



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL 291 OF 1983

JOHN MWITI MINGARUTHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

12.9.83

Appellant absent

Miss Matu for Republic

JUDGMENT

The appellant was charged for stock-theft contrary to Section 278 of the Penal Code with an alternative charge of handling stolen goods contrary to Section 322(2) of the Penal Code.

The evidence was that the complainant left his twelve cows grazing in a field on November 14, 1982. Later when he returned to the field he found three cows missing.

According to Joseph Mbogo, a butcher (PW 2) the appellant approached him on November 16, 1982 with the said three cows asking him if he would buy them. The butcher asked him for the movement permit and thereupon sensing danger the appellant took to his heels. He was chased and apprehended. Joseph Mbugua (PW 3) corroborated the evidence of the butcher in all material respects. The complainant identified the three cows to be the ones which were stolen from the field.

In his defence, the appellant stated that when he was on his way on November 16, he was robbed of his money by the witness for the prosecution. He denied the charge. The Magistrate considered the evidence and accepted that for the prosecution and rejected the defence. He then convicted the appellant on the above evidence for handling stolen property. He erred.

It was stated in *Ratilal and Another v Republic* [1971] EA 575 that on a charge of handling stolen goods the prosecution must prove:

- (a) that the handling was otherwise than in a course of stealing;
- (b) that the accused received the goods knowing or having reason to believe that the goods were stolen, or

(c) that the accused dishonestly undertook or assisted in the retention, removal or disposal or realisation of the goods by or for the benefit of another person.

It is clear that on the evidence it was wrong to convict the appellant of handling stolen goods. The evidence on record established a charge of stock-theft as having been proved against the appellant. I therefore substitute a conviction for stock-theft contrary to Section 278 of the Penal Code.

The learned magistrate sentenced the appellant to nine years' imprisonment. The mandatory sentence provided for handling is seven years' imprisonment. It has been said time and again that where there is a legal provision for minimum sentence it should not be increased unless there is exceptional circumstances. In my view in the instant case the magistrate erred on principle in sentencing the appellant to nine years' imprisonment.

I have substituted the conviction for stock-theft which offence also carried the minimum mandatory sentence of seven years imprisonment. It makes provision for compulsory corporal punishment as well.

The appellant is sentenced to seven years' imprisonment plus three strokes.

Dated and delivered at Nyeri this 12TH day of SEPTEMBER 1983

VV PATEL

JUDGE



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