



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
CRIMINAL APPEAL NO. 61 OF 2014

MUSA GEDI NOOR.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case No.1401 of 2014

of the Chief Magistrate's Court at Garissa–M. Wachira - CM).

JUDGMENT

The appellant was charged with two counts. In count 1 he was charged with stealing stock contrary to Section 278 of the Penal Code. The particulars of the offence were that on 15th September 2013 at Boka market within Tana River County stole one male camel valued at Kshs 40,000/= the property of Abdi Gedi Noor. He was also charged with a second count of house breaking contrary to Section 304(1b) and stealing contrary to Section 279 (b) of the Penal Code. The particulars of the offence were that on the 17th September 2013 at Boka market within Tana River County broke and entered the building used as dwelling house by Abdi Gedi Noor and stole 4 tins of paints valued at Kshs 4,000/= and cash Kshs 53,000/= the property of Abdi Gedi Noor.

He denied both charges. After a full trial he was found guilty of count 1 of stealing stock. He was convicted and sentenced to serve 5 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial petition of appeal on 11th August 2014. However on 11th August 2015, he filed an amended petition of appeal, which he relied upon, on the following grounds:-

1. The learned trial magistrate erred in law and fact in convicting him for the offence of stealing stock in reliance on the evidence of the complainant alone.
2. The learned trial magistrate erred in law and fact when she sentenced him to 5 years imprisonment in a case of stealing stock which was not examined in court to understand whether or not he had committed the crime.
3. The learned trial magistrate erred in law and fact when she failed to evaluate the whole evidence tendered in court to understand the evidence adduced which was from the complainant's family.
4. The learned trial magistrate erred both in law and fact when she did not consider his defence thus

rejecting it without giving any cogent reason contrary to 169 of the Criminal Procedure Code.

The appellant also filed written submissions to the appeal. During the hearing of the appeal the appellant relied on the written submissions and elected to make no oral submissions. I have perused and considered the said written submissions.

The learned Prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that the learned magistrate considered all relevant issues the case, before coming to a conclusion. Counsel emphasized that PW2 was an independent witness who saw the appellant sell the Camel at the market. PW2 neither arrested the appellant nor raised an alarm as he thought that the appellant had the authority of PW1 the owner who was the appellant's father, to sell the camel.

With regard to production of the exhibit counsel submitted that the camel had already been sold and could thus not be produced in court. In addition, the appellant was seen with County Council receipt for the sale at the market but tore the same and as such no exhibit could be produced. Counsel emphasized that the identification of the appellant by PW2 and PW1 was positive, as they knew him before and the incident in fact occurred in broad day light.

Counsel submitted also that there were no contradictions in the prosecution evidence as alleged by the appellant. Counsel submitted

that the arrest of the appellant was proper and in accordance with the law.

Counsel submitted lastly that the defence of the appellant was considered and found to be a mere denial, and that there was no legal requirement or need to bring the buyer of the camel to testify in court in order to prove the case against the appellant.

In response to the Prosecuting Counsel's submissions, the appellant stated that he did not have anything more to add.

During the trial the prosecution called 3 witnesses. PW1 was Abdi Gendi Noor. It was his evidence that he came from Boka location in Bura Tana and that he was aged 86 years. That on 15th September 2013 he went to Boka market to look for his stolen camel which the appellant had stolen from the grazing field. He knew that the appellant would go to sell it at the market, he had received information from two children that is Boru Ngedi and Folmuy Aden who were herding the camels, that the appellant had taken the camel and driven it away. He later reported the incident to the police who promised to arrest the person who stole his camel.

In cross examination, he admitted that the appellant was his son who had married 3 wives. He stated that the appellant had beaten his first wife and was put in prison. The appellant also assaulted his 2nd wife and they had divorced. According to him, when the appellant took a third wife, the family of the wife came for her and took her away. He stated that the appellant had threatened to kill him because he wanted to inherit his camel. He stated that the appellant had stabbed his (appellant's) wife in the stomach and was imprisoned for 7 years. He also stated that the appellant had stolen his 7 cows before stealing his camel. He denied having given the appellant the camel.

PW2 was Abdi Ali Fayah. It was his evidence that the appellant was his relative and that on 16th May 2013, the complainant told him that his cows and camels were being stolen and that the appellant had also stolen Kshs 53,000/= from him. One day, he went to Boka market and saw the appellant selling a camel which belonged to the complainant. Later, the complainant complained to him that the appellant had stolen his camel and he informed the complainant that he had seen the appellant selling the camel at the market.

In cross examination, he maintained that he saw the appellant selling the camel but did not arrest him because he assumed the camel was family property and that the appellant was selling it on behalf of his father, the complainant. He stated that there were many people in the market but everybody assumed that

he was selling the camel on behalf of his father. He maintained that the appellant witnessed the appellant selling the camel.

PW3 was P C Cleophas Koech Kiptoo of Bangale Police Station. It was his evidence that on 17th September 2013, one old man came to the patrol base and reported that his son had sold a camel belonging to him worth Kshs 40,000/= at Boka market. They then investigated the matter and the complainant said that it was his son who had sold the camel and had also stolen from him Kshs 53,000/= on 16th September 2013 which was money raised from sale of goats. It was his evidence that the complainant stated that the appellant had also stolen 4 tins of paints.

They looked for the appellant and traced him and took him to the police station and charged him. He stated that they arrested the appellant from the trading Centre and recovered nothing from him. He stated also that the complainant had said that the appellant used to steal from him previously but he would forgive him.

In cross examination, he stated that the complainant informed the police that the appellant tore the County Council receipt for the sale into pieces. He stated that he arrested the person to whom the camel was sold, but later released him because he said that he thought that the appellant had been sent by his father to sell the camel. He stated that when the appellant was arrested, he said that the camel. He maintained that the appellant did not deny selling the camel. He stated that he found the appellant chewing miraa with other people in a kiosk and arrested him.

That was the prosecution evidence.

When put on his defence, the appellant tendered unsworn testimony. He stated that on the 5th of September 2013, he was arrested at Boka market by the police who took him to the police station where he was informed that his father had complained that he stole his camel. His father later came to the police station and said that he had stolen from him. He denied committing the offence and stated that the evidence of his father was not supported by any witnesses who saw him sell the camels. He stated that the case was a frame up and that his father's camel got lost during the dry season. He stated also that the police did not tender evidence regarding whom he sold the camel to.

This is a first appeal. As a first appellate court I am required to reconsider all the evidence afresh and come to my own conclusion and inferences. ***See the case of Okeno -vs- Republic (1972) EA 32.***

I have reconsidered the evidence on record. I have also perused the judgment of the trial court. The appellant has come to this court on appeal raising several grounds. The main ground is that the learned trial magistrate did not evaluate the whole evidence to understand the same before convicting him.

Indeed the complainant in this particular case was the father of the appellant. He did not see the appellant take away the camel. He heard the story from two children Boru Gedi and Formy Aden. None of these two children was called to court to tender evidence.

The complainant PW1 Abdi Gedi Noor also went to the market but did not see the appellant selling the camel. The person to whom the camel was sold did not come to court to testify. PW2 Abdi Ali stated that he saw the appellant selling the camel but did not report the same because he thought that he was selling the camel on behalf of the complainant who was the appellant's father.

In my view though the children who claimed to have seen the appellant drive away the camel, and the person to whom the camel was sold did not testify, the evidence on record was adequate to justify the magistrate coming to the conclusion that the appellant took away the camel and sold it.

Both PW1 and PW2 had no reason to implicate the appellant without justifiable cause. Though the two children who said that they saw the appellant take away the camel were important witnesses who were not called by the prosecution, in my view the prosecution case was still water tight, as other relevant witnesses were called to testify. The police through PW3 stated that they arrested the person who had

bought the camel but later released him as the appellant did not deny selling the camel. In my view therefore the prosecution evidence established that the appellant stole and sold the camel.

The appellant claimed that his defence was not considered by the trial court. In my view that cannot be true. The learned magistrate clearly considered the defence and came to the following conclusion:-

“This court doesn’t believe the accused defence that the complainants camel died of draught because the accused did not cross examine the complainant on existence of any draught at the material time”.

It cannot thus be said that the defence of the appellant was not considered by the trial court.

The appellant also appealed on sentence. Before sentencing the prosecutor stated that the appellant was a first offender. In mitigation the appellant asked for leniency. The maximum sentence provided by law for theft of stock is 14 years imprisonment. This is a family matter and from the evidence of the complainant PW1, the appellant had been assaulting his wives. As a consequence the appellant had already married three wives and none was with him. He had also been threatening to kill the complainant in order to inherit his camels. In those circumstances I find that the sentence of 5 years imprisonment imposed on the appellant was reasonable sentence. I will thus uphold the sentence.

Consequently and for the above reasons, I find that this appeal has not merits. I dismiss the appeal and uphold both the convictions and sentence of the trial court.

Dated and delivered at Garissa this 3rd day of December 2015.

GEORGE DULU

JUDGE