



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 85 OF 2013

LESIIT, J

MUSA MARIGU MUNGWIKA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant Musa Marigu Mugwika was charged with one David Munene Mitambo with one count of stealing stock contrary to section 278 of the Penal Code. After the trial, both were convicted of the offence and sentenced to 3 years imprisonment on the 2nd August 2013.
2. Being aggrieved by the conviction and sentence the Appellant filed this appeal. He raises 8 grounds of appeal in his petition of Appeal dated 20th September, 2013 as follows:
 - i. **The learned trial magistrate erred in law and fact by convicting the appellant whereas the plea was equivocal, it (the plea) was taken in a language the Appellant did not understand and, the charge and the facts were not read and explained to the Appellant.**
 - ii. **The judgment of the learned trial Magistrate is bad in law and unlawful as the particulars on the charge sheet do not support the evidence on record and the court's judgment on the same are fundamentally and materially at variance.**
 - iii. **The learned trial magistrate erred in law and fact by convicting the appellant whereas the evidence on record clearly shows that he did not commit the offence for which he was charged with by the prosecution.**
 - iv. **The learned trial magistrate erred in law and fact by convicting the appellant whereas the case against the appellant was not proved to the standards required in law for criminal cases.**
 - v. **The learned trial magistrate erred in law by not giving the Appellant an opportunity to cross examine his co-accused which was prejudicial to the Appellant and by convicting the appellant on vague, uncorroborated inconsistent and contradictory evidence of the prosecution witness.**
 - vi. **The judgment of the learned trial magistrate was against the weight of evidence and is bad in law.**
 - vii. **The learned trial magistrate erred in law by imposing a harsh and excessive sentence against the appellant under the circumstances of this case.**

viii. **Sentence against the appellant under the circumstances of this.**

3. The Appeal was urged by Mr. Nyenyire advocate on behalf of the Appellant. Mr. Mulochi, Prosecution Counsel represented the state. He opposed the appeal.

4. I have carefully considered this appeal together with the submissions by both counsels. Being a first appellate court I have subjected the evidence adduced before the trial court to a fresh analysis and evaluation, and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses and I have given the due allowance.

5. I am guided by the court of appeal case of **OKENO V. REPUBLIC [1972] EA 32**. The role of a first appellate Court is given as follows:

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

6. The facts of the prosecution case were that the complainant bought 3 goats at Marimati Market on 9th May, 2013. He tied them at the rear of his butchery cum hotel at 11pm and went to sleep. In the morning at 6 am he found one goat missing. He reported to PW2, the Chairman of the slaughter house at Marimanti to look out for it. At 7.30 am PW 2 received some information from PW3. He took PW 1 and others to the Giekuri where they met one Muriithi who told them that the Appellant and co-accused took a goat for sale to him.

7. According to PW3, he received a call from one Nyaga asking him to purchase a goat from him. He proceeded to Giekuri where he met Nyaga selling local brew at his den. Among his customers were the Appellant and his co-accused. PW3 stated that Nyaga pulled him aside and told him that the goat he was selling was taken to him by the Appellant and that it was stolen.

8. PW3 then called PW2. PW2 went with PW1 and others. The Appellant and his co-accused were arrested together with the goat. The goat was photographed as before being released to the complainant. The photograph was P.Exh 1.

9. The first point taken by Mr. Nyenyire was that there was no evidence that the Appellant stole the goat. Neither was the goat found in the possession of the Appellant. Mr. Nyenyire urged that there was also inconsistency in the evidence of the prosecution witnesses.

10. Mr. Mulochi, learned Prosecution Counsel opposed the appeal and urged that the complainant’s evidence that the Appellant ran away from the scene of crime was corroborated by PW2 and 3. Counsel urged further that the sentence of 3 years imprisonment was lenient as the offence called for 14 years imprisonment.

11. The Appellant and his co-accused faced the charge of stealing stock contrary to section 278 of the Penal Code. There was no eye witness for the offence. Mr. Mulochi’s submission that the Appellant ran away from the scene of crime is therefore misleading.

12. The burden lay with the prosecution to prove its case against the Appellant and his co-accused beyond any reasonable doubt. The prosecution should have adduced evidence to show that it was the two, Appellant and his co-accused, who stole the goat.

13. The evidence adduced before the court was inconsistent. According to PW3 who was at Giekuri, it was one Nyaga who was offering the goat for sale. Nyaga implicated the 1st accused as the one who took the goat to him.
14. PW1 testified that it was PW2 who identified the Appellant and his co-accused to him and others as the ones who took the goat to him to buy. PW1 stated both the Appellant and his co-accused started running away and were both arrested.
15. PW 2 varied the facts by stating that PW3 had told him that it was the Appellant and his co-accused who had the goat and was accompanied by the Appellant. Both were then arrested.
16. I agree with the Appellant's counsel that the prosecution case was full of inconsistency. However, it is quite clear that the goat had been moved from Marimanti to Giekuri, and that it was tied to a tree when the complainant and others recovered it.
17. The evidence is also clear that the person who offered the goat for sale to PW3 was one Nyaga. He was not one of the two charged with the offence. The Investigating Officer made no reference to Nyaga but PW3 stated that Nyaga was involved in a fight and had succumbed and died from his injuries.
18. In terms of evidence, the prosecution adduced no direct evidence to connect the Appellant or his co-accused to the theft. The prosecution also adduced no evidence that the Appellant or co-accused led to the recovery of the goat. All the evidence adduced implicating the Appellant and his co-accused was hearsay evidence.
19. PW2's evidence that PW3 told him it was the Appellant and his co-accused who told him about the goat was contradicted by PW3. PW3 stated that it was the deceased Nyaga who implicated the Appellant as the one who took the goat to him.
20. The hearsay evidence received by the learned trial magistrate from the prosecution witness was itself contradictory. It ought not to have been received. Having received it being hearsay evidence. It was the weakest kind of evidence which could not have sustained a conviction.
21. Perhaps the greatest anomaly in the prosecution case was the omissions by the prosecution to have the complainant identify the photograph of the recovered goat in court. The complainant, PW1 was not shown the photographs. He did not therefore identify the goat in the photograph as the one which was stolen from him.
22. Also important, no where does the complainant describe the goat which was allegedly stolen from him to the court. There is therefore no nexus between the goat stolen from the complainant and the goat in the photograph adduced in court as an exhibit.
23. Both the anomaly and omission referred to hereinabove were fatal to the prosecution case. There was no iota of evidence to prove that the recovered goat was the one stolen from the complainant. Further there was no evidence to establish that the Appellant and/or his co-accused either stole the goat nor had it in their possession at any one time.
24. I have come to the conclusion that the conviction entered in this case was unsafe and ought not to be allowed to stand. Accordingly I allow the Appellant's appeal, quash the conviction and set aside the sentence.
25. The Appellant's co-accused did not file an appeal and if he did the file was not brought to my attention. None the less, in exercise of powers under section 352 to 362 of the Criminal Procedure Code and especially Section 362 I find the finding of guilt, the conviction and sentence against the accused David Munene Mitambo in Marimanti Criminal Case No. 219 of 2013 irregular, and incorrect. Accordingly I set aside both the conviction and sentence against the said David Munene Mitambo.

26. The Appellant was out on a bond pending appeal. I order the cash bail or security deposited to secure his release be refunded to the depositor.

27. I order that both the Appellant and his co-accused be set at liberty forthwith unless they are otherwise lawfully held.

DATED SIGNED AND DELIVERED AT MERU THIS 2nd DAY OF OCTOBER, 2014.

J. LESIIT

JUDGE