



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 35 OF 84

JACOB KIPCHUMBA KIMOSOP APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Mead, J) dated 4th December 1981 in Criminal Appeal No. 229 of 1981

JUDGMENT OF THE COURT

Jacob Kipchumba Kimosop, the appellant, was convicted of two counts of stock theft contrary to Section 273 of the Penal Code and sentenced to the mandatory sentence of 7 years' imprisonment on each count, to run concurrently and to 10 strokes corporal punishment on each count, by an acting Resident Magistrate in Eldoret, on May 11 1981. Hard labour is also mandatory for this offence.

The particulars of the second offence, of which the appellant was convicted, alleged that on February 20 1981 at Tunturung in the Elgeyo Marakwet District of the Rift Valley Province, he stole one head of cattle valued at shs.2,000/-, the property of Joseph Ruto Kisang.

The learned Judge summarized the evidence against and for the appellant on the second charge in this way. Joseph Ruto Kisang valued his very big, dark- brown bull at shs.2,000/- and it was stolen from his boma at Tutturung on February 20th 1981. The appellant sold it to Mathew Suter, a butcher at Chesongochi Trading Centre, the next day at 7 am and Joseph Ruto Kisang found its skin there, later the same day and Matthew Suter said, the bull had been sold to him. None of this was challenged by the appellant. He did not deal with this charge in his defence statement.

It is refreshing to find that, although the appellant's grounds of appeal fell squarely within the provisions of Section 352(2) of the Criminal procedure code, yet, he admitted it to hearing and rightly so because, on the first count, the evidence was that of an accomplice and there was no corroboration of it.

He summarized the prosecution's case against the appellant on the second count incorrectly, however, for Mathew Suter, the butcher, did not buy the very big, darkbrown bull, from the appellant, the day, after it was stolen, but allowed him to slaughter it in his butchery that day and sell portions of it over the next three days, in return for its skin as a fee and about five days after it was stolen, Joseph Ruto Kisang found the skin in that butchery and Mathew Suter told him who had brought it to him.

The magistrate summarized the same evidence correctly, because he painstakingly set out what the

witnesses for the Republic testified and the appellant's defence.

Today, the appellant complains that, the magistrate's interruptions of his cross-examination and of his defence, amounted to an unfair trial. This was not in his grounds of appeal to the High Court when the complaint should have been fresher, and it is belied by the full careful record of the magistrate. We reject that ground of appeal.

He submits that, there was no evidence of his arrest or that reason for it. He was detained by a village elder at Buyaa, on information given to him by the complainant in the first count, on March 12th 1981 and marched to the Chief's office at Chesoi in the Sambirir Location where Ap Kibiwot Cheptoo formally arrested him. So, there was clear evidence of his arrest and the reason for it.

He points out that, he was not asked to take part in any identification parade, which is apparently true. The complainants knew him before their beasts were stolen and there were no eye witnesses of these thefts who gave evidence, save for the accomplice, who also knew the appellant before the event. A parade would have served no useful purpose so far as they were concerned. The butcher had not seen him before they met on February 21st 1981, but he saw him in daylight and for an appreciable period of time during their negotiations, so we are satisfied with that evidence of identification without a parade.

The appellant is correct when he says nothing in the way of a lease the butchery was produced by the prosecution, but the evidence does not suggest there was such a written document. And he is right, when he says, nothing incriminating, so far as the bull is concerned, was found in his homestead. The conviction rested, however, on the fact that, he was found in possession of it very soon after it had been stolen and his denial of this, was proved beyond any reasonable doubt, to be false.

We have dealt with all the points he has raised (including those which are not matters of law) and we are satisfied, despite the learned judge's faulty review of the evidence, that his first appeal against convictions should have been dismissed.

We also dismiss this second appeal against this conviction, for it has no merit, but the sentence must be amended to make the imprisonment with hard labour and we so order.

Delivered and dated at Nakuru this 24th day of September 1984.

A A KNELLER

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JUDGE OF APPEAL

Z R CHESONI

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AG JUDGE OF APPEAL

J O NYARANGI

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AG JUDGE OF APPEAL

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