



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO 27 OF 2017

CONSOLIDATED WITH HCCRA NO. 28 OF 2017

RICHARD KIPLAGAT CHIRCHIR.....1ST APPELLANT

STEPHEN CHERUTICH CHIRCHIR.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENTS

[Being appeals form original conviction and sentence delivered in Eldama Ravine Principal Magistrate’s Court Criminal Case No. 1106 of 2011 by Hon. Kasera, Ag. PM]

JUDGMENT

Introduction

1. The appellants were respectively, the second and first accused persons in ***Eldama Ravine Principal Magistrate’s Court Criminal Case No. 1106 of 2011*** where they were on 22.11.2011 charged with stealing stock c/s 278 of the Penal Code. That between 12th and 13th day of November, 2011 at Tomun village in Mogotio District within Baringo County jointly stole five (5) heads of cattle valued at Ksh. 300,000/= the property of Joseph Lochomoi Chepkonga.

PROSECUTIONS CASE

2. The Prosecution witnesses testified as follows:

1. **(PW1)** Joseph Lochomoi Chepkon’ga.

“I live in Kamar Location in Mogotio District, I am a farmer. On 12/11/2011 at 8.00 am on a Saturday I went to Kamar for a fundraising for bursary. I went home at 10.00 pm and slept. I checked my cattle boma the next day, I only saw seven cattle, 11 missing. I thought the missing cattle were at my neighbors place, I did not look for them. On 14th a Monday I took them to graze; I found 6, they were now 13, 5 missing. I looked for the cattle, went to the neighbors I missed them. I found foot marks and followed them to the road, to Sitet till Chebiwan Molosirwe to Olelit center. I was called from home told that a man was looking for me, my brother informed me of that. At Molosirwe I met Collins; he is the one who was looking for me. He told me on 13/11/2011 cows were taken to him, at Molosirwe by Stephen and Richard. They woke him up and told him to drive the cows, 5 cattle. He took me to where the cattle were and found Richard. Collins described the animals and I found that the animals were mine. I told him I was going to find the Assistant Chief. I went to Sitet to look for the Chief of the area. At 5.00 am Chief come, we went to Stephen (accused 1) and Richard (accused 2). The 2 accused were arrested from their boma. We went to Tindinyong Center, to Chiefs office with them; they admitted they took the animals. Some people came; chief went away and came with Joshua Kibe who said the animals were taken to him by Stephen (accused 1). AP’s took both accused to Mogotio Police Station. Both accused are my neighbors; the next village. I have no grudge with them.”

Cross-examined by accused 1

“The animals got lost on 13/11/2011. You were arrested on 21/11/2011. I do not know who bought the animals.”

Cross-examined by accused 2

“My animals were stolen. I was called on 13/11/2011 my cows went to Kipchumba. 3 were brown and 2 were white with brown colors. 3 had their ears cut on one side. White/brown was cut on one ear twice.

Re-examination

“I lost my animals on 13/11/2011”

2. (PW2) Collins Kiptoo Chepkochei

“I live in Molosirwe, Mogotio. I am a student in secondary at Mugrin in form 2; I am 18 years. On 13/11/2011 I was a sleep at home, someone called me I went outside. I found Stephen (accused 1) he told me to drive the animals to Esageri, that Richard was not well. The moon was up, I saw the 2 accused persons well; they are my relatives. They were 5 cows, that they bought 2 from Singoi and 2 from Kaibos 1 from Lokoris; I know Lokoris. 3 were brown, with white color on the head and 2 were white. We took the cattle with Stephen on the way I heard him say we are on the way we are nearing on the phone. We met the two people in Esageri; they went aside and talked for half an hour. We took a motorbike and went back. I saw him take Ksh. 5000/= he was to take the other the following day. I was paid Ksh. 1,500/= I was left at Molosirwe till 5.00 p.m. I then went home. I heard some people lost 5 cattle; they had descriptions of the animals that we took to Esageri. I looked for the chief, Daniel Busi; on 19/11/2011I decided to go to Joseph Lochomoi’s home to tell him. I was told he came to Oriti, I met him; I asked him about the animals that he had lost. I told him that I took the cows to Esageri. On 20/11/2011 I heard that they were arrested.”

Cross-examined by accused 1

“I woke up at 2.00 pm. you sent my younger brother to come and wake me up. I know you as a farmer. You know the person who took the animals. I said you came to wake me up but through PW3. We walked to the main road with the animals. We were meeting people but I did not know them. I said the buyer gave you Ksh. 5,000 but I do not know the cost of the cow.”

Cross-examined by accused 2

“I was woken up on 13/11/2011 at 2.00 am, Stephen came to our home. I found you with the animals at the road; I did not talk to you I just greeted you. You escorted us for about 100 meters then you went home. I cut a deal with Stephen; I did not concentrate on your dressing. I now the animals were stolen. On 17/11/2011 I reported the matter to the owner.”

3. (PW3) Kibet Chepkochei

“I live in Molosirwe, student at Molosirwe Primary School; am in class 8, am 17 years old. On 13/11/2011 at 12.00 – 1.00 am I was at home, I was asleep Stephen called me I greeted him he asked me for my brother Collins; I told him Collins was asleep at his house about 100 meters away. I woke up Collins. Stephen told Collins that he had cows that he wanted him drive. He said he had 5. I left them to sleep. Stephen had a torch and a phone, the moon light was there. He was alone when he came to me. He lives in Kamar. I did not see the cows. After one week, I heard from Collins that the cows were stolen. Accused 2 is a brother to Stephen he is Richard.”

Cross-examined by accused 1

“I know your home, my mother’s father and your father’s father are brothers. You woke me on 13/11/2011. I did not see the cows; you woke me up to wake up Collins for you.”

Cross-examined by accused 2

“it is Stephen who gave me the work, we went to where the cows were, I found you taking care of the cows; it was at night. I have not heard you sell someone’s cow, but I later heard you that the cows that you had were stolen. Nothing was written at the time, I was contacted but we used to assist in escorting cattle at a fee. PW3 heard you people give me a job. I have never walked with you; you left us near my home and you went away. I proceeded with Stephen.”

Re-examination by prosecutor

“I found Richard (accused two) with the cattle and we shock hands. He told Stephen let me go back.”

4. (PW4) 93501 PC Oliver Wahoni, stationed at Koibatek CID.

“I used to be at Mogotio Police station, I am the investigation officer. On 21/11/2011 at 9.00 pm I was on crime stand by at Mogotio Police Station, accused were brought to the station by members of the public and AP’s. They said they stole herds of cattle from Joseph Lochomoi (PW1). They had 2 witnesses, after a brief discussion with them I recorded their statements. I established that on 12/11/2011, complainant left his 18 heads of cattle at home went to fundraising at Kamar Trading Center; he come home late. On 13/11/2011 he missed some of the animals, he assumed they had strayed. On 14/11/2011 he searched for them; he come across Collins Kiptoo (PW2) Collins Kiptoo who informed him that on 13/11/2011 2 accused went to his home woke up Kibet

Chepkoch (PW3) to go and wake PW2. Accused 1 requested PW2 to help him drive cattle to Esageri; they agreed and accused 1 took PW2 to where the cattle were 100 meters from where PW2 was. They found accused 2 with 5 heads of cattle. Accused 2 went home as PW2 and accused 1 drove the cattle to Esageri where they were disposed off. PW2 described the colors to PW1 who confirmed they were the complainant's cattle. Complainant mobilized villagers who arrested two (2) accused persons took them to Mogotio Police Station where they were charged. The cattle were not recovered."

Cross-examined by accused 1

"Complainant did not make a report of the lost animals; you were not arrested with anything."

Cross-examined by accused 2

"You were not arrested with the animals, the animals were not found so they were not photographed. Complainant did not make a report he was looking for the animals."

DEFENCE CASE

3. When put on his defence the 1st appellant (DW1) Stephen Cherutich Chirchir gave an unsworn statement as follows:

"I live in Kamar Village; I do boda boda work with a motor cycle. On 10/11/2011 I was at home, I woke up the child was sick, I took to the hospital in Molose; I went back home.

On 11/11/2011 I took the child to Mogotio Hospital, I went home on 12/11/2011 I did not go anywhere; I was taking care of the child at home. Sunday I was at home I went to church with other children. We came home that evening, my cousin was having his child ceremony; I came home after that and slept. Monday 14/11/2011 I woke up, the child was not very sick I went on duty at 11.00 am. Continued with work till 21/11/2011 at about 12 noon; chief came and arrested me. They took the motorcycle home; I was taken to the police station. On 22/11/2011 I was brought to court."

4. The 2nd appellant (DW2) Richard Kiplagat Chirchir gave sworn statement as follows:

"I live in Kamar Sub-location; I used to work in Marigat in a barber a shop. On 18/11/2011 I was washing goats, sleeping at 6.00 am. On 21/11/2011 I was told to go out, taken to Tindinyor; we were taken to the Assistant chief who asked me about lost cows. I told him I did not see them, we were there till 5.00 pm we were taken to Mogotio Police Station. On 22/11/2011 I was brought to court

Cross-examination prosecutor

"My landlord was not present when I was arrested. I was not given a receipt. Kibet Chepkoch (PW3) is known to me. On 13/11/2011 at 1.00 am till 2.00 am I was asleep in Marigat; I was alone. I did not hear him say I heard a torch. I do not know how he framed me (Lochomoi), I believe cousin to my father Samuel Cheruiyot used him to frame me up. I did not see any brother on 18/11/2011. We did not steal the animals. I was in Marigat the date in issue.

JUDGMENT OF THE TRIAL COURT

5. The trial court found the charge as proved and convicted the appellants:

"The issue before the Court is whether the 2 accused persons stole the 5 herds of cattle. PW1 said he saw the cattle with the accused 1 and 2. He helped the accused 1 to drive the animals to Esageri. The animals were of the description of the 5 animals lost by PW1 in color and cut on their ears.

The evidence by PW2 that the accused took him up on 13.11.2011 through her brother is not shaken at cross examination. PW2 and PW3 knew the 2 accused persons well as they were cousins from their maternal uncle. I believe that is why accused 1 and 2 chose to take PW2 to help them escort the animals. There was no grudge between the witnesses PW2 and PW3 against the accused persons. The accused were from Molosirwe as such were neighbors to PW1. I find that the 2 accused stole the 5 animals from Molosirwe and drove to Tingingeny before accused 1 and PW2 took them to Esageri where they were sold. I find the accused guilty and convict them accordingly under section 215 of the CPC for the offence of stealing stock c/s 278 of the Penal Code."

APPEALS

6. The accused filed appeals from the Judgment of the trial court as follows: Kabarnet High Court Criminal Appeal No. 27 of 2017 (formerly Eldoret HCCRA No. 120 of 2013) **Richard Kiplagat Chirchir v. R** and Kabarnet High Court Criminal Appeal No. 28 of 2017 (formerly Eldoret HCCRA No. 130 of 2013) **Stephen Cherutich Chirchir v. R**. The appeals were subsequently consolidated for hearing. Although the 1st appellant was initially represented by counsel M/S Kipkemei & Co. Advocates who had filed a Record of Appeal dated 20th July 2017, the 1st appellant subsequently chose to represent himself and filed Amended Grounds of appeal dated 14th September, 2017 as follows:

1. The trial magistrate erred in law and in fact by failing to appreciate that the prosecution failed to prove this case beyond reasonable doubt.

2. That the trial magistrate erred in law by failing to appreciate that a crucial witness was not produced to testify before court.
 3. That the trial magistrate erred in law and in fact by failing to appreciate the conduct of the complainant
 4. That the trial magistrate erred in law and fact by holding that the accused person admitted he stole the cattle and yet the plea of not guilty was entered.
 5. That the learned trial magistrate erred in law and in fact in failing to note that the appellant mode of arrest was inconsistent with the charges.
 6. That the learned trial magistrate erred in law and in facts by failing to invoke the provisions of section 333 and 137 of the CPC
7. The 2nd Appellant filed Amended Grounds of Appeal dated 14th September, 2017 as follows:

1. That the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution failed to prove this case beyond reasonable doubt.
2. That the learned trial magistrate erred in law and in fact in failing to note that the appellant mode of arrest was inconsistent with the charges.
3. That the learned trial magistrate erred in law and in facts by appreciating uncorroborated evidence of a single witness unsupported by independent evidence.
4. That the learned trial magistrate erred in law and in facts by holding that the accused person admitted that they stole the cattle and yet a plea of not guilty was entered.
5. That the learned trial magistrate erred in law and in facts by failing to invoke the provisions of section 333 and section 137 1, 2(a) of the CPC on sentencing.

SUBMISSIONS

Appellants' Submissions

8. In written submissions before the Court the appellants expounded their grounds of appeal and urged as follows:

1st appellant:

Ground 1

I submit that if Collins told PW1 to where the animals were, why did

they not take the animals with them.

PW1 never reported about the lost animals either to the chief or to the police station or never informed his neighbor

No cogent reason was given by the IO for arrest of the accused even after finding the person who had the animals. He only relied on the testimony of Collins without any prove.

Failure to report the loss of the missing cattle to the authority in the earliest time creates sense of doubt as to whether the complainant was serious over the issue. The investigation carried out by the investigating officer did not measure up to an investigation that would yield an ideal result.

Ground two

*In **Bukhenya and another vs. Uganda** [1972] E.A.A 549, the predecessor of this court held that:*

“The prosecution was duty bound to make available all necessary witness to establish the truth even if their maybe inconsistent to its case. Otherwise failure to do so may in an appropriate case lead to an inference that the evidence of the witness who was not called to testify would adverse to the prosecution case.”

In page 14 lines 10-11 states;

“... Some people came. Chief went away. He came with Joshua Kibe who said the animals were taken to him by Stephen accused 1.”

I submit that:

- i) Joshua Kibe to whom the animals were taken to was not interested as an accomplice to the commission of the offence.*
- ii) Joshua Kibe was not taken to the police or asked to write a statement and appear before the court to testify against the accused.*
- iii) If this case was to stand at all, Joshua Kibe would have been the person to prove to the court beyond any reasonable doubt if there existed such a felony.*
- iv) Even after Joshua Kibe admitted that the animals were taken to him by Stephen, accused 1 as was alleged by PW1, no animal was recovered and no action was taken against Joshua Kibe to prove the same allegation.*

Failure for the prosecution to produce this crucial witness was because his production to testify before the trial court would prejudice and weaken the prosecution case.

Neither the chief nor the assistant chief appeared in court to verify the same.

Ground three

I submit that:

- i) The complainant did not report any such incident to the relevant authority about the list of animals on 12/11/2011*
- ii) The complainant's behavior speaks volumes as he was behaving like somebody who never lost any livestock.*
- iii) He never took the initiative to record his stolen cattle even after identifying the person who had them that is Joshua Kibe.*
- iv) Even after identifying the person who had his cattle no action was taken against Joshua Kibe neither was he called in court or tell the court where he took the animals.*

I submit that PW1 is not a truthful witness and Collins Kiptoo must have been mistaken.

Ground four

The trial magistrate did not consider the evidence on record to arrive at a sound decision instead he relied on a divergent evidence of PW1 to conclude that the appellant pleaded guilty when on record it is crystal clear that the appellant did not plead guilty. The above misdirection resulted to injustice and prejudice on the rights of the appellant and thus urged this court to resolve the above in favor of the appellant.

Ground five

The appellant was alleged caught after Collins informed PW1 about the ordeal which was never proved beyond reasonable doubt.

I humbly submit that:-

- i) The appellant was found sound asleep in his boma*
- ii) There is no evidence that was led by the prosecution to prove that the appellant was the one who stole the animals*
- iii) Upon arrest chief come with Joshua Kibe who said the animals were taken to him by Stephen accused 1 but there was no evidence to connect the 2nd appellant and accused with the said stock theft.*
- iv) Joshua Kibe who admitted that the said animals were said to him was never called to testify to prove PW1's allegations.*

Apart from the testimony of PW2 there is no other evidence to show that accused 2 was involved in stock theft.

Ground six

The trial magistrate in his judgment erred in law by failing to invoke the provisions of section 333 and 137 1, 2(a). I suffered in remand for a period of one year seven months. May this court be pleased to invoke the provisions of section 333 of the CPC and order that the period of 1 year and seven months be deducted from my sentence.

2ND APPELLANT

Ground one

I submit that PW1 did not bother to tell the trial court where he found the 6 cows. The conduct of the complainant; he believed that the cattle were in his neighbors compound. These cattle were not recovered even after Joshua Kibe with the help of the assistant chief and the chief confirmed that Joshua Kibe had the cattle.

I submit that:

- i) PW1 never bothered to know where Joshua Kibe took his cattle*
- ii) PW1 never bothered to recover his missing cattle that is to say the missing cattle were not his*
- iii) No action was taken against Joshua Kibe even after he confirmed the same.*
- iv) Joshua Kibe who is the crown witness was called to testify neither did he write any statement to confirm the same.*
- v) The investigation officer only relied on the testimony of PW1 and PW2 to conclude that the incident occurred instead of doing investigation to arrive at the decision.*
- vi) Joshua Kibe could have been called and testified if indeed the accused person gave him the missing animals.*
- vii) Ownership of the alleged animals was not satisfactory proven.*

Ground two

The appellant was allegedly caught after Collins informed PW1 about the ordeal.

I humbly submit that:

- i) The appellant was found sleeping on his boma as he knew nothing about the theft.*
- ii) there is no evidence that was led by the prosecution to prove that the appellant stole the animals*
- iii) upon arrest chief came with Joshua Kibe who said the animals were taken by Stephen accused 1 as PW1 alleged from his testimony but there is no evidence that connect the accused person to the said stock theft prove PW1 allegation.*
- iv) Joshua Kibe who admitted that the said animals were taken to him by accused 1 was never called to testify to prove these allegations.*
- v) No animals were recovered from Joshua Kibe even after he admitted he had animals and no action was taken against him. Therefore there was no truth to confirm these allegations.*

Apart from the testimony of PW2 there is no other evidence to show that the appellant was the one who was involved in stock theft.

Ground three

PW2 did not produce the amount paid by Stephen as exhibit before court to prove that truly there was a transaction. Failure to produce the exhibit as proof of transaction proves that there never existed a transaction.

*In **James Macharia vs. Republic** [1988] held that;*

“Mere or bare words are not sufficient for identification of exhibits where are no receipts or marks of identification.”

The description given by PW1 did not match the description of PW2. During cross-examination by accused 2 PW1 describes the lost animals as brown cows and 2 white ones with brown color. 3 cows had their ears cut on the ear on one side and white/brown was cut on the ear twice.

I submit that:

PW1's description contradicts that PW2 and may be that was the reason why PW1 never took the said animals from Joshua Kibe after confirming. He found the animals do not fit the description given to him. 5 animals were not recovered; the evidence of PW2 can corroborate the independent evidence if it were there.

Ground four

The trial magistrate did not consider the evidence on record to arrive at a sound decision; instead he relied on divergent evidence of PW1 to conclude that the appellant pleaded guilty while on record it is clear that the appellant did not plead guilty. The above misdirection resulted

to injustice and prejudice on the rights of the appellant and thus urged the court to resolve the above in my favor.

Ground Five

The trial magistrate erred in law and in fact by failing to invoke the provisions of section 333 and 137 1, 2(a) of the CPC while sentencing. The trial court did not consider the period I suffered in remand (1 year seven months).

RESPONDENT'S SUBMISSION

9. For the Respondents, Prosecution Counsel, Ms. Kenei made oral submissions as follows:

Appeal is opposed. The (2) two accused were charged with stealing of stock contrary to section 278 of the Penal Code and sentenced to serve (7) years. The appellants are brothers.

PW1 testified attending a fundraising on 12/11/2011 and when he came back he found that 11 heads of cattle were missing.

On 13/11/2011 he found six of them missing and five could not be found. On 14/11/11 he started looking for the cattle in the neighboring houses and he could not find them. He was later called by PW2 who informed him that he knows where his cattle were.

PW2 testified that on 13/11/2011 he had been contacted by Stephen the 2nd appellant in the company of the 1st appellant, Richard to help him drive (5) cows to Esageri. He testified that he was his younger brother.

PW3 who was sent by the 2nd appellant to call him on that date at around 2.00 am. He woke me up and was able to recognize both appellants. They were People he knew well because they are his relatives.

PW2 further testified that he drove the said cows in company of the 2nd appellant (Stephen) while the 1st appellant only escorted him for around 100 meters and he went back.

The 2nd appellant told PW2 that the 1st appellant could not accompany them as he was unwell. PW2 further testified that on getting to Esageri with Stephen the 2nd appellant. He saw the second appellant speak to two people he could not recognize and saw him receive Ksh. 5000/= for the 5 cows and the rest of the money was to be paid the following day.

PW2 was paid Ksh. 1500/= in the same night being payment of assisting the 2nd appellant drive the cows.

Evidence of PW2 was corroborated by PW3 on the identification of the 2nd appellant. PW3 did not see the 1st appellant because he did not go to where he was.

On the age of PW2 and PW3, PW2 was 18 years and PW3 was 17 years. They were therefore not minors and therefore did not require voire dire as argued by the appellants.

PW2 testified that he heard that there were cows that were missing belonging to PW1 the cows fitted the description of the cows that he had escorted the cows to Esageri. That was the information that led to the arrest of the appellants.

Indicated on record points to the appellants as the one who were identified by PW2; the one appellant Richard was identified by PW2 while the 2nd appellant was identified by PW2 and PW3. They were people who were well known to the witnesses.

The fact that the cows were taken to Esageri at night and that has fitted the description of the stolen animals indicated that they were stolen cows.

Sentence of stealing stock contrary to section 278 of the Penal Code has a maximum of 14 years. The appellants were given 7 years which is fair and within the law. We urge the court to dismiss the appeal.

DETERMINATION

10. The issue for determination in the case is whether the ingredients of the offence of theft of stock contrary to section 278 of the Penal Code were proved and whether the appellants, or any of them, were proved to have been involved in the theft, and the Court in accordance with the of-cited case of **Okeno v. R** [1972] EA 32, as a first appellate court is required to re-evaluate the evidence and form its own conclusion before considering the correctness or otherwise of the decision of the trial court.

The law

11. It is trite law as held in **Bukenya and another vs. Uganda** [1972] E.A 549, that an adverse inference may be made where the Prosecution does not call crucial witness, but not when a fact may be proved by the witness(es) called by the Prosecution. See **Ng'angá v. R** [1981] KLR 483; **Kihara v. R** [1986] KLR 473. In other words of section 143 of the Evidence Act –

“143. Number of witnesses

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

12. It is also trite that an accused who raises an alibi defence does not thereby assume a burden to prove the alibi as that would be to require him to prove his innocence while the burden of proof in criminal cases always remains with the prosecution. See **Karanja v. Republic** [1983] KLR 501, 505 where the Court of Appeal (**Hancox, JA, Chesoni & Platt, Ag. JJA**) as held as follows:

*“The word “alibi” is a Latin adverb, meaning “elsewhere” or “at another place”. Thus, if an accused person alleged that he was not present at a place at the time an offence was committed, and that he was at another place so far distant from that at which it was committed. The appellant said in this case that he left Edgewood Farm at Subukia on February 7, that is the day of the discovery of the body, and the day after that stated in the information as the date of the offence. He did not in terms say that he was at Edgewood Farm on February 6, but Mr. Odera submitted, the implication was that the appellant was saying that he could not have done the act charged because he was elsewhere at the material time. After consideration the judge rejected the appellant’s account of how he was arrested on February 7, that is to say on the following day. We do not accept that the appellant’s story amounted to an alibi on the facts of this case, but in any event it is a material factor that when charged initially the appellant did not put forward this story, but contended himself with little more than a denial. Nevertheless, we agree with the observations of the Court of Appeal for Eastern Africa in **R v. Ahmed Bin Abdul Hafid** [1934] 1 EACA 76, and with those of the former Court of Criminal Appeal in **R v. Little Boy**, [1934] 2KB 413, that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggest of afterthought.”*

On the evidence

13. On the dates of 12-13 of November 2011, 11 cattle belonging to Joseph Lochomoi Chepkon’ga (**PW1**) disappeared. He thought that the cattle would be at the neighbor’s when they did not show up. On 14/11/2011, he took the cattle to graze, he found 6 cattle and still missed 5. That he did not report the loss of the animals the first night was because he thought they were at the neighbours, and no capital may be made by the appellants of the fact. (**PW2**) Collins Kiptoo stated that on the 13/11/2011 at 2.00 am he was woken up at night by his younger brother (**PW3**) that Stephen (2nd appellant) was calling him. He went outside and found Stephen asked for his help to drive the cattle to Esageri. Stephen was with Richard (1st appellant) whom he said was not feeling well. Stephen told his cousin Collins (PW2) that he bought 2 animals from Singoi; 2 from Kaibos and one he bought from Lokoris. PW3 stated Stephen had a torch and phone and there was moonlight. PW2 identified the animals to 3 being brown with white color on the head and 2 were white. No question of identification was raised from the evidence as the brother PW2 and PW3 identified their cousins Stephen (2nd appellant) and Richard (1st appellant) as the persons who were with the cattle and indeed for Stephen, accompanied him in escorting the animals to Esageri. PW1 in cross-examination by the accused identified his cattle by the same colours as given by the PW2 who escorted the animals to Esageri.

14. Barely a day after, on 14/11/2011 the complainant PW1 was called from home that there was a man looking for him who turned out to be PW2 who told him how the cattle were on 13/11/2011 taken to him at Molosirwe by Stephen and Richard when they woke him and asked him to drive to Esageri 5 cattle, of which he gave a description fitting the complainant’s lost cattle. the complainant’s lost cattle. From this evidence, it is clear that 5 missing cattle belonging to PW1 were cattle that PW2 with at the request of his cousins Stephen and Richard, escorted with the former to Esageri where they were sold, not surprising no recovery was made.

15. Although accused does not bear the burden of proving an alibi, both appellants bare alibi that on the date of the disappearance of the cattle at home asleep, without any witness to vouch for this defence does not raise any reasonable doubt to the cogent evidence of the prosecution given by their cousins who knew them and who placed both of them with the cattle on transit to Esageri for sale under escort by the said relative and the 1st appellant.

16. Despite the appellants’ alibi defence, which I must reject when considered and weighed as part of the whole evidence given in the case, I have no doubt or hesitation in finding that the prosecution has discharged its burden of proof in proving the theft of that 5 cattle, 3 brown with white patches and 2 white on the 13/11/2011 by the appellants. The cattle were sold to unknown persons and were never recovered. The evidence of PW2 and PW3, both cousins of the appellants, corroborated that of PW1, concerning identification of the cows and that of the both accused persons.

Reckoning of sentence time taking into account time spent in custody

17. In my view, the provision for the reckoning of time spent in custody applies to the time spent while awaiting trial does not include time served in custody in execution of a previous sentence for a different offence.

“333. Warrant in case of sentence of imprisonment

(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death

(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

18. The record shows that following their arraignment in court on **22.11.2011** for the offence of stock theft in Eldama Ravine PM's Court Criminal Case No. 1106 of 2011 from which this appeal arises, barely two weeks thereafter on **6.1.2012**, it is indicated that they were facing two cases, which is given as criminal case no. 34 of 2012 in which according to the police records presented after conviction in the present case they were on **13.1.2012** on their own plea of guilty sentenced to imprisonment for 2 years for escape from lawful custody against the 2nd appellant and for 4 years for aiding a prisoner to escape against the 1st appellant, among other charges. Such time spent serving a sentence cannot, in my view, be considered time spent in custody for purposes of section 333 (2) Proviso of the CPC. It is not clear whether the trial court in the said criminal case no. 34 of 2012, in convicting the appellants took into account the three weeks from the 22.11. 2011 when the appellant had been in custody. It was also not clear from the record how much of the three weeks, the 2nd appellant had been out of custody while on escape form lawful custody.

Consecutive or concurrent sentences

19. In the circumstances of this matter, it is section 37 of the Penal Code which applies and which provides for the Court to give directions s follows:

“37. Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:”

20. The general principle is that sentences for subsequent offences shall be executed consecutively. Unless the court otherwise directs. In this case the Court considered the matter and ordered that the sentences be served consecutively, which was within the discretion of the Court and for which nothing wrong **in principle** has been shown to warrant the interference thereof by this Court. See **Wanjema v. R.** [1971] EA 493 where it was held that:

*“The appellate Court should not interfere with the discretion of which the trial court has exercised as to sentence unless it is evident it overlooked some material factors, **acted on a wrong principle** or sentence is manifestly excessive in the circumstances of the case.”*

21. The principle is that in cases where the offences are part of the **same transaction**, concurrent sentence should be ordered. The Court in **Odero v. R.**, [1984] KLR 621, (**Bratt and Mbaya, JJ.**) explained the principle as follows:

*“In cases where a person has been charged with and convicted of two or more counts involving the **same transaction**, the practice is to direct that the sentences should run concurrently: see **R v Fulabhai Jethabhai & Another** [1946] 13 EACA 179. We think that in the instant case the three counts for which the appellant was convicted were a series of offences founded on the same facts and **committed in the course of the same transaction**. That is why the three counts were joined in one charge as is envisaged by section 135(1) of the Criminal Procedure Code (cap 75). The phrase **“same transaction”** was considered by the former Court of Appeal in **Rex v Saidi Nsabuga s/o Juma and another** [1941] 8 EACA 81 and explained again by the same court in **Nathani v R** [1965] EA 777. The court said that the proper construction of the phrase **“same transaction”** is that:-*

“if a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.”

In the instant case the series of acts were the rumour-mongering which the appellant indulged in within the proximity of eleven days from the first act of December 7, 1982 to the last one on December 19, 1982. There was continuity of action and purpose, for what the appellant did was merely to repeat publication of the very rumour he spread on the first occasion”

22. Not so in different unrelated offences as in this case where the other charges were for escape from lawful custody.

ORDERS

23. Accordingly, for the reasons set out above, the Court finds no merit the respective appeals of the appellants and the same are dismissed.

DATED, SIGNED AND DELIVERED ON THE 25TH DAY JANUARY 2018.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Appellant in Person.

Ms. Macharia Ass. Director of Public Prosecutions for the Respondent /Defendant.