



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: OUKO (P), OKWENGU & SICHALE, JJ.A]

CRIMINAL APPEAL NO. 1 OF 2017

BETWEEN

JOHNSTONE OUMA GOR.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from a judgment of the High Court of Kenya at Homa Bay

(Omondi J) dated and delivered on 3rd October 2016.)

in

Homa Bay HC. CRA NO. 13 of 2016

JUDGMENT OF THE COURT

Johnstone Ouma Gor (the appellant herein) and Walter Odhiambo Obonyo were charged with the offences of stealing stock contrary to Section 278 of the Penal Code CAP 63 of the Laws of Kenya and interfering with investigations contrary to Section 37 (1) of the Sexual Offences Act No. 3 of 2006, at the Ndhiwa Principal Magistrate's Court. After close of the prosecution's case, the said Walter Odhiambo Obonyo passed on and the trial against him abated.

The appellant was eventually convicted on both counts and sentenced to a fine of Kshs 10,000/= and in default to serve 6 months' imprisonment in each count with a further order that the imprisonment sentences run consecutively.

Being dissatisfied with both the conviction and sentence of the trial court, the appellant moved to the High Court challenging the trial magistrate's findings. In a judgment delivered on 3rd October 2016 Omondi, J, found *inter alia* that the evidence did not prove a charge of stealing as defined under the Penal Code and subsequently quashed the conviction in respect to count one. With respect to count two, the learned judge found that the appeal had no merit as the conviction with respect to the same was based on sound evidence and upheld the same.

Undeterred and being dissatisfied with the findings of the High Court, the appellant has now filed this appeal and probably the last one vide Memorandum of Appeal dated 18th September 2020, raising the following grounds of appeal;

“1. The appellate judge misdirected herself in several matters of law.

2. The appellate judge erred in law in partly dismissing the appellant's appeal and convicting the appellant for the offence of interfering with investigations contrary to Section 37 (1) of the Sexual Offences Act which was not proved by the evidence adduced by the prosecution.

3. The appellate judge erred in law in convicting for a charge under Section 37 (1) of the Sexual Offences Act when there was no evidence to support the same and when the charge sheet clearly referred to Section 37 (1) (2) of the Sexual Offences Act.

4. The appellate judge erred in the law of evidence in failing to note the demeanour of the prosecution witnesses and the fact that they were all adducing rehearsed evidence in order to sustain the continued detention and subsequent conviction of the appellant.

5. The appellate judge misdirected herself on the law of evidence in failing to take cognizance of the evidence adduced by prosecution witnesses on cross examination or to take note of the contradictions arising out of such cross examination.

6. The learned trial magistrate erred in law of evidence in deciding the case against the weight of the evidence.”

The appeal came up before us for hearing on **14th December 2020**. The appellant who appeared in person intimated to court that that he had filed his submissions and wished to entirely rely on the same.

In opposing the appeal, **Mr. Kakoi** learned State Counsel who appeared for the State made oral submissions in which he submitted that the charge of interfering with witnesses was properly founded and that the sentence that was meted out against the appellant was very lenient and urged us to uphold the conviction and the sentence.

We have considered the record, the rival oral and written submissions, the cited authorities and the law.

The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the Criminal Procedure Code we are mandated to consider only matters of law. In **Kados vs. Republic Nyeri Cr. Appeal No. 149 of 2006 (UR)** this Court rendered itself thus on this issue:

“...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ...”

In **David Njoroge Macharia vs. Republic [2011] eKLR** it was stated that under Section 361 of the Criminal Procedure Code:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong vs. Republic [1984] KLR 213).”

A review of the evidence is however crucial in order to determine whether the two courts below misapprehended the evidence and /or whether they acted on wrong principles in arriving at their determinations.

With regard to grounds **1,2 and 3**, of appeal it was submitted by the appellant that he was first charged on **15th September, 2014**, under **Section 37 (1) of the Sexual Offences Act** but later the said charge sheet was amended on **29th September, 2014**, thereby charging him under **Section 37 (1) (2) (c) of the Sexual Offences Act** and that in the instant case, the appellate court upheld the conviction without proof beyond reasonable doubt that the evidence presented supported the amended charge.

We have carefully gone through the record. It is indeed true that the appellant was initially charged under **Section 37 (1) of the Sexual Offences Act**. On **29th September, 2014**, the court allowed the prosecution to amend the charge sheet and the appellant was given a chance to plead to the amended charges whereupon he pleaded not guilty. It is not clear from the record the nature of the amendment that was sought by the prosecution. Be that as it may, the appellant is contending that he was initially charged under **Section 37 (1) of the Sexual Offences Act** but the charge sheet was later amended whereupon he was charged under **Section 37 (1) (2) (c) of the Sexual Offences Act**.

Section 37 (1) of the Sexual Offences Act provides:

“37. Keeping scene of crime secure, etc.

Any person who intentionally interferes with a scene of crime or any evidence relating to the commission of an offence under this Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than three years or to a fine of one hundred thousand shillings or to both.”

Subsection 2 thereof further provides:

“ (2) Interference referred to in subsection (1) includes but is not limited to:

(a) tampering with a scene of crime;

(b) interference or intimidation of witnesses; and

(c) any other act or omission that would hinder or obstruct investigations or materially misrepresent any evidence.”

Section 37 (1) *supra*, simply creates the offence and the punishment thereof whereas Sub-section 2 simply defines what amounts to

interference under Section 37 (1).

From the circumstances of this case, it is our considered opinion that the appellant was in no way prejudiced with the aforesaid amendment as the nature of the evidence against him never altered or changed and he was given a chance to plead to the amended charges to which he pleaded not guilty and as was rightly held by the High Court and as we shall demonstrate shortly, the appellant's conviction on the second count was based on sound evidence. Consequently, nothing turns on this point.

With regard to grounds **4,5 and 6** of appeal, the appellant submitted *inter alia* that the evidence of the prosecution witnesses needed to be corroborated in order to hold him criminally liable for the offences charged; that it was quite probable that the allegation that money was given to the appellant was a rehearsed lie to have the appellant convicted since the witnesses had already been charged and stood trial in court for the offence for which the appellant had arrested them; that the prosecution failed to discharge the burden of proof beyond reasonable doubt and the benefit of such doubt should go in his favour.

Even if it were to be taken that some of the prosecution witnesses were accomplices as the appellant seemed to suggest, **PW4, 5 and 8** were all independent witnesses and they had no reason whatsoever to implicate the appellant. In any case there is no evidence to suggest so. The contention that their evidence was a rehearsed lie was not supported by any evidence and the same was baseless. The evidence of these prosecution witnesses remained firm, credible and unshaken even in cross examination.

The trial court while assessing the evidence of the prosecution witnesses stated *inter alia* as follows;

“I have no doubt again in the consistency of the witnesses’ testimonies on record that a “deal” arose at Ongeng as the chiefs led the suspects to Ndhiwa police station, where the sale of the bull occurred and suspects went back home. As area chiefs, the accused persons held an obvious critical administrative and supervisory duty in matters of law and order over their subjects. Indeed, area chiefs receive initial criminal reports or incidents within their jurisdictions and inevitably facilitate criminal investigations through expeditious delivery of evidence, witnesses, suspects and victims to the police authorities. The 1st accused person absolved himself from any wrong doing and made no particular reference or plausible counter reply to the horrible events that he did and directed at Ongeng according to virtually all the prosecution witnesses. He suggests that potential suspects of crime under his custody and on delivery to the police station reached Ongeng and abruptly decided to sell one of their bulls for no purpose: that upon the suspect’s decision of sale of the bull, he paused and settled down on some ground where he passively watched the livestock dealers arrive and delivered the sale proceeds to the suspects! On the same breath, he felt that mere release of the suspects in his custody after arrest or during delivery to the police station had nothing to do with inference of investigations! That there ought to have been investigations by the police failure to which whimsical release of criminal suspects in transit to the police authorities did not amount to acts or omissions that hinders or obstruct investigations or materially misrepresent evidence. But the actions of the first accused person herein definitely led to a fraudulent conversion without claim of right the complainant’s bull with the result of termination of delivery of the suspects to the police authorities at the time. The release of the suspects in essence fell short of a deliberate cover up of the process of law and justice for a minor, concealed evidence of sexual abuse and gross violation of the rights of a child. At worse, the accused person took the advantage to collude with criminal suspects in circumventing justice, to abuse public authority and unjustly enrich themselves through acts of threats, intimidation, coercion, extortion and corruption....” (Emphasis ours.)

Again, the High Court at paragraph 33 of the judgment stated thus:

“the trial magistrate correctly took cognizance of the fact that a report had been made to the appellant in his company as the area chief that PW1 had given out her minor daughter in marriage to PW3. In fact, PW1 and PW3 were arrested by the appellant in exercise of his legal authority. It is also true that the appellant did not forcefully drive the bull from PW1’s compound, but the evidence indicates he coerced them to part with the animal by way of sell and then appropriated the proceedings saying the same would be transmitted to the OCS Ndhiwa police- probably so as to act favourably towards the suspect’s what is of greater significance, and which all the prosecution witnesses attested to as that after the appellant received the money, he immediately released the suspects.”(Emphasis ours.)

From the circumstances of this case and having re-evaluated the evidence, we find that both the trial court and the High Court correctly analyzed and evaluated the evidence on record and made concurrent findings that the evidence was strong, overwhelming, credible and sufficient to support a conviction with regard to count two. We have no reasons to depart from these findings and do find that the conviction of the appellant in respect to count two, was safe and sound. Accordingly, the appellant’s appeal against conviction with regard to count two is without merit and the same must fail.

With regard to sentencing, the appellant was sentenced to a fine of **Kshs 10,000/= or in default to serve 6 months’ imprisonment**. Section 37 (1) of the Sexual Offences Act pursuant to which the appellant was charged with provides:

“Any person who intentionally interferes with a scene of crime or any evidence relating to the commission of an offence under this Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than three years or to a fine of one hundred thousand shillings or to both.”

The sentence of a fine of Kshs 10,000/= or in default 6 months’ imprisonment that was meted out on the appellant was very lenient in the circumstances. As a matter of fact, the appellant was very lucky that he did not get a stiffer penalty. Consequently, we have no reason to disturb the same. The same is hereby affirmed and upheld.

The upshot of the foregoing is that the appellant’s appeal is without merit and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2021.

W. OUKO [P]

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JUDGE OF APPEAL

H. OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR