



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 113 OF 2009

REUBEN NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Reuben Njoroge was charged with the offence of **stealing stock contrary to section 278 of the Penal Code**. The particulars of offence state that on the 20th day of February 2008 at Nyandarua Farm Solai in Nakuru District within Rift Valley Province, stole 11 sheep valued at Kshs 33,000/- the property of GAT KARANJA.

After a full trial the appellant found guilty of the offence and convicted. He was sentenced to serve two (2) years imprisonment. Being dissatisfied with both the conviction and sentence the appellant filed this petition citing five grounds of appeal as follows:

1. That no *mens rea* or guilty mind was proved on the part of the appellant in which case the prosecution failed to discharge its burden of proof fully or satisfactorily.
2. The conviction was against the weight of evidence adduced by the prosecution which evidence, according to the appellant, was not only inconsistent but also contradictory.
3. That the learned trial magistrate misdirected himself by giving weight to admissions made out of court by the appellant, thereby arriving at wrong conclusions.
4. That the learned trial magistrate erred both in law and in fact in failing to give cognizance and/or due consideration to the appellant's reasonable defence.
5. That the appellant's constitutional rights as guaranteed under **section 73 of the Constitution** had been violated, thus rendering the whole trial a nullity.

The State has opposed the appeal on the grounds that the appellant was seen driving the stolen sheep by two persons who knew him and recognised the sheep as belonging to the complainant and also that the guilt of the appellant was established, owing to the fact that he was a neighbour of the complainant and ought to have known the origin of the sheep he was driving away.

Submitting on behalf of the appellant, learned counsel Mr. Kanyi told the court that the charge against the appellant was not proved to the required standard since the animals alleged to have been stolen by him

were not described either in colour, size or distinctive marks. They were also said to have included a goat whereas the charge sheet and the report made to the police referred to eleven sheep. Mr. Kanyi pointed to the evidence of PW3 who stated that he met the appellant with about 'ten sheep' and asked him where he was going with the 'sheep'. PW1 testified that he owned ten sheep and one goat whereas PW2 testified that he saw the appellant with some sheep and a goat. According to Mr. Kanyi the evidence of PW1, PW2 and PW3 bore material inconsistencies and contradictions and created doubt as to what was stolen. This according to counsel clearly shows that the learned trial magistrate's finding that the appellant had in his possession ten sheep and one goat was quite at variance with the particulars of the charge. He submitted that such a finding does not meet the requirements of the Court of Appeal decision in **Yongo vs. Republic [1983] KLR 390**, stating that the appeal should be allowed on that ground. As to whether the offence itself was proved, Mr Kanyi submitted that the learned trial magistrate failed to analyse the prosecution evidence in light of the defence which was that; although the appellant did not deny that he was found driving some sheep, he explained that he had been hired by a certain Mathenge to drive them for him at an agreed wage of Kshs 200/=. Counsel submitted that had the learned trial magistrate considered this defence, which was supported by the investigating officer when he stated in his evidence that the appellant had told him the same thing when he arrested him, then the trial court would have found that the appellant had neither stolen nor did he have the intention of stealing the sheep. Counsel submitted that the investigating officer ought to have conducted further investigations to confirm the appellant's contention that he was driving the animals for a Mr. Mathenge whose telephone number and motor vehicle registration number the appellant gave to PW5, who, admittedly, did not bother to use the same. Further, learned counsel submitted that the alleged admissions by the appellant during interrogation by PW4 ought not to have been relied upon in arriving at a conviction since the same were not proved at the trial. Finally Mr. Kanyi asked this court to find that the detention of the appellant for four days without being arraigned in court for a bailable offence contravened his constitutional rights under **section 72(3) of the Constitution**.

In reply learned State counsel **Mr. Mugambi** submitted that the reference to ten sheep and one goat, some sheep and a goat and eleven sheep did not constitute material discrepancies since, according to him the term goats and sheep can be used interchangeably and goats and sheep are collectively referred to as sheep. He submitted further that the appellant, having been a neighbour of both the complainant, PW2 and PW3 he knew that the goats which he was found driving did not belong to the Mathenge who he alleged to have been hired by but to the complainant. Further that his confession to PW4 that he had stolen the animals and had sold them having been made in the course of interrogations was properly admitted in the light of **section 111 of the Evidence Act** and ought to be taken as an admission rather than a confession. The learned State Counsel explained the delay in arraigning the appellant stating that, since the appellant was arrested on a Thursday and taken to court the following Monday, the delay cannot be considered to have been unreasonable. He stated that recent court of appeal decisions have held that the date of arrest is not to be counted when determining what is reasonably practical as regards the period within which a person arrested on suspicion of having committed or being about to commit a criminal offence is to be brought before court.

After evaluating the evidence adduced before him, the learned trial magistrate found as a fact that there was no dispute that the complainant had lost ten sheep and one goat on 20th February 2008 and that the appellant was seen with some sheep on the same day by PW2 and PW3 who knew him well. The learned trial magistrate considered PW2's evidence that the complainant had described his sheep to him and told that one of his sheep had long fur and that the sheep PW2 had seen with the appellant had long fur. The learned trial magistrate also took into consideration the investigating officer's evidence that the appellant had admitted that he had stolen the animals and had even offered to pay for them. He rejected the appellant's defence that he had been hired by someone, whom the learned trial magistrate referred to as "an unnamed person" to drive the sheep to Solai at a fee. He found as a fact that the appellant was not being candid, basing reliance on the evidence of PW5, which, according to the learned trial magistrate, was that the accused gave PW5 some numbers to call but the same 'turned out to be fake'. Based on those considerations the learned trial magistrate proceeded to convict the appellant, holding the view that the prosecution had proved its case beyond any reasonable doubt.

This court has carefully examined the record of the lower court, re-evaluated and analysed the evidence

adduced at the trial before arriving at its own independent conclusion on the matter. The complainant PW1 testified that he lived 10km away from the appellant. On 20th February 2008 at about 2.00 p.m. he was informed by his wife that ten sheep and one goat which she had left grazing in the field were missing. The couple searched for them until 7.30 p.m. to no avail. The following day the complainant proceeded to Kamukunji in search of his lost sheep where he met a neighbour known as Pachi (Bachi?) who informed him that he had met the appellant the previous day with the complainant's sheep and goat. The complainant made a report at the Kamukunji police station where he was advised to go and check if the appellant was at his home. The complainant met up with the appellant at Engashura and on questioning him about the sheep and goat, the appellant said that he had sold them. PW2 Douglas Mbachi Chege testified that he met the appellant on 20th February 2008 at about 1.00 p.m. at a place called Factory. The appellant had some sheep and a goat which he had brought to drink water. The appellant told PW2 that he was taking the sheep to Mama Wambui. The following day on 21st February 2008 at about 9.00 a.m. he met the complainant at Kamukunji centre as PW2 was going to sell milk. The complainant said he had lost ten sheep and one goat which he described to PW2. PW2 told the complainant that he had seen the appellant with some animals the previous day. PW2 later came to learn that the appellant had been arrested. Under cross-examination by the appellant PW2 stated that the complainant had told him that one of his sheep had long fur. It was his testimony he had seen one such sheep among the animals he saw the appellant driving the previous day. PW3 Samuel Muchai Kirathe on his part testified that he met the appellant on 20th February 2008 at a place called Endua as he was heading home from Solai. The appellant had about 10 sheep which, when asked by PW3 where he was taking them, the appellant replied that he was taking the sheep to Solai. The two had a short conversation and then parted ways. PW3 testified that he had known the appellant for about 12 years and that the appellant was a businessman who sold fruits. The following day PW3 learnt that the complainant's sheep had been stolen. PW4 PC James Kinyua a police officer attached to Solai police station was the arresting officer. He testified that on 21st February 2008 at about 9.00 a.m. four people brought the appellant to the police station and reported that he had been found with the complainant's sheep which he was driving from Solai heading to Nakuru. He testified under cross-examination that he asked the appellant whether he was found with the animals and he answered in the affirmative adding that he would pay for them. PW5 PC Bernard Koech stated in evidence that on 21st February 2008 at about 11.00 p.m. the complainant reported to him the loss of his sheep on 20th February 2008. He entered the report in the occurrence book and advised the complainant to carry out his own investigations. At about 2.00 p.m. the complainant came back saying that the appellant had been seen taking the sheep to Nyandarua. According to PW5 it was PW2 who had seen the appellant with the complainant's sheep. He admitted in cross examination that the appellant gave him a number to verify his story but he did not bother to call that number because he did not believe the appellant. He also admitted having been given a vehicle registration number. He testified that both the phone number and the registration number given to him were fake.

In his defence, the appellant testified that he was jobless but undertook odd jobs here and there. On the material day he was hired to drive some sheep to Solai centre which he did. He was paid for the assignment and went back home. On the following day he was surprised to learn that the sheep had been stolen. He was arrested and taken to Solai police station. Under cross-examination by the prosecution the appellant stated that he had been assigned the task to drive the sheep by a certain old man called Mathenge who paid him Kshs 200/=. He testified further that the said Mathenge whom he never saw again owned a pick-up registration number KAA 117G.

It is clear from the prosecution's evidence that no one witnessed the complainant's sheep or goats or sheep and a goat being stolen. The complainant himself testified that he was only informed of the disappearance by his wife. The information that the appellant had been seen driving sheep on the day they were stolen came from PW2 and PW3 whom he met a day after the same went missing. When PW2 and PW3 met the appellant driving animals (which he told PW2 he was taking to a Mama Wambui and to PW3 he said he was taking to Solai) none of them raised any suspicion whatsoever. The two told the complainant of having seen the appellant with animals the following day on learning that he had lost his sheep. It does not appear to me that either of the two recognised the animals as belonging to the complainant since, had that been the case they would have informed the appellant of the same promptly.

They may even have taken the issue up with the appellant himself when they enquired where he was taking the sheep. PW4 and PW5 acted only on what they were told. They did not carry out any investigations at all to confirm whether indeed the appellant had stolen the sheep from the complainant or if he was involved in any way with their theft. Even PW5, who was given a number to call to establish the truth of the appellant's story, which was that he was driving the animals on behalf of another, did not bother to make an inquiry. He merely dismissed the appellant's statement and/or explanation as being untrue. PW5 having stated in his evidence that he did not call the number which the appellant gave him, I find that the learned trial magistrate's finding that the number turned out to be fake is not supported by evidence. The same goes as regards the learned trial magistrate's reference to an unnamed person when clearly the appellant stated that he was hired by one Mathenge to drive the animals. The complainant's lost sheep were never recovered. The evidence that it was his sheep which were found with the appellant is mere hearsay. The State's contention that those who saw the sheep knew them to have belonged to the complainant is also not supported by evidence. The appellant was convicted on evidence which was purely circumstantial. It has been held that circumstantial evidence in itself is not always sufficient to sustain a conviction. In the case of **Simon Musoke vs. Republic [1958] EA page 715**, while restating the holding in **R. vs. Mwangi [1936] 3EACA 29**, the Court of Appeal had this to say in regard to such evidence;

“In a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than that of guilt.”

In a case very similar to the one before court, **Mwachupa & 2 others vs. Republic [1989] KLR page 477**, which authority I find persuasive, the Hon. Githinji J (*as he then was*) had this to say:

“The strongest evidence against the appellants was that they were met driving the goats. This was circumstantial evidence which before it can found a conviction must be strong and must irresistibly point at the appellants as thieves and be incapable of any other explanation than that of the guilt of the appellant. Further there must be no further co-existing circumstances which destroy that inference of guilt.”

In light of the evidence, and guided by the above authorities I am of the considered opinion that the charge with regard to which the appellant was charged and subsequently convicted and sentenced was not proved to the required standards. The judgment having been against the weight of the evidence cannot be upheld and the appeal must succeed. In the circumstances I do not consider it necessary to deal with the other grounds of appeal not considered in this judgment.

Accordingly I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless he is otherwise lawfully detained.

Dated signed and delivered at Nakuru this 1st day of October, 2009

M. G. MUGO

JUDGE