



[REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 45 OF 2013

JAMES MUGENDI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by M. OBIERO Senior Principal Magistrate Runyenjes in Criminal Case No. 97 of 2013 on 7th May, 2013)

J U D G M E N T

1. **JAMES MUGENDI** the appellant herein was charged and convicted of the offence of **Stealing contrary to Section 275 of the Penal Code**. The particulars as stated in the charge sheet were as follows:-

“On the 14th day of Februry 2013 at about 0830 hours at Kiangungi village in Embu County, stole 10 kilograms of tea-leaves valued at Kshs.520/= property of JOSEPHINE NJERI”.

2. The appellant denied the charge and after a full hearing he was convicted and sentenced to two years imprisonment.

3. He was aggrieved by the judgment and filed this appeal against the conviction and sentence. He cited the following grounds:-

- i. ***The trial Magistrate erred in both points of law and facts when he failed to consider that there was growing grudge between him and the complainant of land dispute and which lead up to this implication of this case against him.***
- ii. ***The trial Magistrate furthermore erred in both points of law and facts when he failed to consider that he had lodged a case of assault against the complainant in this case and of which lead her to implicate him with this case.***
- iii. ***The learned trial Magistrate still erred in both points of law and facts when he failed to note that his fundamental rights were violated when he was held in police cells for more than 24 hours before having been availed to court leaving Section 71(3) violated.***
- iv. ***The trial Magistrate rejected his defence on weak reasons leaving Section 169(1) being violated.***

4. The prosecution case was that ABEL MWANIKI is the proprietor of land LR. KYENI/MUFU/4075. PW1 (Josephine Njeri) who is the complainant is the wife of ABEL MWANIKI.

5. On the 14/2/2013 PW1 sent PW2 (Venzio Nyaga Charles) to the above mentioned land to go and harvest her tea leaves. On reaching there with two others PW2 found the appellant harvesting the tea.

6. PW2 then reported the matter to PW1 who in turn reported to PW3 (APC Edison Lwangasi). PW3 and others accompanied PW1 to the shamba and they found the appellant harvesting the tea leaves. He was arrested and later charged.
7. The tea leaves he had harvested were produced in Court as EXB1. The title deed to the above land was also produced as exhibit.
8. The appellant in his unsworn defence admitted harvesting the tea leaves on the said shamba but maintained that the shamba was given to him by his father. His mother DW2 (Judith Mutito) supported the appellant's defence saying the land which belongs to PW1's husband is No.4077. She confirmed that there were tea bushes on parcel No. 4075.
9. A brother to the appellant testified as DW3 (Anthony Muriuki). He stated that their late father distributed to them plots before he died. The portions of land were given to them in 1995 at the Land Control Board. The appellant's portion is parcel No. 4075 while that of PW1's husband is parcel No. 4077.
10. When the appeal came for hearing the appellant orally submitted and stated that he had had several cases with the complainant over this land. And that he even has a title deed which was rejected by the Court.
11. Mr. Wanyonyi learned State Counsel opposed the appeal saying a title deed was produced by the complainant showing that she had proprietary rights over the land. He made some submissions on criminal cases between PW1 and the appellant filed at Chuka Law courts.
12. He cited the case of ***JOSHUA THURANIRA VS REPUBLIC Meru High Court Criminal Appeal No.127/2009*** to support his argument that since the complainant had produced a title deed and the appellant had produced none when the complainant had proved ownership of the land in question.
13. This is a first appeal and this Court has a duty to re-evaluate the evidence and the grounds of appeal and arrive at its own conclusion. It must not lose sight of the fact that it did not have the opportunity to see or hear the witnesses. I am guided by the case of:-

- i. ***OKENO VS REPUBLIC [1972] EA 32***
- ii. ***SOKI VS REPUBLIC [2004] 2 KLR 21***
- iii. ***AJODE VS REPUBLIC [2004] 2 KLR 81***

14. I have considered all the submissions by both the appellant and the State. I have equally considered the evidence on record and the grounds of appeal.

15. The change sheet confirms that the appellant was arrested on 14/2/2013 and arraigned in Court on 15/2/2013. There was therefore no violation of his rights. **Ground 3** fails.

16. I will consider grounds 1, 2 & 4 jointly. The issue for determination is whether it was proved beyond doubt that the land and tea leaves allegedly stolen belonged to PW1 or the appellant.

17. There is no dispute that PW1's husband bought land from the appellant's father. There is also no dispute that there is a dispute concerning this land.

Though PW1 played it down, from the cross-examination of the appellant, his defence and the evidence of PW2 and DW3 there is a dispute over this parcel No. 4075.

18. It is true that PW4 produced a title deed No. KYENI/MUFU/4075 which is said to belong to the husband of PW1. Abel Mwaniki was not called as a witness.

19. DW2 and DW3 acknowledge that the appellant's father sold land to Mr. Mwaniki but what he bought was KYENI/MUFU/4077 and not KYENI/MUFU/4075. And this is where the crux of the matter is.

20. It was therefore imperative for the Prosecution to go beyond the production of the tea leaves and title deed and adduce evidence on how this land was transferred to Mwaniki.

Secondly evidence ought to have been led to show that the information in the title deed translated to what is on the ground.

21. It was also important for the Court to establish the nexus between parcel Nos. 4075 & 4077. Could there be some confusion between the documents and what is on the ground?

22. When did Mwaniki plant these tea bushes he is claiming to be his? Were they planted by the appellant's father, and if so were they sold together with the soil?

23. And I am in agreement with the appellant when he states:-

“The trial Magistrate finally rejected my defence on weak reasons leaving Section 169(1) being violated”.

Had the learned trial Magistrate considered the defence along side the Prosecution evidence and not just relied on the evidence of the title deed he would have arrived at a different conclusion.

24. My finding is that this is a matter that needs to be properly investigated to establish the acquisition of title No. 4075 and not 4077 by Abel Mwaniki.

25. I finally find that there being queries about the title No. KYENI/MUFU/4075 the element of ownership of the tea leaves allegedly stolen could not be said to have been proved beyond reasonable doubt. The parties are however asked to have this issue sorted out by the relevant forum.

I therefore find merit in the appeal which I hereby allow. The conviction is quashed and sentence set aside.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 2ND DAY OF MAY, 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Ms. Mbae for State

Appellant

Mutero/Kirong CC