



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.66 OF 2014

(An appeal from original conviction and sentence of Kilgoris PM's Criminal Case No 939 of 2013 by Hon. Monica Munyendo RM dated 28TH November, 2014)

DAVID KIPRONO SITIENEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein **DAVID KIPRONO SITENEI** together with 2 other persons were tried and convicted by Kilgoris Principal Magistrates Court for the offence of stealing stock contrary to **Section 278 of the Penal code**. They were each sentenced to serve 7 years imprisonment and the appellant who was the 3rd accused before the trial court, has now appealed against both conviction and sentence.
2. The particulars of the charge were that on 31st October 2013 at Soit village in Transmara West District of Narok County jointly with others not before the court stole 8 (eight) heads of cattle all valued at Kshs. 293, 000/= the property of **SANIAN'GO TASUR**.
3. The appellant has in his petition of appeal stated that the trial court erred in law and in fact in failing to give him an opportunity to digest the prosecution's evidence, in relying on hearsay evidence and in failing to consider his mitigation among other grounds of appeal.
4. At the hearing of the appeal Mr. Bigogo, advocate for the appellant, submitted that the evidence tendered by the prosecution was not consistent and therefore, the trial court erred in law and in fact in convicting the appellant. Mr. Bigogo added that prosecution's case was based mainly on hearsay evidence and the uncorroborated evidence of a single eyewitness whose age was not determined.
5. The appellant contended that the value of the alleged stole cattle was not established through expert evidence and that there were glaring material contradictions in the prosecution's case.
6. The appellant contended that the alibi evidence tendered by the appellant was not considered by the trial court thereby making his conviction unsafe.
7. It was Mr. Bigogo's submission that the conduct of the appellant soon after the alleged commission of the offence did not portray him as a person who was guilty of any wrong doing since he did not run away or go into hiding.
8. On sentence, the appellant's counsel submitted that the same was harsh and manifestly excessive taking

into account the fact that the appellant was a first offender and that none of the alleged stolen cattle was found in his possession.

9. Mrs. Mbelete, counsel for the state, on her part, conceded to the appeal while submitting that the whole of the prosecution's case was anchored on the uncorroborated evidence of a single eyewitness who was not capable of identifying all the accused persons at one time and in one place.

10. Mrs. Mbelete added that all the accused persons tendered alibi evidence and called witnesses placing them at different places at the time of the commission of the offence, which evidence was not considered by the trial court yet the prosecution did not avail any evidence to counter the alibi evidence.

11. As the first appellate court, this court is now taxed with the duty of re-evaluating the evidence tendered before the lower court with a view to reaching its own findings bearing in mind the fact that it neither heard nor saw the witnesses testify. See **Okeno vs Republic [1972] EA 32**.

12. The prosecution called a total of 5 witnesses whose evidence was as follows:

13. PW1 SANIAN'GO TASUR the complainant herein stated that he owned 200 cattle and that on the material day, PW2 HILLARY KIPLAGAT KOECH, who was his herdsboy went out to graze the cattle only to return at 6.30 p.m. with information that 7 cattle were lost and that he saw the people who had stolen the cattle but they chased him with knives. According to PW1, PW2 informed him that the cattle had been taken by 3 people and that he knew the people one of whom he said was the son of one Kimalel. Later on, the complainant noticed that 8 cows were missing after which he reported the incident to PW3 the area chief, and later to the police.

14. PW2, HILLARY KIPLANGAT KOECH, was the herds boy and the key witness in the case. His testimony was that he was grazing PW1'S cattle on the material day and as he was driving the cattle home, he noticed, upon reaching the river that 7 cattle were missing after which he went back to the grazing field where he found four people with the cattle heading towards Manyatta. He claims that the four people had the 7 cattle and they threatened to cut him with knives after which he ran away. PW2 stated that he knew the one of the accused very well as David Kiprono Sitienei but he knew the other two by appearance.

15. He then reported the loss of the cattle to the owner PW1. His testimony was that he was on the material day grazing 200 cattle out of which 8 were stolen and only one was recovered. PW2 added that he knew the appellant as they usually graze together at "kwa Nyayo" and that he knew the appellant's home at Kamoleli.

16. PW3 was the area chief who received information about the theft of the cattle. His testimony revolved around the recovery of one cow that was seriously injured and abandoned on the road. His testimony was that he was informed by PW1 that PW2 could identify the thieves whose names were given to him as Cheruiyot, Ngetich David Sitienei and Charles Koech. He said that the said Charles Koech is yet to be arrested. PW3 stated that on 31st November, 2014 he organized with the APS to arrest the suspects starting with the appellant who gave them the directions to the other 2 suspects who were later identified by PW2. None of the accused persons were found in possession of the stolen cattle.

17. PW4 was No. 2008108404 APC BENARD RONO. His testimony was in regard to how he received information of the stock theft and how he arrested the appellant from his home on 6th November 2013 at 5am. He stated that he was accompanied by PW3 the area chief and one APC RODGEN NJOE at the time they arrested the 3 suspects.

18. PW5 No. 35381 Sgt. Stephen Omaiyo was the investigating officer whose testimony was limited to the report here received concerning the stock theft and the charges he preferred against the three suspects who were presented to him by police officers from Esoit Police Post. When placed on their defence, the first 2 accused persons gave sworn statements and called witnesses to support their case.

19. Since this particular appeal is in respect to the appellant who was the third accused before the trial court, I will first focus my evaluation of evidence of the testimony of the appellant and his witness.

20. The appellant testified as DW3. In his unsworn statement, the appellant stated that on the material date, he was at his home taking care of his cattle and siblings as his wife was away only for him to be arrested on allegations of stock theft.

21. DW5, Richard Terer testified that he knew the appellant as his neighbor and that on 31st October, 2013 he was ploughing with the appellant after which the appellant went to herd cattle. DW5 was therefore surprised to learn that the appellant was accused of having stolen cattle on 31st October 2013 yet he was with him the whole time.

22. On cross examination, DW5 said he was with the appellant on the material day the whole day till up to 7 p.m. when they parted ways.

23. DW1 Hillary Kipkurui Cheruiyot, who was the first accused before the trial court, testified that he was arrested for no justifiable cause as he neither deals in cattle nor was he found with the stolen cattle. His testimony was that on 31st October 2013, the day he is alleged to have stolen the cattle, he was engaged in the construction of a chicken pen the whole day. DW6, a village elder called Thomas Kiprono Sitonik confirmed that he had hired DW1 to put up a chicken pen in his home on the material day only to learn later that he had been arrested on allegations of stock theft.

24. DW2, ERICK KIPLAGAT ROTICH wondered why he had been arrested on allegations of stock theft yet he was at the home of one Edward (DW4) on the day he is alleged to have stolen cattle. DW4, Edward Langat confirmed that he knew DW2 (2nd accused) and that he was on 31st October 2013 with him the whole day as they were engaged in the digging of a borehole.

25. As I have already mentioned in this judgment, Miss Mbelete for the respondent did not oppose the appeal. However, even though the respondent reserves the right to oppose or concede to a criminal appeal, the said opposition or concession is not binding on the court because opposition does not lead to dismissal and likewise a concession does not connote automatic success of the appeal. See **Norman Ambich Mero & Another vs Republic Nyeri Criminal Appeal No. 279 of 2005.**

26. In effect therefore, this court will still re-evaluate the evidence afresh with a view to reaching an independent conclusion.

27. From the evidence that was adduced before the trial court, it is clear that there was only one eye witness to the alleged stock theft who was PW2 the herdsboy. A close scrutiny of the testimony of PW2 shows that it had so many loose ends that made his evidence not add up so as to convince me that it could sustain a conviction.

28. While PW2 testified that he knew the appellant very well and that the appellant was among the thieves who had stolen the cattle in question, the actual initial report of the theft that he made to PW1, his employer was that he knew one of the thieves whose father is Kimalel. PW1 had the following to say about PW2's report in his testimony before the trial court.

“They were three people. He said he knew the people. He said he knew one whose father is Kimalel.”

29. From the report that PW2 gave to his employer, it is clear that he did not identify the appellant positively using his names even though he claimed that he knew the appellant as he used to graze cattle with him. He said that he knew one whose father was Kimalel which leaves one wondering who Kimalel was and how many sons the said Kimalel had. It is also noteworthy that PW2 was not present at the time the appellant was arrested so that he could point out or identify the appellant as the son of Kimalel that he had referred to and neither was PW2 present during the arrest of the other two accused persons so that he

could identify them to the police before their arrest as he had said that he knew them by their appearance. One therefore wonders how the police identified the accused persons including the appellant during their arrest. No identification parade was conducted so that PW2 could identify the accused persons.

30. Furthermore, the appellant and his 2 co-accused were reportedly arrested on 6th November 2013 which brings to question why it took more than 5 days, after the alleged stock theft, for the appellant to be arrested if indeed his identity was known to PW2 and he lived in the same neighborhood with the complainant. This court could go on and on over the glaring discrepancies surrounding the circumstances under which the appellant was allegedly identified and arrested.

31. In the case of **Wamunga vs Republic (1989) KLR 424**, Court of Appeal held as follows:

“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from the possibility of error before it can safely make it the basis for a conviction.”

32. In **Republic vs Turnbull & others [1976] 3 All ER 549**, the court held that mistakes can be made even in cases of recognition, and that an honest witness may nonetheless be mistaken.

33. In **Kiarie vs Republic [1984] KLR 739**, the Court of Appeal had the following to say:

“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.”

34. In the instant case, the sequence of events that led to the discovery, by PW2, that 7 herds of cattle were missing and the theory that he went back to the grazing field and found 4 people with the cattle does not add up at all. The court was not told how far PW2 had gone with the rest of the cattle before he realized that some were missing. It is also inconceivable that the alleged 4 thieves could, after stealing the cattle, still be at the grazing field waiting for PW2 to come back before threatening him with knives. Furthermore, the conduct of PW2, upon seeing the 4 thieves with the stolen cattle and upon being threatened with knives also left a lot to be desired.

35. PW2 did not raise any alarm to call for assistance or help from anyone who could have been in the vicinity. Instead, he went all the way to the home of PW1 and informed him of the incident at around 7pm.

36. I am not satisfied that the conduct of PW2 soon after being allegedly accosted by the thieves fitted the conduct of a person who had been robbed of cattle before his own eyes. None of the alleged stolen cattle was found in the possession of any of the accused persons.

37. The missing links in this case make me entertain doubts on the veracity of the prosecution's case. The prosecution was under a duty to prove its case beyond reasonable doubt. The benefit of doubt always goes to the accused person.

38. Turning to the alibi evidence tendered by the appellant and his co-accused, they all gave different accounts on their whereabouts on the date and time of the alleged theft of cattle. They all called witnesses to confirm their alibi evidence.

39. The trial court however rejected their alibi evidence on the ground that the same was to be raised early enough as is required by law. It is however noteworthy that all the accused persons were not represented by advocates before the trial court so as to be able to know the legal requirement on when exactly to put across the alibi evidence.

40. Moreover, under **Section 309 of the Criminal Procedure Code**, the prosecution could have sought

leave to adduce further evidence in reply to rebut the appellant's defence of alibi. The said **Section 309 of the Criminal Procedure Code** states as follows:

“309. Evidence in reply

If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”

41. The prosecution did not dislodge the alibi evidence tendered by the appellant, his co-accused and their witness.

42. In the case of **Ssentale vs Uganda (1968) E3.A. 365**, it was held that it was the duty of the prosecution to adduce evidence to dislodge the appellants alibi.

43. All in all, I find that for the reasons stated herein, the appellants conviction and the conviction of his co-accused, was unsafe and I accordingly allow the appeal. The appellant's conviction and the conviction of his co-accused HILLARY KIPKURUI CHERUIYOT and ERICK KIPLAGAT NGETICH is hereby quashed and their sentences set aside. The appellant and his 2 co-accused shall be set at liberty forthwith unless they are otherwise lawfully held.

Dated, signed and delivered in open court this 15th day of September, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Mr. Bigogo for the Appellant

Omwoyo court clerk