



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO.66 OF 2013**

**BETWEEN**

**EDWIN NYANDIEKA OMWERI..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence of Hon. Macharia, PM, dated and delivered on the 19<sup>th</sup> day of July 2013, in the original Keroka PMCR No.984 of 2012)*

**JUDGMENT**

1. The appellant **Edwin Nyandieka Omweri** was charged with the offence of preparation to commit a felony contrary to **Section 308 (3)** of the **Penal Code** the particulars of which were that on 23<sup>rd</sup> day of July 2012 at Kahawa village in Borabu District within Nyamira County jointly with others not before court were found at the residence of Joshua Gesora Maisiba at the cattle boma with an intent to commit a felony namely stealing stock.
2. He pleaded not guilty to the said charge, was tried, convicted and sentenced to a fine of Kshs.20,000/= in default nine (9) months imprisonment.
3. Being dissatisfied with the said conviction and sentence he filed this appeal through the law firm of Oguttu-Mboya & Co. Advocates and raised the following grounds of appeal:-
  1. *The Learned Trial Magistrate erred in Law in finding and holding that the offence charged had been proved in accordance with the law, notwithstanding the material contradictions apparent in the evidence tendered and/or rendered by and/or behalf of the prosecution, which contradictions negated proof of the offence charged.*
  2. *In finding and holding that the offence charged had been proven, the Learned Trial Magistrate misconstrued and/or misapplied the standard of proof, attendant to Criminal matters, consequently, the finding and holding of the trial magistrate, based on proof of the offence charged was/is erroneous.*
  3. *The Learned Trial Magistrate erred in Law and in convicting and sentencing the appellant on the basis of the offence charged, notwithstanding the fact that the evidence on record, was at variance with and/or contradicted the statement of the offence and the relevant provisions of the law stated.*
  4. *The Learned Trial Magistrate erred in Law in convicting and sentencing the appellant on the basis of a Defective and therefore Invalid Charge. Consequently, the conviction and sentence meted against the appellant, is bad in law and hence legally untenable.*
  5. *The Learned Trial Magistrate failed to cumulatively evaluate and/or analyze the totality of the evidence tendered and consequently, the Learned Trial Magistrate reached and/or arrived at an*

- unbalanced and erroneous conclusion, contrary to the weight of evidence on record.*
6. *The Learned Trial Magistrate erred in Law in failing to consider and/or in disregarding the appellant's defence, including the plea of the existence of grudge and bad blood between the appellant and the complainant, without assigning any credible reason(s) and/or explanation(s), for such disregard. Consequently, the Trial Court did not afford the appellant a fair and reasonable treatment.*
  7. *The Learned Trial Magistrate erred in Law in ignoring, failing to take into account and/or disregarding material discrepancies, apparent and discernible in the prosecution's case and consequently, misdirected himself on the Burden of Standard of proof in respect of criminal Matters. In a nutshell, the judgment of the Learned Trial Magistrate has occasioned a miscarriage of justice.*
  8. *The judgment of the Trial Magistrate is devoid of reasons and contrary to and/or in contravention of **Section 169 of the Criminal Procedure Code Chapter 75, Laws of Kenya.***
  9. *The conviction and sentence of the Learned Trial Magistrate are illegal, null and void ab initio.*
1. At the hearing of the appeal herein Mr. Oguttu appeared for the appellant while Miss Mbelete appeared for the DPP and opposed the appeal.

### Submissions

2. It was submitted by Mr. Oguttu that the appellant was convicted based upon contradictory evidence of the prosecution witness as regards the date of the alleged offence. It was further submitted that though the incidence is alleged to have occurred in the compound of PW1, two vital witnesses were never called. The court was therefore urged to make an inference that their evidence would have been adverse to the prosecution case.
3. It was further submitted that the charge sheet was defective and invalid. It was submitted that the ingredients of the offence were not in the statement of the offence and particulars thereof. It was submitted that the evidence tendered were at variance with the offence.
4. The appellant further submitted that the trial court did not give sufficient consideration to the appellant's defence and only dismissed the same as not believable.
5. Miss Mbelete for the state submitted that as regards the date of the alleged commission of the offence the evidence tendered was that it was on 23<sup>rd</sup> July 2012. It was submitted that there was no grudge between the appellant and the complainant and that they had just met while the appellant was performing his official duties. It was submitted that PW1 testified that the appellant tried to bribe him with Kshs.3000/=. He however admitted that members of the public who arrested the appellant were never called.
6. This being a first appeal, the court is required to re-evaluate the evidence tendered before the trial court to come to its own conclusion though taking into account the fact that it did not have the advantage of hearing and seeing witnesses.
7. On behalf of the prosecution, **PW1 Joshua Gesora** testified that on 23<sup>rd</sup> July 2012 at around 11.00 p.m he heard his dogs barking and his bull making some unusual noise. He peeped through the window using torch and saw four people in the cow shed. He raised an alarm attracting neighbours including Mongare who was his worker and one Philip Omaa. When they reached the cow shed they found only the appellant whom he recognized as the area assistant chief.
8. He further testified that other members of the public arrived at the scene and that the appellant who had a black jacket inside which there was a new rope tried to bribe him with Kshs.3000/=. He thereafter sent Philip to call police officers. Under cross examination he confirmed that he had seven teachers who were staying in his compound. He further stated that he had never had a grudge with the appellant and that the appellant had written to him sometimes back and that he did not tie the appellant with his workers outside his compound.
9. **PW2 James Osoro** testified that he received report at about 11.45 that the appellant had been arrested by the complainant as he was stealing a cow inside a cow shed. He rushed to the scene and found people surrounding the appellant and beating him and that he was informed that he had been found trying to steal the cow. Under cross examination, he stated that it had rained and that the appellant had been tied with a rope to the fence. He further testified that the appellant had helped the police track a stolen car to the compound of the complainant.

10. **PW3 Sgt. Herbert Modibo's** evidence was that on 3<sup>rd</sup> July 2012 he received a telephone call from Chief Inspector Ndeti that the appellant had been arrested in the complainant's cattle boma. They rushed to the scene and found him tied with a rope inside a cattle boma. Under cross examination he stated that the appellant had assisted them in tracking stolen animals and a stolen car which had been found in the complainant's compound. He further stated that Philip who was the one who arrested the appellant disappeared and could not be traced. He further confirmed that there were many people at the scene who did not volunteer to record statements.
11. When put on his defence, the appellant testified that on 23<sup>rd</sup> June 2012 at 10.00 p.m he had come from a club when he met four people of whom he recognized Joshua Gesora and Philip Okemwa. Philip told him to stop and they started pulling him towards a gate. They assaulted him on the forehead and left hand. He screamed and members of the public came to his aid including his sister.
12. He further stated that there was a grudge between him and the complainant arising from the theft of motor vehicle which was recovered from his home and his refusal to sign identity cards form for his son Kevin under different names. He had further stopped him from building on a road reserve that heads to the market and had not been in talking terms with him since 2010.
13. **DW2 Cecitic Nyakerario Okwoyo** testified that she responded to the call of the appellant and found him being pulled by the complainant towards his house.
14. In convicting the appellant, the trial court had this to say:-

**“Though it is clear from the accused defence that the complainant and chief had in the past “crushed” with the complainant due to car, land and complainant's son, it is my finding that the accused was “preferring” is administration duties and by law required.**

**I find it hard to believe that it could be in a basis of fabricative the case against the accused person.**

**Similarly that the accused was being pulled towards the complainant's gate is not credible at all .....**”

15. From the proceedings herein and submissions by counsels, it is clear that the appellant was convicted only on the material evidence of PW1 which was at variance with the evidence of the appellant and DW2 as to how and where the appellant was arrested at. It was the complainant's evidence that at the time of arresting the appellant he was together with Philip Omae and Mongare. These witnesses would have corroborated the complainant's evidence. None of the members of the public who allegedly responded to the complainant's alarm and assisted in arresting the appellant were never called.
16. Whereas the prosecution has also discretion in the number of witnesses to call on the authority of **Bukenya & others -vs- Uganda [1972] E.A 549** where the court said that the prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent and taking into account the evidence of DW2 and the appellant, I would therefore make an adverse inference that their evidence including that of the complainant's wife would be adverse to the prosecution case.
17. In the absence of any corroborative evidence to that of PW1, I would agree with the submissions by the appellant that the prosecution case was not proved beyond reasonable doubt. I would further agree with the submission by the appellant that his defence was not given adequate consideration and therefore the trial court fell into error having found as a fact that there was a grudge between the appellant and the complainant in dismissing his defence as not believable.
18. Further the trial court fell into error by holding that the appellant was not able to give an account or explanation of his presence at the accused's home in view of the appellant's defence and thereby shifting the burden of proof to the appellant.
19. From the analysis of the evidence herein, I find the conviction of the appellant was not safe and would therefore allow the appeal herein, quash the conviction and set aside the sentence herein. The appellant should be set free forthwith and any sums of money paid in fine be refunded to the same.

**Signed and dated on this 4<sup>th</sup> day of February, 2015.**

**J. WAKIAGA**

**JUDGE.**

In the presence of:

Mr. Ochwangi for Appellant

Majale for Respondent