it to be stolen item (sic).”

COUNT III

“On the 2nd day of March 2015 at around 1700 HRS at Wundanyi Police Station in Wundanyi Location within Taita Taveta County was found in possession of Narcotic drugs namely Canabis(sic) sativa to wit 5 grammes with a street value of Ksh 30/= which was not in medical form in contravention of the said Act.”

3. The Learned Trial Magistrate, Hon Orege K. I., Senior Resident Magistrate tried and convicted him of

the offence of stealing stock and sentenced him to serve three (3) years' imprisonment. He, however, acquitted him of Count III.

4. Being dissatisfied with the said judgment, on 6th October 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. The Grounds of Appeal were as follows:-

1. That it was the first time to be criminalized, sentence (sic) so he begged for leniency and remorsefulness(sic).

2. That he was a sole bread winner of the family who were currently suffering as a result of his incarceration, he mitigated for a review of the sentence to a non-custodial sentence (sic).

5. His undated Amended Grounds of Appeal and Written Submission were filed on 6th October 2016. The Amended Grounds of Appeal were as follows:-

1. THAT the learned trial magistrate erred in law and fact in failing(sic) to see that the alleged matter in question was not proved to have any link with him, hence the evidence relied on was un-reliable to just decision (sic).

2. THAT the learned trial magistrate erred in law and fact in failing(sic) to see that the Prosecution failed to prove there (sic) case beyond reasonable doubt contrary to Section 107, 109 of the Evidence Act(sic).

3. THAT the learned trial magistrate erred in law and fact in failing(sic) to see that the matter in question was though (sic) suspicion which the same was un-reliable to sentence him the Appellant(sic).

4. THAT the learned trial magistrate erred in law and fact in failing(sic) to see that he was not supplied with witnesses (sic) statement. Hence not accorded a fair trial contrary to Article 50 (2) (c) of the Constitution of Kenya 2010(sic).

6. The State filed its Written Submissions dated 9th November 2016 on 10th November 2016. The Appellant filed his undated Further Written Submissions on 15th December 2016. He attached further Grounds of Appeal which were as follows:-

1. That the Learned Hon. Trial Magistrate erred both in law and facts when he relied on incredible adduced evidence adduced by Prosecution witness(sic) yet failed to find that the same could be impeached under Section 163(D(C) (sic) of the evidence Act laws of Kenya(sic).

2. That the Learned Hon. Trial Magistrate erred both in law and facts by failing to consider that there were (sic) no tangible evidence was adduced before court linking him the Appellant (sic) to the commission of stealing stock or handling stolen goods(sic).

3. That the Learned Hon. Trial Magistrate erred both in law and facts by failing to consider that the Prosecution failed to prove their case beyond reasonable doubt.

7. When the matter came up 15th December 2016, both the Appellant and counsel for the State requested this court to render its judgment based on their Written Submissions. The Judgment herein is therefore based on the parties' respective Written Submissions which they relied upon in their entirety.

LEGAL ANALYSIS

8. 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”.

9. As can be seen hereinabove, the Appellant herein placed before this court three (3) sets of Grounds of Appeal. The same was unprocedural and irregular. However, as he was acting in person, this court opted to overlook the procedural technicality in line with Article 159(2)(d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to technicalities.

10. Having consolidated all the aforesaid Grounds of Appeal that were well addressed in the Amended Grounds of Appeal that were filed on 6th October 2016 and which this court adopted for the purposes of the Appeal herein, this court found that the issues that were really before it for determination were:-

a. Whether or not the Appellant was accorded a fair trial;

b. Whether or not the Prosecution had proven its case beyond reasonable doubt.

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

I. FAIR TRIAL

12. Ground of Appeal No 4 of the Amended Grounds of Appeal that were filed on 6th October 2016 was dealt with under this head.

13. The Appellant pointed out that Article 50(2)(c)(j) of the Constitution of Kenya 2010 provided as follows:-

“Every accused person has the right to a fair trial which includes the right to have adequate time and facilities to prepare defence and to be informed in advance of the evidence the prosecution intended to rely on and have reasonable access to that evidence.”

14. He submitted that he was not accorded a fair trial in accordance with the said provision of the Constitution as he was not furnished with Witness Statements. On its part, the State referred this court to the case of **Dominic Kimaru Tanui vs Republic [2016] eKLR** wherein it was held that when an accused person did not object to a hearing proceeding and continued to proceed, then he could not use the lack of statement (**sic**) as a ground of appeal.

15. A perusal of the proceedings shows that after the Appellant took his plea, the Learned Trial Magistrate recorded as follows:-

“Plea of not guilty is entered. Hearing on 26/03/15. Mention on 17/03/15.”

16. Notably, the said Learned Trial Magistrate did not order that the Appellant be furnished with the witness statements the Prosecution intended to rely upon. In fact, he never re-visited the issue of the said witness statements being supplied to him throughout the proceedings in which the Appellant was shown to have represented himself.

17. The State’s submissions that the Appellant could not raise the issue of failure to be supplied with the Witness Statements at this appellate stage were not persuasive. Indeed, the case of **Dominic Kimaru Tanui vs Republic** (Supra) that it relied upon was distinguishable from the circumstances of this case as it was evident that the appellant therein was represented by counsel during trial who was expected to have known the procedures in court.

18. Appreciably, the Learned Trial Magistrate was expected to have directed that the said documentation be furnished to the Appellant, who was a lay man, to enable him prepare for trial. Failure by the said Learned Trial Magistrate to do so contravened the provisions of Article 50 of the Constitution of Kenya and undoubtedly occasioned the Appellant prejudice and great injustice.

19. Although this was not an issue that was raised by any of the parties herein, this court noted that the proceedings did not show if the Learned Trial Magistrate made a finding as to whether or not a *prima facie* case had been made against the Appellant him so as to put him on his defence. Just to be sure that it was not an omission, this court looked at the handwritten notes of the said Learned Trial Magistrate and did not find the said Ruling either.

20. What was evident was that the Prosecution sought an adjournment on 29th July 2015 as it did not have any witnesses in court on that date. The hearing was adjourned to 10th August 2015 when the matter was re-scheduled to 16th September 2015 as the said Learned Trial Magistrate was on annual leave. When the matter came up for hearing on 16th September 2015, the Prosecutor indicated that he was ready for the Defence hearing, to which the Appellant indicated that he was ready to proceed.

21. This court was not certain why the said Learned Trial Magistrate omitted the critical step of parties submitting whether or not a *prima facie* case had been made out against the Appellant herein. As was observed hereinabove, the Appellant was a lay man and was not expected to have been aware of the court processes. The fact that the said Learned Trial Magistrate explained the provisions of Section 211 of the Criminal Procedure Code to the Appellant did not sanitise the proceedings.

22. As the Appellant was not given an opportunity to submit whether or not the Prosecution had made out a *prima facie* case against him before he was put on his defence, this court formed the opinion that the trial fell below the threshold of a fair trial.

23. In view of the aforesaid irregularities, the Appellant's trial could not have been said to have been fair at all and that a Re-trial would have been a good option to cure the irregularities by the Trial Court. Appreciably, if an appellate court is of the view that the case should be sent for re-trial, it must exercise caution not to get into the merits of a case.

24. However, as it is trite law that a re-trial is not ordered as a matter of course and it depends on the particular circumstances of a case, an appellate court must satisfy itself that such re-trial will not cause injustice to an appellant by giving the prosecution a second bite at the cherry. The converse is also true; that an appellate court will not grant orders for a re-trial if it will cause injustice to the prosecution and give an appellant a second bite of the cherry.

25. In this regard, this court fully associated itself with the holdings in the cases of **Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481** and re-stated in **Fatehaji Manji vs Republic [1966] E.A. 343** that Mutende and Thurania Jaden JJ cited in the case of **Jackson Mutunga Matheka vs Republic [2015] eKLR** where it was stated as follows:-

“... a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused.”

26. In that respect, this court found Amended Ground of Appeal No 4 of the Amended Grounds of Appeal that were filed on 6th October 2016 to have been merited.

II. PROOF OF THE PROSECUTION'S CASE

27. To enable it determine whether this case was fit for a re-trial, this court therefore considered the facts of the case of the Trial Court by addressing Amended Ground of Appeal Nos 1, 2 and 3 of the Amended Grounds of Appeal that were filed on 6th October 2016 under this head.

28. The Appellant was categorical that the evidence that was adduced by the Prosecution witnesses was not sufficient to have warranted his conviction and sentence as it was all heresay. He argued that no evidence was adduced to link him to the theft of the goat and that PW 3's brother, one Solomon, ought to have been summoned as a witness in this matter in accordance with the provisions of Section 150 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

29. The said Section provides as follows:-

“A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

30. He referred this court to the case of **Bukenya vs Uganda 197 (sic)E.A. 549**(the proper citation was **Bukenya & Others vs Uganda [1972] EA 549**)in which it was held as follows:-

“The Prosecution is duty bound to make available all witnesses necessary to establish the truth even if their evidence may be inconsistency (sic) to its case otherwise failure to do so may in an appropriate inference that the evidence of the uncalled witness would have tendered to be adverse to the prosecution.”

31. He pointed out that Carlos Mwaruma (hereinafter referred to as “PW 3”)’s evidence that he went to see the he-goat which he negotiated in the presence of his brother contradicted the evidence of Rita Kulola (hereinafter referred to as “PW 4”) who testified that she was going to the shops when he found PW 3 and the Appellant herein negotiating about purchase of a goat.

32. He also referred this court to the case of **Muiruri Njoroge & Others vs Republic Cr App No 185 of 1987** in which it said that the Court of Appeal held as follows:-

“A court of law does not act on an assertion unless such assertions are proved by evidence before court.”

33. On its part, the State submitted that although there was no documentation establishing the fact that Darius Kimbichi (hereinafter referred to as “PW 2”) was the owner of the said goat did not diminish his claim for ownership for the reason that an employee of PW 2 namely, Moses Ndunda (hereinafter referred to as “PW 5”) had confirmed that PW 2 had a he goat, that he was present during the search of the said he goat and that the carcass of the said goat was recovered. It was its submission that the head and skin of the goat were recovered which enable both PW 2 and PW 5 to identify the said goat.

34. It added that although there was no eye witness who saw the Appellant selling the he goat, PW 4 who was an independent witness confirmed seeing him selling a goat to PW 3, which corroborated PW 3's evidence that it was the Appellant who sold him the goat. It argued that it was not necessary to call the said Solomon as a witness because Section 143 of the Evidence Act provides **“that no particular**

number if witnesses shall in the absence of any provision to the contrary be required to prove a fact.”

35. It was its further submission that the goat was stolen on 1st March 2015 and that as the Appellant did not deny having been at the Centre on the said date and consequently, the timeline within which the goat was stolen and stolen had a close proximity that raised suspicion as to the Appellant’s involvement in its theft. It said that the Learned Trial Magistrate considered the evidence that was adduced by the Prosecution witnesses and did not find any evidence that could disassociate the Appellant as the perpetrator.

36. It submitted that as the Prosecution had proved its case beyond reasonable doubt, the Learned Trial Magistrate meted a fair sentence upon the Appellant having considered that he was a first offender by sentencing him to three (3) years’ imprisonment vis-a vis the sentence of fourteen (14) years provided for the offence of stock theft. It therefore urged this court to dismiss the Appellant’s Appeal herein as the same was not merited.

37. Right at the outset, this court wishes to point out that it was unable to confirm the existence of the case of **Muiruri Njoroge & Others vs Republic Cr App No 185 of 1987** from the citation that was provided herein and it could not therefore consider the same.

38. In addition, this court found the Appellant’s Written Submissions filed on 6th October 2016 relating to the absence of a Written Agreement and arguments in his Written Submissions of 15th December 2016 regarding the value of the goat not to have been relevant. However, the evidence relating to the purchase and identification of the said goat was material in the circumstances of the case herein.

39. It was evident from the evidence of PW 2 and PW 5 that a he- goat belonging to the former went missing from his compound. What was, however, not clear was whether or not it was this he- goat that PW 3 said he allegedly purchased from the Appellant and the same one that Mathew Kibicho (hereinafter referred to as “PW 6”) purchased its head, having bought the same from the said Solomon.

40. This evidence was pertinent for the reason that PW 3 said that he purchased a he-goat that was brown in colour while PW 6 said he purchased a goat head that was brown and black stripes. On his part, No 65842 PC Johnstone Mwaura (hereinafter referred to as “PW 1”) adduced before the Trial Court a carcass that had a brown black head.

41. Notably, the sequence of how the Appellant approached PW 3 as recorded appeared incoherent as it referred to the Appellant bringing the goat to PW 3’s butchery, the Appellant tying the goat at PW 3’s home and PW 3 going to see it with his brother Solomon.

42. In addition, PW 4’s evidence had unexplained gaps. She told the Trial Court that on 1st March 2015, she was going to the shops when she found PW 3 negotiating with the Appellant about purchase of a goat. From her testimony, it was not clear whether both PW 3 and the Appellant herein were known to her so as to have been able to identify the Appellant herein as the person she saw negotiating with PW 3 and the circumstances under which she overheard the said negotiations. It was also not clear where she overheard the said conversation.

43. It was also not lost to this court that there was material contradiction in the evidence of PW 3 who said that he sold the goat’s head and hooves at the slaughter house while PW 6 testified that he purchased heads and hooves from the said Solomon. If indeed, as PW 6 stated that he purchased the head and hooves from the said Solomon, it was not clear how the said Solomon got hold of the said head and hooves from the slaughter house.

44. This court therefore agreed with the Appellant’s submissions that the said Solomon was a critical witness as he could have shed light as to whether he sold the head and hooves to PW 6 at the slaughter house where PW 3 is said to have sold them or at his shop and/or clarified the material contradictions

herein.

45. The identification of the goat by PW 2 also raised more questions than answers. He said that he found the goat and identified it from the head and hooves at a butchery. As PW 3 had testified that he sold the hooves and head at the slaughter house, it was reasonable to expect that there were many heads and hooves at the said slaughter house.

46. In the absence of any peculiar mark, this court was not satisfied that PW 2 would have been able to identify his missing he-goat from the head and hooves on 2nd March 2015.

47. In the premises foregoing, this court found Amended Ground of Appeal Nos 1, 2 and 3 of the Amended Grounds of Appeal that were filed on 6th October 2016 to have been merited.

CONCLUSION

48. Accordingly, having considered the submissions by the Appellant and the State and the case law in support of their respective cases, this court noted that the evidence that was adduced by the Prosecution was inconsistent, contradictory and did not prove the case to the required standard required in criminal cases, the standard being proof beyond reasonable doubt.

49. As seen hereinabove, a matter ought not to be sent to Re-trial to give a party a second chance to fill gaps in its case. It was the considered view of this court that the failure by the Prosecution to link the Appellant herein to the offence weighed against this matter being sent for Re-trial.

DISPOSITION

50. For the foregoing reasons, in view of the fact that the evidence that was adduced before the trial created doubt in mind of this court, that benefit of doubt leads it to quash, set aside the conviction and 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.

51. The upshot of this court’s Judgment was that the Appellant’s Appeal that was lodged on 6th October 2016 was merited and the same is hereby upheld.

52. It is so ordered.

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

J. KAMAU

JUDGE

In the presence of:-

Pascal Mwakichwa MchawaAppellant

Miss Anyumba.....for State

Josephat Mavu– Court Clerk