



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 42 AND 43 OF 2014
(CONSOLIDATED)

BETWEEN

DAVID CHERUIYOT KIBET 1ST APPELLANT

MARGARET TERER CHERONO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence of the SPM's Court at Kilgoris in Criminal case No. 215 of 2012 delivered on 30th April, 2014 – Hon. B.O. Ochieng, SPM)

JUDGMENT

1. The appellants herein DAVID CHERUIYOT KIBET and MARGARET TERER CHERONO were charged with the offence of stealing stock contrary to **Section 278** of the **Penal Code**. The particulars of which were that on the 25th day of March 2012 at Soit area in Transmara District of Narok County jointly with others not before court stole Seventeen cows valued at Kshs.300,000/= the property of OLADARO SANINGO TASUR.
2. They faced alternative charges of handling stolen goods contrary to **Section 322 (2)** of the **Penal Code** the particulars of which were that on the 11th day of March 2012 at Chepalungu forest in Chepalungu District of the Bomet County otherwise in the course of stealing dishonestly received or retained three cows for the 1st Appellant and one cow and two calves for the 2nd appellant knowingly or having reason to believe them to be stolen property or unlawfully obtained.
3. They pleaded not guilty, were tried, convicted and sentenced each to serve five years on the alternative charge. Being aggrieved by the said conviction and sentence they both filed appeals which appeals were consolidated for purposes of trial raising the following grounds:-
 1. *The Learned Trial Magistrate erred in Law in finding and holding that the Appellant herein was culpable and/or guilty of the offence of handling stolen property contrary to **Section 322(2) of the Penal Code, Chapter 63, Laws of Kenya**, as charged vide Count II, whereas the charge in respect of the said Count was bad for Duplicity.*
 2. *The finding, holding and conviction of the Appellant herein on the basis of the duplex charge, renders the judgment, conviction and sentence void ab initio. Consequently, the conviction and sentence herein is riddled and/or vitiated with error.*
 3. *In finding and holding that the appellant herein would not suffer any prejudice on the basis of the Duplex charge, the Learned Trial Magistrate misconceived, misapprehended and misapplied the*

provisions of **Section 137 of the Criminal Procedure Code, Chapter 75, Laws of Kenya** as read together with the provisions of **Article 50(2) (b) of the Constitution, 2010**.

4. In arriving at the finding and conclusion that the appellant herein was guilty of the offence of handling stolen property, the Learned Trial Magistrate disregarded and/or ignored a binding decision of the honourable Court of Appeal. Consequently, the judgment, conviction and sentence is contrary to and in violation of the Doctrine of Stare Decisis.
 5. The Learned Trial Magistrate misconceived the Burden and Standard of proof and on whom same laid and thereby erred in subjecting the Appellant to prove his innocence and/or the truth of his testimony, contrary to trite and established principles of the law.
 6. The Learned Trial Magistrate erred in law in denying and/or depriving the Appellant of the benefits of doubts, which were apparent in the prosecution's case and thereby violating the established and hackneyed principles of law that requires doubts to be resolved in favour of the Appellant.
 7. The Learned Trial Magistrate failed to appreciate and/or evaluate the gist and/or crux of the defence evidence and thereby misconceived same culminating into the erroneous finding and holding against the appellant.
 8. The Learned Trial Magistrate erred in law in failing to consider and/or in disregarding the appellant's Defence 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.
 9. 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 erroneous conclusion, contrary to and at variance with the weight of evidence on record.
 10. The Learned Trial Magistrate erred in law in failing to isolate the issues for determination and the determination thereon. Consequently, the judgment of the Learned Trial Magistrate is lopsided and coloured with errors both of Omissions and Commissions.
 11. The Learned Sentencing Magistrate erred in law in failing to adopt, consider and/or take into account the mitigation by the Appellant and instead the Judicial mind of the Trial Court was overwhelmed with extraneous and irrelevant consideration. Consequently, the sentence meted out against the Appellant is Manifestly Excessive and Punitive.
1. When the appeal came up for hearing before me, Mr. Mboya Oguttu appeared for the appellants while Mr. Majale appeared for the state and opposed the appeals.

SUBMISSIONS

2. On behalf of the appellants it was submitted that the charge or charges in relation to the offence of handling stolen property was bad in law for duplicity and therefore void. It was submitted that the issue of duplicity is a point of law that can not be remedied. In support thereof the case of **Selemia Mbeo Owuor & Another -vs- R Criminal Appeal No.68 of 1999** was submitted. It was submitted that the appellant could not be charged in respect of both receiving and retaining.
3. It was submitted that the defect in the charge sheet were not related to form or procedure but went into the substance of the charge and the jurisdiction of the court. It was further submitted that the trial court shifted the burden of proof upon the appellants and in support thereof the case of **Benson Juma Akumu & 2 others -vs- R. Eldoret Criminal Appeal No.94 & 95 of 2004** was submitted.
4. It was submitted that the trial magistrate failed to analyze and evaluate the evidence tendered and failed to establish whether the 2nd appellant being a wife had exclusive control of her husband's homestead and that a doubt had been raised in the prosecution case the benefit of which should have gone in favour of the appellants.
5. On behalf of the state Mr. Majale submitted that **Article 159 (2) (d) of the Constitution** requires that justice shall be administered without undue regard to technicalities and therefore the defect on the charge sheet was not material since the appellants were not prejudiced by the same. It was submitted that the prosecution's case was proved beyond any reasonable doubt. It was submitted that there was no error on the judgment and that the appellants' defence did not rebut the

- prosecution case.
6. This being a first appeal, the court is required to evaluate the evidence tendered before the trial court though taking into account the fact that it did not have the advantage of hearing and seeing the witnesses.
 7. On behalf of the prosecution PW1 OLODARU TASUR SANGO's evidence was that on 5th March 2012 he found 17 of his cattle missing. On 6th March 2012 he reported to the Soit Livestock Unit. On 9th March 2012 he got a report that one cow had been recovered. On 10th March 2012 he received a phone call from the chief Mogor that his cows were in Bomet at teacher Terer's on the way cattle emerged from a forest with four people including the 1st appellant and he was able to recover three of his cattle.
 8. He proceeded to the home of Terer where they found cattle in the "wives home." He was able to identify one of his cows and two calves mixed with Terer's. The second appellant who was in the home was arrested and she stated that the cattle were her husband's. In cross examination by Mr. Oguttu he stated that his two hard boys could not have sold the cows. He further stated that he had mentioned Terer as a suspect and that the second appellant was arrested because the said suspect was missing.
 9. PW2 DAVID KIPKOECH KORIR the chief of Mogor location testified that on 11th March 2012 he got information that PW1's cattle had been spotted at Chepalungu and that on the way to the said place at 2.00 a.m they bumped into the cattle at Chepalungu forest near the road where the first appellant was arrested. They proceeded to the home of Daniel Terer where three cattle were found and the 2nd appellant arrested. They proceeded to Sosion primary school but did not find the said Terer.
 10. Under cross examination he stated that the 1st appellant was arrested at night and that he was able to identify the 1st appellant since they had torches. He stated that the 2nd appellant was found sleeping in her house together with her children and that she stated that the cattle were her husband's.
 11. PW3 PC ALBERT MOSETI received a report on the missing cattle from PW1 on 11th March 2012 together with two administration police officer. PW1 and PW2 they laid ambush near Chepalungu forest and the 1st appellant with others not before the court came out with three cattle. The other three people escaped while the 1st appellant was arrested. He further testified that he led them to the 2nd appellant's house where three cattle were recovered and that the 2nd appellant told them that the cattle were her husband's. Under cross examination he stated that they never managed to arrest the 2nd appellant's husband.
 12. PW4 BENJAMIN TASUR LEMASHON testified that on 10th March 2012 he accompanied PW1 to Chepalungu forest where the 1st appellant was arrested and that upon interrogation he stated that the rest of the cattle were at mwalimu Terer's home. He led them to the home where three cattle were recovered.
 13. When put on their defence, the 1st appellant gave a sworn evidence and stated he was arrested while he was awoken by his neighbour Daniel Ruto who told him that his brother was sick and wanted him to assist in taking him to the hospital at 3.00 a.m when he met more than six people including PW2. It was his evidence that he was never found with any cattle.
 14. DW2 DANIEL CHERUIYOT RONO testified that he called the 1st appellant to help him take a patient to the hospital and that he was arrested on his way.
 15. The 2nd appellant MARGARET CHERONO TERER gave sworn evidence and stated that on 12th March 2012 she was asleep when people went to her home and told her to accompany them. They met Assistant Chief Richard Koech who asked where they were taking her to which they responded that her husband had disturbed them a lot. She stated that the 1st appellant was not with them but found him in the vehicle. It was her evidence that women in Kipsigis do not steal cattle.
 16. DW3 RICHARD KOECH the Assistant Chief of Cherelech sub location testified that he was on 12th March 2012 awoken by an Administration police officer from the chief's camp who told him that they had found a cattle thief. He was with the 1st accused and that they had recovered six cattle. He never saw the six cattle. He went to the house of the 2nd appellant and met one Administration police officer and when he asked them why they were arresting the 2nd appellant

they said that her husband had disturbed them a lot. He further stated that he found the 1st appellant at the chief's camp.

17. From the proceedings and submissions herein the following issues have been identified for determination:-

- a. *Whether the charge sheet was defective.*
- b. *Whether the prosecution case against the appellant was proved beyond reasonable doubt.*

1. On the defect of the charge sheet, Mr. Oguttu for the appellant submitted the case of **Selemia Mbeo Owuor & another -vs- R the Court of Appeal at Nairobi Criminal Appeal No.68 of 1999** where the Court of Appeal had this to say at page 4 thereof.

“Under section 322(1) of the Penal Code a person handles stolen goods if he, otherwise than in the course of stealing dishonestly-

- a. **receives**
- b. **retains**
- c. **undertakes or assists in their removal etc.**

The prosecution must accordingly chose which of these subheads they wish to proceed and it is not open whether to combine dishonest, receipt with dishonest retention in one charge. If they do that the charge would be bad for duplicity. The point is that an accused person is entitled to know whether it is being alleged that he dishonestly received the goods or that he dishonestly retained them and so on.”

1. The above authority was followed in **Muena -vs- R[1984] KLR 480** but where the court at page 483 had this to say:-

“This charge was defective in that it did not specify the manner of alleged handling as required by Section 322(1) of the Penal Code. In other words whether the allegations was that the appellant dishonestly received or retained the goods or dishonestly undertook or assisted in their retention, removal, disposal or realization by or from the benefit of another person or if he arranged so to do However such a defect may not infact occasion a failure of justice to an accused person if it is quite clear what he has to met but it is safer to have the charge properly drawn...” Emphasis added.

2. **Article 159 (1) (d)** now requires that justice shall be administered without undue regard to procedural technicalities. **Section 13A** of the **Criminal Procedure Code** provides that *“every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”*
3. Whereas the charge sheet was not specific as to whether it was by dishonestly receiving or retaining, the defect in selecting to charge the appellants which either mode did not prejudice the appellants neither it did cause a failure of justice to the appellants as they were able to mount a defence to the said charges. In view of the provision of **Article 159(1)(d)** the defect in the charge sheet did not go to the substance of the charge.
4. On the issue as to whether the prosecution case against the appellant was proved beyond reasonable doubt, the appellants were charged with the offence of handling stolen property. The important elements of the charge are that the accused must have reason to believe that the goods were stolen and that the accused dishonestly received or retained the goods.
5. It was for the prosecution to prove these element against the appellants. As regards the appellants, the prosecution evidence was that three cows emerged from a forest with four persons and the 1st appellant was arrested. In his defence the 1st appellant denied being found with the said cattle while the 2nd appellant stated that the cattle found in the compound belonged to her husband Daniel Terer who was a suspect. PW2 confirmed that she stated that she did not know where her

husband had found the said cattle.

6. It is clear from the evidence tendered that the prosecution did not prove its case against the 2nd appellant beyond reasonable doubt and that she was just arrested since her husband who was a suspect could not be found.
7. In convicting the appellants herein the trial court put the burden of proof upon them when he pronounced herself as follows:-

“... cattle were recovered at 3.00 a.m in the morning and there is no other explanation as to what the accused No.1 was doing in the forest with the cattle. 1st accused tried to give his version but I found it to be diversionary.

As for Accused No.2 the local provincial administration who knew her home well explained how they found the cattle. There was an issue touching on her husband which tended to pop up during cross examination of defence witnesses. The explanation was that the husband had disturbed the authorities a lot on cattle rustling. I never understood why the husband never came to defend her..... She must have been aware of the cattle in her home..... there was no proper explanation as to how she came to possess stolen cattle...”

8. I therefore find that the prosecution did not prove its case against the appellants beyond reasonable doubt as required in law and further find that all the element of the offence of being in possession of stolen property was not proved by the prosecution and therefore the conviction of the appellants was not safe.
9. There were doubt raised in the prosecution case as to where the 1st appellant was arrested and whether or not he accompanied the prosecution witnesses to the home of the 2nd appellant. Taking into account the evidence of DW3 Richard Koech the area Assistant Chief against the evidence of prosecution witnesses therefore the benefit of this doubt should have been given to the appellants.
10. I would therefore allow the appeal herein on both conviction and sentence, and quash the said conviction and set aside the sentence. The appellants should be released forthwith unless otherwise lawfully held.

Signed and dated on this 11th day of March, 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Kaburi for Oguttu Mboya & Co. Advocates for the Appellants

Miss Boyon for Respondent