REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 174 of 2010

MOSES NGUTU EPOKOR……...……...APPELANT

V E R S U S

REPUBLIC ……..RESPONDENT

J U D G M E N T

The Appellant Moses Ngulu Epokor together with others were charged with one count of robbery with violence contrary to section 296 (2) of the Penal Code and in the alternative handling stolen goods contrary to section 322(2) of the Penal Code. After the trial the Appellant was convicted of the alternative count of handling stolen goods contrary to section 322(2) of the Penal Code and sentenced to 10 years imprisonment.

The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. The Appellant raised six (6) grounds of appeal:

1. That the learned trial magistrate erred in both law and facts in failing to observe that the doctrines of recent possession was not established in the present case.

2. That the learned trial magistrate erred in both law and facts in failing to question the prosecution in absence of vital witnesses mentioned in the trial case.

3. That the learned trial magistrate erred in both law and facts in failing to find that the provisions of section 72(3) of the Constitution of Kenya was flouted.

4. That the learned trial magistrate erred in both law and facts in failing to find that the trial suffered some procedural irregularities.

5. That the learned trial magistrate erred in both law and facts in dismissing and disregarding the proffered sworn defence without giving any cogent reason.

6. That the grounds herein has been drafted in absence of certified copy of the trial proceedings. I pray to be served with the same to enhance me draft further firm supplementary grounds of appeal.

When the appeal came up for hearing the Appellant abandoned his appeal against conviction and instead urged his appeal against sentence. He pleaded for mercy urging that the sentence imposed against him was too long.

The state was represented by Mr. Moses Mungai. The learned State Counsel conceded the appeal and submitted that the conviction could not stand as the goats recovered from the Appellant were not properly identified as the property of the complainant.

I have considered this appeal and have re-analyzed and re-evaluated the evidence adduced before the trial court and have drawn my own conclusions, while bearing in mind I neither saw nor heard any of the witnesses and giving due allowance. I am guided by the case of;

Okeno Vs. Republic 1972 EA 32 where the court of Appeal held:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957)EA. (336) and 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 Vrs. R. (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 finding and conclusion; 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 Vrs Sunday Post [1958] E.A 424."

The facts of the case are that the complainant PW1 had hired the services of his brother PW5 to work for him as herdsman to graze his 245 goats within 78 Tank Battalion camp in Isiolo. On the 9th September, 2009 the complainant PW1 received information from PW5 that his goats were stolen from the camp at 8.30 pm by eight men, four of them armed with firearms. The complainant's evidence was that part of the goats were recovered from the Appellant on 13th September 2009. The goats were photographed and then released to the complainant. The photographs were exhibited in court.

The Appellant was the only one convicted of the offence. His defence was that he had gone to visit a friend and that on 13th September, 2009 he was left by his friend in his home. The friend was to return shortly. However before the friend returned, Police, the complainant, the Area Chief and others found him where he was assisting his friend's children to graze the goats. He was arrested for the offence. The Appellant's defence was the Chief, who was present, knew the owner of the goats very well.

The Appellant was convicted of the offence on the basis of the doctrine of recent possession in the case of Charles Okelo Olala vs Republic CA No. 328 of 2008

Charles Okelo Olala vs. Republic Criminal Appeal Case No. 328 of 2008 stated thus:-

"***Police investigations ended in the arrest of the appellant who had no explanation for being in possession of the recently stolen vehicle***.

"In Ogembo vs. Republic [2003] 1 EA 222 at page 225 this Court said:-

"Dealing with a similar point, the Court of Appeal for Eastern Africa (as it was then) said as follows in the case of R. vs. Bakari s/o Abdulla [1949] 16 EACA 84.

That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a case point no other reasonable conclusion, the presumption can extend to any other charge however penal. This principle was quoted with approval in the case of Obonyo vs. Republic [1962] EA 592. In this case the court stated as follows:-

"If all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal."

"In this we are satisfied the circumstances of the case did not point to any other reasonable conclusion

other than the conclusion that the appellant was one of the six robbers that terrorized the two families in Bureti District and that he was arrested with some of the stolen property a day after the robbery in Kisii which is not far from Bureti considering the fact that the robbers had easy transport namely the stolen vehicle."

"And in ***Matu vs. Republic*** *[2004] 1 KLR 510 this court was dealing with a similar situation in which it conducted its judgment thus:-*

The inevitable conclusion therefore, is that the appellant was in possession of the goods stolen from the complainant's kiosk and he could not offer any acceptable explanation of how he came by them. The two courts below came to the same conclusion and rightly so in our view, that the appellant was one of the robbers."

The above case clearly shows that the prosecution must establish that the recovered things were stolen that they belong to the complainant and the Appellant has no reasonable explanations of how he came by them.

The issue of the identity of the animals recovered from the Appellant was crucial. The learned trial magistrate observed in his judgment that the witnesses loosely referred to the animals as goats even though they were mixed goats and sheep. The photographs of the animals were adduced in evidence. I have seen the two photographs. Clearly there were goats and sheep in the photograph.

It was not sufficient for the learned trial magistrate to find that there was mis-description of the animals. The description of the animals stolen and those recovered were critical for the proper identification of the animals. It is only after the complainant has proved ownership that the doctrine of recent possession can be applied. I find that the learned trial magistrate did not take into account the fact the complainant PW5 and other witnesses mis-described the recovered animals.

There was a more serious issue which is the one the learned state counsel dwelt on. This is the identification of the recovered animals as the property of the complainant. The complainant was PW1. All he said about his ability to identify the recovered animals as his was as follows:

"**We walked on foot for about 7 kilometers we found goats in the bush. There was a person sleeping in the middle. We surrounded the goats. We arrested that person… we recovered 44 goats from him. I identified my goats. We separated them I identified 44 goats. I had cut off a small piece of both ears. That was my mark. All of them had that mark**."

The complainant was shown photographs of goats recovered, some from Appellant and some elsewhere. He said the following about them.

"**Being shown two (2) photographs. These are the goats. The marks are visible"**

With due respect to the learned trial magistrate, the identification of the animals recovered in this case was not satisfactory to establish beyond any doubt that they were the property of the complainant. The alleged marks on each ear of the goats are not visible on the photographs exhibited in court. The goats should have been viewed by the court before being released to the complainant. In that way the trial court would have been able to satisfy itself whether indeed they had marks as alleged by the complainant. The court would then have been able to determine whether the alleged marks were sufficient to enable the complainant distinctly identify the animals as his.

I find that the evidence of identification was poor and insufficient to establish ownership of the recovered sheep and goats as the complainant property. I agree with the learned state counsel that the identification of the animals was not safe to found a conviction. The identification was not sufficient to prove beyond reasonable doubt that the alleged marks on the animals which were not sufficiently identified to court, were exclusively put on the animals by the complainant. Another important fact is that possession of the animals per se is not proof of guilt. See James Mwangi ves Republic [1983]KLR 327.

The Appellants defence was he had gone to the owner of the animals to get his money. He said he was very tired and spent the night. The complainant's evidence is that they found Appellant sleeping in the middle of the animals. He also said the Area Chief knew the owner of the goats where they found the Appellant.

The Area Chief was PW4. His evidence was that the Appellant was found in the home of a person whom they also met at the same place. PW4 said that it was the said owner of the home who implicated the Appellant as the owner of the animals he was found sleeping in the middle of.

The evidence that animals found in the Appellant's possession belonged to him was from a person not called as a witness. The person was also the owner of the home where the Appellant was found. I find that evidence was not only hearsay but evidence of an accomplice and therefore suspect and the weakest kind of evidence. The learned trial magistrate should not have used that evidence against the Appellant.

The learned trial magistrate found as follows:

In his defence the accused person claimed that the said goats belonged to a person he did not have known he had gone(sic) **to visit. However he did not raise this issue when he cross-examined the prosecution's witnesses. There are several witnesses who were present during the said recovery.Their evidence is that the accused person led them to the recovery of 46 other goats. If the accused person is as innocent as he claimed how did he know where these 46 goats were? The fact that the accused person led the complainant and others to a manyatta where other 46 goats were recovered dislodges his defence. I have no doubt in my mind that the accused person was directly involved in the said robbery and therefore he knew very well that the 44 goats in issue were stolen property. He had gone to hide them in Daaba when they were recovered.**

With respect the learned trial magistrate contradicted his own findings. While finding Appellant was involved in the robbery and that it was the reason he led to the recovery of the animals, he concluded that there was overwhelming evidence in relation to the alternative charge of handling. That was contradictory, was shifting of the burden of proof against the Appellant and finally led to conviction on shaky evidence.

I find that on the basis of the above the conviction was unsafe and ought not to be allowed to stand.

I have come to the conclusion that the Appellant's appeal against conviction and sentence has merit and should be allowed. Consequently I do allow the Appellant's Appeal, quash the conviction and set aside the sentence.

The Appellant should be set at liberty forthwith unless he is otherwise lawfully withheld.

SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF MAY 2013.

J. LESIIT
JUDGE