



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 50 OF 2014

***(AN APPEAL FROM THE JUDGMENT AND SENTENCE OF THE RESIDENT MAGISTRATE,
EMBU IN CMCR. CASE NO. 860 OF 2014)***

DAVID MUCHANGI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

This is an appeal against the judgment of Embu Resident Magistrate in Criminal Case No. 860 of 2014. The appellant was charged and convicted with the offence of Stock Theft contrary to Section 278 of Penal Code and sentenced to serve 10 years imprisonment. He was dissatisfied with the both conviction and sentence and lodged this appeal.

In his petition of appeal the appellant relied on the following grounds:-

- 1. That the magistrate erred in finding that the prosecution had proved the case beyond reasonable doubt despite inconsistencies and contradictions.*
- 2. That the magistrate convicted the appellant without credible evidence for the case was based on mere suspicion that he stole the bull.*
- 3. That there was no exhibit produced to connect the appellant with the offence.*
- 4. That the evidence of the prosecution witnesses was not credit-worthy and consisted of several irregularities.*
- 5. That the magistrate erred in ignoring the fact that the appellant did not have legal representation although the offence was a felony.*
- 6. That the magistrate erred in sentencing the appellant to 10 years imprisonment without an option of fine.*

In his written submissions, the appellant argued that the magistrate relied on insufficient evidence and that the evidence was full of contradiction and inconsistencies. He stated that he was arrested and charged on mere suspicion. He argued that he was only a broker of livestock trade in the area and that he was arrested long after the offence was committed. There was no eye witness to the offence and that the evidence of PW4 and PW5 lacked corroboration. PW6 the investigating officer was biased in that he only believed the story of the complainant.

The appeal was opposed by the respondent. Ms. Matere filed written submissions in which she relied on the case of ***AMBANGA alias ONYANGO VS REPUBLIC Criminal Appeal No.32 of 1990 (UR)*** which laid down the principles to be applied in testing circumstantial evidence. However, the said authority was not attached to her submissions.

The respondent argued that the appellant had approached the complainant to sell to him her bull but she declined. The animal went missing a short while later. The evidence of PW3 was that on 13/4/2014 he woke up in the morning and found a small bull tied to his house and that the appellant claimed that it was his property. The appellant took it away with the assistance of PW4 who transported it for him.

The Assistant Chief investigated the case on receiving the PW1's report and reached a conclusion that the appellant is the one who had stolen the bull. He therefore requested him to return the bull which he failed to do prompting PW1 to report the matter to the police. It was submitted that the prosecution's evidence was consistent and well corroborated. The witnesses were credible pursuant to Section 125 of the Evidence Act.

The duty of the first appellate court was explained in the Court of Appeal case of **NJOROGE VS REPUBLIC [1987] KLR 19** where it was held:-

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya Vs Republic [1957] EA 336, Ruwalla Vs Republic [1957] EA 570)”.

The appellant was charged with stock theft under **Section 278 of the Penal Code**. It provides:-

“If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram ewe, whether goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years”.

The evidence of PW1 was that she owned a brown bull with white parts on head. On the 12/4/2014, she locked her bull in the shed but did not find it the following morning. She reported the matter to the area chief who embarked on searching for the bull. The chief interrogated the appellant who had earlier requested to be sold the bull by the complainant. He chief also interrogated other witnesses and was convinced that the appellant had stolen the bull. He was asked to return the bull but failed to do so.

PW2 the chief testified that he received the report of the stolen bull from the complainant. He did his enquiries and confirmed that appellant had the bull which he had taken to the house of PW3 John Rutere on the night of 14/4/2014. He summoned the appellant and PW3. The witness told him that he had woken up the following morning and found a brown bull with white spots outside his house. The appellant owned up that the bull belonged to him. The appellant then hired PW4 to transport the bull for him about half a kilometer away. PW4 left the appellant there talking with the interested buyers. The chief asked the appellant to return the bull and he promised to do so within 3 days. He did not fulfil his promise and the matter was reported to the police.

PW3 testified that on 13/4/2014 he found a brown bull with white spots on the head tied outside his house. The appellant later came to his house and told PW3 that the bull belonged to him. He requested that the animal stay in his home awaiting collection in the evening. The animal was collected the following morning by the appellant and PW4 Michael Muchangi.

PW4 testified that on the 14/4/2014 he was hired by the appellant to transport for him a brown bull with white spots to the home of one Wanjira Njiru. He took the bull there and left the appellant in the said home discussing the price. It was a few days later that he was summoned by the chief and informed that the said bull was stolen from PW1.

It was the testimony of PW5 Wanjira Njiru that on the 14/4/2014, the appellant brought a small bull to her home. It was brown in colour with white patches on its head. The appellant collected the bull on 15/4/2014. PW5 came to learn later that the bull was stolen property.

The investigating officer PW6 received the appellant at Manyatta police station on the 4/6/2014. He was handed over to him by PW2 accompanied by administration police officers. He was informed that the appellant had stolen the bull of PW1. He recorded statements of witnesses and later charged the appellant with the offence.

The rights of defence under Section 211 of the Criminal Procedure Code were explained to the appellant. He opted to remain silent.

The appellant argued that the magistrate failed to consider that he had no legal representation. Under Article 50(2)(g) of the Constitution, every accused person has the right to choose and to be represented by an advocate. Article 50(9) provides that parliament shall enact legislation providing for the protection for, right and welfare of victims of offences. It was held in the case of **MOSES GITONGA KIMANI VS REPUBLIC [2015] eKLR** that parliament has an obligation to enact legislation which would ensure the realization of rights of accused persons under Article 50 which would set parameters and circumstances under which an accused person may be provided with legal representation at the expense of the State. This legislation is yet to be enacted to form the basis for realization of the said rights under Article 50. The framers of the constitution intended that the legal representation be achieved progressively. I reach a conclusion that the trial court did not violate the rights of the appellant for legal representation in this case.

It was not necessary for the prosecution to produce the exhibit before the court to prove the offence. What is required is the prosecution to adduce sufficient evidence to sustain a conviction which was done in this case. In the case of **JOHN WACHIRA MUTHIKE VS REPUBLIC [2014] eKLR** the court held that failure to produce exhibits even where they have been recovered is not fatal to the prosecution's case. In the case before me, the exhibit was not recovered and could not have been produced.

The evidence of the complainant was that the appellant had approached her to buy her bull and that it went missing a few days later. When she reported the matter to the area chief she had no idea where her bull was. The chief conducted independent investigations which revealed that the appellant was the suspect. It was confirmed to him by PW3 and PW4 that the appellant was the one who was in possession of the bull. The description of the bull by PW1, PW3 and PW4 that it was a small brown bull with white patches on the head was very clear and consistent. PW3 testified as to how the appellant owned up that the bull found outside his house belonged to him. The appellant requested that the bull remain in PW3's home until he was available to collect it. The evidence of PW3 and PW4 was that the appellant collected the bull and transported it to the home of PW5. PW5 confirmed that the bull which she described as brown with white spots on the head was taken to her house by the appellant on 14/4/2014 and collected by him the following day.

The bull was stolen from PW1's house on 12/4/2014. It was found in possession of the appellant who had kept it in PW3's house the following day. There was evidence that the appellant was in possession and control of the bull until the 15/4/2014 after which he may have disposed of it. The prosecution adduced overwhelming evidence against the appellant on the possession of the bull.

The evidence of the prosecution remained unchallenged since the appellant did not give any defence. The allegation by the appellant that the evidence was inconsistent and not corroborated is not correct. He did not bring out the particulars of the alleged inconsistencies. Corroboration is not required for the court can convict on the evidence of a single witness provided it is found to be worthy of credit. The evidence of PW1, PW2, PW3, PW4 and PW5 was well corroborated.

The principles applicable in cases of recent possession were set out in the case of **ARUM VS REPUBLIC Court of Appeal at Kisumu Criminal Appeal Case No. 85 of 2005** the doctrine of recent possession applies where the stolen property was found with the suspect; that the property was positively identified by the complainant; that the property was stolen from the complainant; that the property was recently stolen from the complainant.

It was also held in the case of **ANTONY KARIUKI KARERI VS REPUBLIC [2004 eKLR]**

“Includes not only having in one’s own personal possession but also knowingly having anything in actual possession or custody of any other person or having anything in any place (whether belonging to or occupied by oneself (or not) for the use or of benefit of oneself or any other person”.

It has been established in this case that the stolen bull was found in the possession of the appellant and that the complainant positively identified it as her stolen property. The bull was stolen from the complainant about 2 days before it was spotted by PW3 in possession of the appellant.

The magistrate in his judgment found that the prosecution had proved the case against the appellant beyond any reasonable doubt. Although he did not deal with the doctrine of recent possession, he analyzed the evidence of the prosecution and reached a conclusion that the appellant had stolen the complainant’s bull. I entirely agree with the judgment of the learned magistrate.

Section 278 of the Penal Code provides for a sentence of imprisonment not exceeding 14 years. In this case the appellant was sentenced to serve 10 years imprisonment which was within the law. The principles upon which an appellate court will interfere with the sentence of the trial court were discussed in the case of **FRANK MUIA MUTUA VS REPUBLIC [2014] eKLR** where the court cited the case of **OGOLLA S/O OWOUR REPUBLIC [1954] EACA 270** where it was held as follows:-

“The court does not alter a sentence unless the trial judge has acted wrong principles or overlooked some material factors. To this we would add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case”.

It is my considered opinion that the sentence imposed was reasonable and that the trial magistrate took into consideration all the relevant factors.

I find the conviction safe and the sentence within the law and are hereby upheld. The appeal has no merit and it is hereby dismissed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF OCTOBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

The appellant

Ms. Nandwa for the Respondent