



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 29 OF 2015 and 30 of 2015 (CONSOLIDATED)

(From original conviction and sentence in Criminal Case No. 260 of 2014 of the Principal Magistrate's court at Kyuso – B. M. MARARO – P.M)

1.PETER MUNYOKI MWANDIKWA 1ST APPELLANT

2.PAUL MANTHI NZIWILI 2ND APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

The appellants Peter Munyoki Mwandikwa and Paul Manthi Nzwili were charged in the magistrate's court at Kyuso with stealing stock contrary to Section 278 of the Penal Code. The particulars of the offence were that on the 31st May 2014 at Ikime sub location of Kyuso sub County within Kitui County jointly stole 3 cows valued at Kshs 100,000/- the property of Susan Musya Musyimi. In the alternative, they were charged with handling stolen property contrary to section 322(1) of the Penal Code. The particulars of the offence were that on the 2nd June 2014 at Enziu area of Mwingi East sub County within Kitui County otherwise than in the course of stealing dishonestly retained 2 cows knowing or having reason to believe them to be stolen property or unlawfully obtained.

Paul Manthi Nzwili was the first accused at the trial while Peter Munyoki Mwandikwa was the 2nd accused.

After a full trial, they were convicted of the main count of theft of livestock. Each was sentenced to serve 4 years imprisonment. They were dissatisfied with the decision of the trial court and have come to this court on appeal. Each filed separate appeals. Paul Mathi Nzwili filed appeal No. 30 of 2015 while Peter Munyoki Mwandikwa filed appeal No. 29 of 2015. The appeals were consolidated and heard together as they arose from the same trial.

Their grounds of appeal are similar that the prosecution failed to prove its case beyond reasonable doubt. That the investigations were shoddy. And for Paul Manthi Nzwili that he was wrongly convicted on allegations by a co accused. Lastly that the sentence was harsh and excessive.

Each of them filed written submissions to the appeal.

At the hearing of the appeal Peter Munyoki Mwandikwa relied on the written submissions. Paul Manthi Nzwili relied on the written submissions filed, and added that the cows were found with Peter Mwandikwa and that he was still in the dark as to why he was connected with the offence. He asked the

court to reconsider the evidence of PW1, PW2 and PW3, and PW4. He maintained that there were several contradictions in the prosecution evidence.

Learned prosecuting counsel Mr. Okemwa opposed the appeal. Counsel submitted that the prosecution tendered evidence which established the commission of the offence against both appellants, and proved dishonesty on the part of each of appellants. The prosecution also proved that the property of another was stolen by them. Thirdly the prosecution proved that there was an intention to deprive the owner of the property permanently.

Counsel also submitted that the photos of the stolen cows were produced, in evidence and, instead of the appellants addressing the allegations of the prosecution leveled against them in their defence, they merely went around blaming each other. Even on appeal they still continued blaming each other. In counsel's view the conviction was safe and the sentence was within the law. Counsel emphasized that the appellants were infact on the verge of selling the cows, before the said cows were spotted and recovered.

In response to the prosecuting counsel's submissions Peter Mwandikwa 1st appellant stated that the cows were given to him by Kimanzi to take to Bondoni which facthe informed the police. He stated that he was surprised that he was charged with theft of 3 cows while he said he had been given 11 cows.

The 2nd appellant Paul Nzwili submitted that the evidence of the prosecution witnesses was not consistent, contrary to what had been said by the prosecuting counsel. He said that he explained to PW5 how he came to be in possession of the cows. He said PW1 stated that she was told by the 1st appellant that he had the cows. He asked the court to consider the evidence on record.

In brief the prosecution evidence is that on the 31st of May 2014 Susan Musya Musyimi found that her 3 cows had disappeared at Bondoni after they were sent to graze. She searched but did not find them. She later reported the matter to the police and continued searching and informing people she knew. She was informed by a driver of a Nissan vehicle that the cows had been spotted at Nziu. She took a boda boda (motor cycle) and proceeded to Nziu where the cows were said to have been seen and found that one person, whom she knew, had been tied with ropes and that person begged for mercy. That person was taken to the police station. She said that person said that he was given the cows by somebody called Manthi and when they went to the police station the arrested person called Manthi on phone and pretended that he had intended to sell the cows but had delayed. That is how the other person was arrested by the police. The cows were photographed. Both accused persons were arrested and charged.

In their defences Paul Manthi Nzwili said on oath he was a charcoal dealer and that on 30th May 2014 he was doing his charcoal dealing business by transporting charcoal from Ngomeni to Thika, Nairobi and back. On the 2nd of June 2014 which was a Monday, they packed the vehicle because the permit had expired. At a place called Kwamenze he was called on a certain telephone number which he did not know and the people said they were police from Ngomeni and the officer said he was called Mumua and they asked him to go there. The police officer later found him at a butchery and said he was arresting him. He was then taken to Kyuso Police station where he saw the other accused person.

Peter Munyoki Mwandikwa on the other hand, testified on oath that he was a cattle dealer at Tseikuru and Nairobi. They bought cows and took them to Nairobi. At the material time, they bought cows at Nguni and when he reached Nziu they were stopped when he had 11 cows belonging to a person. He gave the telephone number of that person to the police who called him. Though he denied stealing the cows and said he was given the same by Kimanzi Munuve, he was told he was a thief and taken to the police station charged for an offence he did not know.

This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not see the witnesses testify to determine their demeanor and give due allowance for that fact. See the case of ***Okeno -vs- Republic (1972) EA 32.***

I have re-evaluated the evidence on record. I have considered the grounds of appeal of both appellants. I have also considered the submissions both written and oral of the appellants as well as the submissions of the prosecuting counsel.

There is no doubt that the 3 cows of the complainant PWI Susan Musya Musyimi went missing on or about 31st May 2014. There is no doubt that they were found on the 2nd of June 2014 in possession of Peter Munyoki Mwandikwa the 1st appellant herein. He gave an explanation at the trial that he was given the said cows by somebody and as such he was not a thief of those cows. He stated that he had in his possession a total of 11 cows and as a dealer in cows was driving them to the market.

Though there is no explanation as to where the other 8 cows disappeared, it is a fact that the 3 cows of the complainant which were marked with identifying marks were found in his possession. The person he said gave him the cows was the other appellant Paul Mwanthi Nzili though he gave a slightly different name of him and called him Kimathi Nzwili. In my view Kimathi Nzwili is the same as Paul Manthi Nzwili.

The said Nzwili did not deny knowing the 1st appellant. He said he was a charcoal dealer and had been doing his errand of charcoal dealing between Kora, Thika and Nairobi and was called from a telephone number which he did not know, and discovered he was being called by the police on allegations of theft.

The cows of the complainant were stolen some days 3 days before they were found on 2nd June 2014 in possession of Mwandikwa. He said he was given those cows by somebody else who was Nzwili. Nzwili on the other hand said that he was a charcoal dealer and did not give him those cows to Mwandikwa.

Indeed this is a case where the circumstances would determine whether or not a theft by the appellants had occurred or they were merely victims of suspicion. This is because nobody said that he saw them or one of them stealing the cows. Mwandikwa who was in possession of the cows gave an explanation as to how he came to be in possession of those cows. For him the court has to consider the application of the doctrine of recent possession. The burden was on him to give a reasonable explanation of the cows recently stolen from PWI – see the case of *Maina –vs- R (1986) KLR 301*. In my view the explanation given by him did not discharge his burden of dispelling the application of the doctrine of recent possession to him. It was not a convincing and a truthful statement. There is no evidence that he was seen with 11 cows as alleged by him. That was not a truthful statement. He was a principal offender, a thief.

As for Nzwili, my view is that both appellants knew each other well. There was no indication that there existed any grudge between any of them. The telephone number given by Mwandikwa 1st appellant was that of Paul Nzwili and he talked to the police and he was also found by the police and he did not deny that the telephone number belonged to him. He did not deny knowing Mwandikwa. I agree with the learned prosecuting counsel that both appellants are just taking advantage of the circumstances of the case to avoid responsibility for the stealing 3 cows. The circumstantial evidence points irresistibly to the guilt of the 2nd appellant Paul Nzwili. He was even finding out how far the 1st appellant had gone with the cows.

I agree with the learned magistrate that the prosecution proved its case against both appellants beyond reasonable doubt. I will uphold the conviction.

As for the sentence, it is a lawful sentence and though the 3 cows were recovered in my view it is a serious offence, which needs to be discouraged.

Consequently I dismiss the appeals and uphold both the conviction and sentence of the trial court. Right of appeal explained.

Dated and delivered at Garissa this 14th day of September 2016.

GEORGE DULU

JUDGE