



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO 111 OF 2012

JOSEPH MALUKI MWASI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

APPEAL FROM CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 57 OF 2012

AT THE PRINCIPAL MAGISTRATE'S COURT AT KYUSO (B.M. MARARO PRINCIPAL
MAGISTRATE)

JUDGEMENT

Background

Joseph Maluki Mwasi, hereinafter the appellant, was charged before the Principal Magistrate at Kyuso with burglary contrary to section 304(2) and stealing contrary to section 279(b) of the Penal Code. It is alleged that on the night of 13th and 14th April 2012 at Kalalani village in Usueni sub-location Tseikuru District of Kitui County broke and entered the dwelling house of Joseph Kang'utu with intent to steal therein and did steal from therein 260 kilogrammes of millet valued at Kshs 5,720/= the property of the said Joseph Kang'utu.

After a full trial with the prosecution calling a total of nine witnesses the trial court returned a finding of guilty, convicted and sentenced the appellant to five and three years imprisonment in the first and second limbs respectively. The sentences were to run concurrently.

The appellant is aggrieved by the conviction and sentence and has preferred this appeal.

Petition of appeal

The appellant has faulted the trial court in the following grounds of appeal and claims that the trial court:

- i. **Erred in law by convicting him on inconsistent evidence.**
- ii. **Erred in law by not observing that the Chief had a grudge with him.**
- iii. **Erred in both law and fact by not observing that the evidence surrounding the recovery of the exhibits was contradicting and the evidence tailored.**

The appellant has submitted that the evidence is inconsistent; that complainant did not know the amount of the millet allegedly stolen; that the complainant said the millet was 260 Kilogrammes and again that it was 3 bags and again that it was 3½ bags. The appellant further submitted that the evidence of PW2 contradicted that of PW1 on the amount of the millet allegedly stolen.

The appellant submitted that there was a grudge between him, the complainant's family and the chief and the trial magistrate did not consider this issue; that there is no proof that the millet found with him belonged to the complainant because there was no identifying mark; that there was no proof that he owned a donkey and that the trial magistrate failed to consider the possibility of stray donkeys leaving hoof prints near the appellants home. He claimed that the millet found at his home belonged to him. The appellant relied on the case of **James Mwangi v. Republic [1983]** KLR to stress the point that there are other co-existing circumstances which would weaken or destroy the inference that he is guilty.

The appeal is opposed by the Respondent. Mr. Orwa the learned State Counsel submitted that the millet was weighed and was confirmed to be the amount stolen; that the allegations of the grudge with the Chief are unfounded; that the appellant did not explain how he came to possess the millet; that the prosecution case is overwhelming and the defence of the appellant amounts to a mere denial. Learned counsel urged this court to look at the surrounding circumstantial evidence and take into account the doctrine of recent possession and uphold the conviction and sentence of the lower court.

Facts

On 14th April 2012 Kasyoka Mwikya, PW2, went to the house of Joseph Kang'utu Mutie, PW1, to let out the chicken when she found the door broken and some millet stolen. At the time PW1 was away. She called PW1 and informed him. She also informed other family members and neighbours including Koli Mwikya, PW3, Kyalo Mwikya, PW4, Patrick Musee Muneeni, PW5 and Wilson Musyimi, PW6. The matter was reported to the Chief Daniel Mwenga, PW7.

Evidence shows that the ground was wet after the rains and foot marks, hoof marks of a donkey and a trail of spilled grains of millet were clearly visible. The above witnesses followed these to the home of the appellant where the trail ended. In the group of witnesses was Corporal Herbert Manjaani, a General Service Unit Officer, PW8. He asked the appellant to explain the fact that the footmarks, hoofmarks and spilled grain ended at his home. PW8 noticed millet in appellant's house with some spilled around. A search revealed millet in the granary.

The matter was reported to Chief Inspector Francis Oyieno, PW9, who went to the scene. Following the claim by the appellant that the millet was his, PW8 weighed the millet and found it to be 2 ½ bags. The appellant was arrested and later charged.

The appellant admitted the above witnesses visited his home claiming that PW1's millet had been stolen; that they found millet in his homestead which he alleged was his. He claimed that PW7 was malicious to him and had sworn to revenge against the appellant for having caused him to be arrested. He said all the witnesses were relatives and they lied to court and that it was his millet that was taken.

The appellant called his wife, Agnes Kasyoka Maluki, DW2 who testified that the millet belonged to her and that she is the one who had covered the granary after taking some millet from it.

Determination

This court sitting on first appeal has a duty to examine and evaluate all the evidence afresh with a view to arriving at an independent finding. The appellant is dissatisfied with the manner in which the trial magistrate handled the evidence presented to him. According to the appellant the evidence was contradictory, inconsistent and fabricated due to a grudge. I have carefully considered the prosecution evidence against the appellant's contention that the millet found at his home and allegedly stolen from the complainant belonged to him. I have considered the contention of fabrication of the evidence due to a grudge.

The evidence of all the witnesses shows that the complainant's house had been broken open. PW9 who investigated this case told the trial court that the door had been broken using an instrument that he called a metal bar between the frame and the door. There is no evidence that this instrument was recovered. What is proved however is that the door to complainant's door was found broken. PW9 confirmed finding

footprints and trail of spilled grains up to the appellant's house.

The appellant claims that the case was fabricated by the Chief, PW7, in order to get even with him because of an earlier grudge. He claims that the complainant and the other witnesses were related to the chief and all had a grudge with him. I have considered this evidence and find that it cannot be true. PW8 and PW9 are independent witnesses who are not connected with the Chief or any of the other witnesses. The two have confirmed that there were hoofmarks, footmarks and a trail of spilled grains of millet from the broken house to the home of the appellant.

I find the evidence consistent in material facts that the door was broken; that there were spilled grains of millet from the complainant's house; that there were hoofmarks of a donkey and footmarks of a person that led to the home of the appellant and that millet was found in what the witnesses are calling a traditional granary that had been freshly sealed. The ground was wet following rains and the footmarks were clear on the ground.

The appellant was not seen at the scene and the evidence is the one of circumstances. The appellant was also found in possession of recently stolen millet. His explanation that it is his millet would be reasonable if there was no evidence of footmarks, hoofmarks and trail of spilled grains of millet from the house where millet was stolen to the appellant's home. I agree with the appellant that in criminal law, an accused person is presumed innocent until there is evidence proving otherwise and that where reasonable doubt exists the court must give the benefit of that doubt to an accused (see Woolmington v. DPP [1935] UKH1). In what is referred to as the "golden thread" the court in that case had the following to say:

"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

The circumstances of this case lead to one conclusion that the appellant is the person who broke the complainant's house and stole the millet.

In James Mwangi v. Republic [1983] KLR 337, the Court of Appeal held that:

"In a case dependent on circumstantial evidence, in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis other than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no coexisting circumstances which would weaken or destroy the inference (Teper Vs. Queen (1952) AC 480 at page 489)".

Citing the James Mwangi case, above, with approval the Court of Appeal in Johnson Muhuthu Wanjohi v. Republic Criminal Appeal No 471 of 2007 (Johnson Muhuthu Wanjohi v Republic [2013] eKLR) stated that:

"The circumstantial evidence presented against the appellant proved the case against him with the requisite degree of exactitude."

I find no coexisting circumstances in this case which would weaken or destroy the inference that the appellant is guilty of breaking into the complainant's house and stealing the millet. Like the Court of Appeal in the Johnson Muhuthu Wanjohi case above, I am of the view that the circumstantial evidence presented against the appellant proves the case against him with the requisite degree of exactitude.

I have considered the evidence of the quantity of the millet stolen and the recovered millet. Although I

note that the complainant stated that 2 ½ bags of millet were stolen. I find no evidence to show whether the complainant had weighed the bags. Although the exact weight of the millet is not clear I find this does not weaken the case for the prosecution given that there is evidence that the footprints and spilled millet led to the home of the appellant.

The appellant was required to explain the footmarks and hoofmarks as well as the trail of spilled millet grains leading from the complainant's house to his house. He did not do so. He explained that the millet found in his home belonged to him but this explanation taken together with the other evidence of foot prints and spilled grains of millet is not reasonable. He has not established on a balance of probabilities that the millet belongs to him. The trial court considered this issue as follows:

“I have considered all the material (sic) placed before me and beginning with the accused's defence I note that he together with his witness could not explain the source of the millet recovered from his freshly sealed granary which was the exact amount of grain that was allegedly stolen from the complainant's house. I also note that the accused and his witness could not explain the trail of millet grains, hoof marks and foot marks from the complainant's house to that of the accused. I am not convinced at all that the millet recovered from the accused's house was his and I proceed to dismiss the same.”

I find the grounds of appeal lack merit. The evidence of PW8 and PW9 as stated above is evidence of independent witnesses. I therefore come to the same conclusion at the trial court that this case has been proved beyond reasonable doubts. I consequently dismiss the appeal and uphold the conviction and sentence of the trial court. I find no reason to disturb the sentence. I make orders accordingly.

Dated, signed and delivered this 27th November 2013 in open court.

S.N. MUTUKU

JUDGE