



IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 51 OF 2013

Appeal from the original conviction and sentence by the Resident Magistrate (I.W.Gichobi, RM) in Mwingi Principal Magistrate's Court Criminal Case No. 439 of 2012.

MUTHAMI KALIMA.....1ST APPELLANT

JAMES KILONZI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

The two appellants were tried, convicted and sentenced to two years imprisonment each for the offence of stock theft contrary to section 278 of the Penal Code. They had been charged jointly with another that on 3rd August 2012 at Kavuni Village in Mwingi District of Kitui County they stole three goats valued at Kshs 15,000 the property of Esther Wayua.

The appellants are dissatisfied with the conviction and sentence and have preferred this appeal. The 1st Appellant had filed Criminal Appeal No. 51 of 2013 while the 2nd Appellant filed Criminal Appeal No. 52 of 2013. The two appeals were consolidated on 26th March 2014 into Criminal Appeal No. 51 of 2013. Muthami Kalima is the 1st Appellant while James Kilonzi is the 2nd Appellant in the consolidated appeal.

Facts

Mwinzi Muvengi, the Chief of Kavuvwani Location in Mwingi Central District who testified as PW2 was woken up at about 3.45am on 4th August 2012 by one Simba Musyoka (Simba). Simba was said to be a motor cycle (boda boda) rider. He told PW2 that he had spotted two people along Katalwa/Mwingi road leading two goats towards Mumbuni and that he suspected them to have stolen the goats. PW2 called members of community policing among them Joseph Maluki, PW3. They proceeded to Katalwa where they spotted hoofmarks and footprints of two people. They followed the tracks up to Katalwa/Mumbuni junction. The footprints changed into those of a single person. They followed the hoofmarks and the footprints of one person towards the homestead of one Paul Musili. Paul Musili was the 3rd accused person in the lower court.

By this time, it was around 7.00am. According to prosecution evidence they found the 3rd accused at his homestead still holding the goats. It is stated that the 3rd accused led them to some lodging in Mumbuni

town where he showed them the appellants said to have been found sleeping in what the 3rd accused said was his lodgings. They were arrested and the three of them were taken to Mwingi Police Station.

In the meantime, Esther Wayua, PW1, the complainant in this case found her three goats missing in the morning of 4th August 2012 and decided to report the matter to the Chief, PW2. She found PW2 not present. She was informed that PW2 was at Mwingi Police Station where some goats suspected to have been stolen had been taken. She went to Mwingi Police Station and identified the three goats as her stolen goats. She was shown the appellants and the 3rd accused as the people who had been arrested with the goats.

Petition of appeal

Each appellant filed his petition and grounds of appeal separately. I have read the respective petitions and understood the appellants to be raising the following issues:

- i. That the evidence is contradictory and inconsistent.
- ii. That the trial court relied on hearsay evidence.
- iii. That the witness who claimed to have seen two people leading the goats away did not testify.
- iv. That the appellants were not identified as the ones who had stolen the goats.
- v. That the witnesses told the court that the 3rd accused had mentioned the appellants as accomplices yet the 3rd accused denied knowing them.
- vi. That the trial magistrate did not consider the appellants' strong defences.

The appellants submitted briefly in support of their respective grounds of appeal. The 1st appellant had made written submissions while the 2nd appellant submitted orally during the hearing.

Respondent's submissions

The respondent opposed the appeal. Learned state counsel submitted that the witnesses followed footprints of safari boots and that the 2nd appellant was arrested wearing the same shoes; that the stolen goats were identified by all the witnesses; that the alleged contradictions do not go to the root of the prosecution case; that the goats were found with 3rd accused in the lower court who led the Chief and members of the community policing to where the appellants were; that the appellants' defences were mere denial and that 2nd appellant misunderstood the evidence in stating that the 3rd accused did not testify; that the 3rd accused was an accused person and he testified that he is the one who implicated the appellants. Counsel asked the court to apply the doctrine of recent possession and uphold the conviction.

Determination

From the outset, Simba, who is said to have spotted two people leading three goats along Katalwa/Mwingi road did not testify. The two persons were not identified. The two appellants were not found with the goats. It was alleged that the goats were found with Paul Musili who was the 3rd accused person charged in the lower court jointly with the appellants. He is said to have led the Chief and members of community policing to the appellants. In his evidence in defence he stated that he found the 1st and 2nd appellants at the Chief's Office being beaten by members of public. He also said he was not present when the 1st and 2nd appellants were arrested.

PW1, referred to as Esther Wayua Kithaka, did not know who stole her goats. She found them at Mwingi Police Station and was shown the appellants and 3rd accused as the people who had stolen the goats. She told the court that the goats were stolen from her home at Kavuni Village. The same witness is referred to as Esther Kinyaika by PW2 and as Esther Wayua by PW4 who said he was investigating theft of goats at Ikuuni village.

The crucial witnesses in this case are the Chief, PW2 and the PW3 a member of community policing.

They told the court that they followed footprints of two people, one print made by Safari boots. They said that the 2nd appellant was found wearing safari boots and they suspected to have been the shoes. PW2 testified that the 3rd accused was found at his homestead still holding the goats as if he had just arrived. PW3 said they found the 3rd accused about 50 metres from his house. Both PW2 and PW3 said the 3rd accused told them that two people had brought the goats to him. PW2 testified further that:

“We then headed to Mumbuni and the accused (3rd) showed us 1st and 2nd accused as the people who had sold the goats to him. They were outside the 3rd accused persons plot.”

Referring to the same incident, PW3 testified that:

“He then told us that the two people were waiting to him at his plot/lodging at Mumbuni so that he give them money. We headed there, entered the 3rd accused lodging/plot. Inside we found the 1st and 2nd accused person sleeping. They told us they had rented the room from the 3rd accused. Myself and two assistant chief moved ahead to meet the 1st and 2nd accused persons. We found the two in the plot and knew they were the ones who took the goats to 3rd accused (sic).”

These are two different versions of what happened. PW2 said the two appellants were identified to them by 3rd accused as the people who had brought the goats to him while PW3 said that they knew the two appellants were the ones who took the goats to 3rd appellant without saying how they knew this. PW3 said the two appellants were found sleeping while PW2 said they found the two appellants outside the 3rd accused’s plot.

In his defence the 2nd appellant told the court that he was arrested when he went to the scene where the 1st appellant was being beaten by members of public. The 1st appellant said he was arrested from his lodging at Mumbuni with those who arrested him claiming that the shoe prints they had been following were made by shoes resembling the shoes he was wearing.

I have carefully examined and evaluated all the evidence for the prosecution and the defence. The appellants were not found with the goats and the 3rd accused who is said to have implicated them did not do so in his defence. I have evaluated the evidence alleging that the 3rd accused told PW2 and PW3 that two people had sold the stolen goats to him. The expected thing in such a case is to give the names of the people in question. The 3rd accused did not name the appellants as the two people and in his defence he did not implicate them.

Coupled with the above evidence, the evidence of PW2 and PW3 differ on material facts in regard to the identity of the appellants and the manner they were arrested. The appellants’ respective defences are credible and in my view raise doubts as to their involvement in this crime.

I agree with the appellants that the evidence touching on their identity as having stolen the goats is shaky. I also agree that the evidence by the prosecution is contradictory and inconsistent as highlighted in this judgment. I find that the appellants have raised plausible defences and this has successfully created doubts in this case.

I have noted that the trial magistrate other than narrating the evidence of all the witnesses did not evaluate the same. This is how the trial magistrate summarized the evidence:

“All prosecution witnesses were consistent in their testimony in that the 3rd accused implicated the 1st and 2nd accused persons as the people who took the goats to him, to sell to him after he was caught red handed with the three goats at his homestead and the court is convinced that indeed the 3rd accused person was found with the 3 goats which were actually handed over to him at Katalwa Mumbuni junction by the 1st and 2nd accused persons. The

3rd accused headed home with the goats while the 1st and 2nd accused persons went to Mumbuni to spend the rest of the night at the 3rd accused persons lodging, where he would meet them and pay them a thing they normally did (sic).”

With due respect to the trial magistrate, she misdirected herself on the evidence. There was no evidence to show that the two appellants were the two people who allegedly handed over the three goats to the 3rd accused. There is no evidence to show that they went to 3rd accused’s lodgings to spent the night. This is what PW2 and PW3 said happened but the 3rd accused did not confirm this evidence. It remains speculation and speculation cannot be relied on to prove a case beyond reasonable doubt.

With the above analysis, I find that the appeals filed by the 1st and the 2nd appellants respectively are meritorious. I hereby allow the same. The conviction against each appellant is hereby quashed. The sentence against each appellant is likewise set aside. Each appellant is set at liberty forthwith unless for any other reason each is held in custody. It is so ordered.

Dated, signed and delivered this 1st day of July 2014.

S.N.MUTUKU

JUDGE