

REPUBLIC OF KENYA

Gacheru v Republic

High Court, at Nairobi October 1986

Mbaluto J, Bosire J

Criminal Appeal No 509 of 1986

October 1986 Mbaluto J delivered the following Judgment.

On April 4, 1986, the appellant Godfrey Murai Gacheru, was convicted by a resident magistrate, at Kiambu, of stealing stock contrary to section 278 of the Penal Code, and was sentenced to the statutory minimum sentence of 7 years imprisonment together with 5 strokes of the cane. He now appeals against both the conviction and the sentence.

It was the prosecution case that on April 15, 1985 Hussein Aden Abdilie (Hussein) gave the appellant and another called Kimani 17 heads of cattle on the understanding that he would on delivering them to his "boss" at Dagoretti Market, pay to one Ndungu the value of all the animals which was negotiated and agreed upon at Kshs 1,700 per head of cattle. The appellant and the man who was with him later sold 12 of the animals to Edwin Njoroge Gachwiri (Edwin), a butcher at Dagoretti market, pocketed the proceeds after which they absconded. Edwin was later found in possession of 7 hides which were identified by Hussein as being for seven of the animals he had given the appellant. Five of the 17 animals given to the appellant and his companion were found abandoned at the Athi River weigh Bridge. When Edwin could not give information as to the whereabouts of the appellant and his companions he was arrested and charged. It is not clear from the record which charge was preferred against him. He was not amused about that so he set out to look for the appellant whom he later found in Nakuru. He pointed him out to the police on June 24, 1989 and was arrested and separately charged with stealing Hussein's 12 heads of cattle.

In his defence the appellant admitted he had been given the cattle, but denied he had stolen them. His contention was that he had bought the animals on credit with a view to reselling them, which he did. However, they fetched a price which was much lower than that agreed upon between him and Hussein. He testified that he was arrested before he found the full purchase price of the animals for payment to Hussein.

The learned trial magistrate after evaluating all the evidence before him found as fact that the appellant had been given 17 heads of cattle by Hussein on the understanding that he pays for them within a specified period not exceeding four days; that after he sold the cattle to Edwin, he was paid some money which he appropriated to his own use; that in doing so he intended to permanently deprive Hussein both of the cattle and the proceeds of their sale.

In his petition of appeal, and also in his written submissions, the appellant complains that the transaction between him and Hussein was one of contract and not one of criminal nature. He also complained, that his conviction was based on insufficient and contradictory evidence, that a vital witness, Ndungu, not having been called; it was clear from the testimony of Hussein, that the animals had initially been entrusted to him, it cannot be established, nor will it be possible to know how the animals passed from him to the appellant; that the trial magistrate failed to consider his defence which he considers to be quite valid; and that the sentence was arrived at following wrong legal principles.

Learned state counsel, Mrs Mulei, was in full agreement with the reasoning and conclusions of the learned trial magistrate. She added that the appellant's conduct, in absconding upon receipt of the proceeds of sale of the twelve animals, was clear evidence that he had the necessary intention of permanently depriving Hussein of the sale proceeds of his animals.

Determination of this appeal hinges on the question whether or not in taking the animals the appellant had an intention to permanently deprive Hussein of either the animals or proceeds of their sale. The appellant was introduced to Hussein by one Ibrahim Abdi Ali alias Ibrahim Guyo (Guyo), who had earlier been introduced to the appellant by one Ndungu. It is because Guyo confirmed to Hussein that he knew Ndungu well that Hussein agreed to give the appellant and his companion the 17 animals.

Both Hussein and Guyo testified that the appellant and his companion said they were agents of a rich man who was a resident of Dagoretti Market. Someone was required to accompany the appellant to Dagoretti Market. Someone was required to accompany the appellant to Dagoretti Market to receive the sale money on behalf of Hussein, who could not do so because he had other animals which he had yet to sell. At the suggestion of Guyo, Hussein agreed that Ndungu would collect the money on his behalf. Accordingly, Ndungu, accompanied the appellant and Kimani as they drove away the 17 animals. What happened thereafter is not fully clear as Ndungu never returned to give the whole story. Be that as it may, 5 of the 17 animals were later found abandoned at the Athi River Weigh bridge. According to the appellant, they were left behind because they could not all fit into the lorry they had used to transport them to Dagoretti Market. It should however, be noted that no one was left behind to take charge of those five animals. Nor did anyone come to collect them later. The complainant later found them abandoned near the weight bridge, and took them away. The appellant, Kimani and possibly Ndungu, sold the remaining twelve animals to Edwin, who said he paid to the appellant about Kshs 1,500 per animals. The appellant and Kimani, were thereafter nowhere to be seen in Nairobi. The evidence on record is quite clear that Edwin was not the "rich boss" Hussein and Guyo said the appellant had talked about. It is therefore quite evident, that the appellant was not a commission agent.

The foregoing analysis of the evidence demonstrates that the transaction between Hussein and the appellant was not intended by the appellant to be contractual. Otherwise the appellant and his accomplices would not have left the 5 animals behind unattended. They had nothing to lose if the animals went astray or were stolen. Coupled with that is the conduct of the appellant after he received money from Edwin for the 12 of the 17 animals.

He absconded. For a period of about two months he could not be located here in Nairobi. His explanation was that he had sold the animals at a loss and he was still looking for some money to top up what he had got from Edwin. That explanation did not find favour with the trial magistrate, nor does it with us. The appellant did not produce to the police the money he had received from Edwin. He at no time went to Hussein to explain to him his predicament. He absconded. We are of the view that he was eluding arrest.

The prosecution did not call Ndungu as a witness. There were at least two adjournments granted to allow the prosecution time to get two witnesses. One of those was Ndungu. However the prosecution closed their case without offering any explanation as to whether or not they had found him. His evidence was desirable although not necessary before a conviction could be had. Failure to call him as a witness is not in our view fatal to the appellants conviction. There is ample evidence on record which the trial magistrate accepted and acted upon to convict the appellant. We find no merit in the appeal against conviction.

One aspect which we need to mention concerns the particulars of the charge. The police indicated that twelve animals were stolen. However, it is clear from the evidence that the appellant, Kimani and Ndungu drove away 17 animals. Out of those they abandoned 5 on the way. The charge ought to have specified that a total of twelve heads of cattle were stolen. However, the prosecution have the absolute discretion of deciding what to include in the particulars of a charge, which is in most cases dependent on the evidence they have with them. As regards sentence the minimum sentence of imprisonment provided under the section creating the offence was imposed on the appellant. He cannot legally reduce it. There were not compelling circumstances shown to make us substitute it with a non-custodial sentence other than a fine which under section 26(3)(i) of the Penal Code cannot be imposed.

Accordingly we have no basis interfering with the sentence. The appeal must fail in its entirety. It is dismissed. Order accordingly.