



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 74 OF 2018

EZEKIAH OCHAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the Judgment of C. Obulutsa, Chief Magistrate, in Eldoret Criminal Case No. 3664 of 2013 delivered on 17th September 2018]

JUDGMENT

1. The appellant (**EZEKIAH OCHAMA**) was convicted on a charge of stealing stock Contrary to Section 278 Penal Code, keeping government stores Contrary to Section 324(3) as read with Section 36 of the Penal Code, and preparation to commit a felony Contrary to Section 308 (2) of the Penal Code and sentenced to serve 18 months imprisonment on each count. The sentences were to run concurrently.

2. The background to the matter is that on 25.7.2013 at **MANYONYI** village the appellant jointly with others not before court stole two bulls and one cow worth Kshs.106,000/-, the property of **JOHN OKWEMBA ALELA**.

3. Further on 13th August 2013 at **MANYONYI** Sub-Location within **KAKAMEGA** County, he was in possession of public stores namely one 88 pack, two smock jungle trousers, one military pullover, two bush tents, one green military belt, and three empty ammunitions wooden boxes the property of disciplined forces namely Kenya Army, which was suspected to have been stolen or unlawfully obtained. On the same date at **KONA MBAYA** village in **LUGARI** district, within **KAKAMEGA** County, not being at his place of abode had with him an article for use in the course or connection with stock theft namely 10 sisal ropes, two bags of saw dust and timber measuring 5 ft.

He denied all the charges.

4. **JOHN OKWEMBA** (PW1) told the trial court that while asleep in his house within **MANYONYI** village on 25.07.2013 at about 11.00pm he woke up to go outside and answer a call of nature. He also decided to inspect his homestead generally, as he kept cattle.

While moving around the compound using a torch, he realized that three of his cattle were missing from the herd i.e 2 bulls and 1 cow.

5. He woke up his son **WILLIAM NDETA** and they followed the animal foot prints towards the river. While at the river, he heard the sound of a vehicle and rushed towards it, only to find his very animals being loaded onto the vehicle.

He stated;

“ I had put off my torch. On reaching the road, I lit my torch. The chicle was 10 metres ahead of me. It had loaded the cattle on it. Behind it there were three people hanging therefrom. Those were my three cattle. It was an (sic) Isuzu Pick-up white in colour, the metal body was black. Registration Number KAB 588V. The people around the pickup had on jungle green clothes like for police officers.”

6. When he screamed for help, the motor vehicle sped off. He made a report to police at Lumakanda Police Station. The animals whose value was given as Ksh,106,000/- (the bulls being valued @Ksh.40,000/- each, and the cow 26,000/-) were never recovered. The bull was black with a white patch on the forehead, the other was almost red with white patches, and the cow was white.

7. Later police who had impounded three vehicles, called him to the station and he identified KAB 588V as the motor vehicle he saw with his animals that night. He explained that he was not able to identify the three people he saw at the back of the pick-up that night.

8. On cross examination PW1 said he did not see the appellant that night – apparently the appellant was well known to him as a neighbour’s

son. All he could tell is that the 3 people at the back of the pick-up wore jungle green uniforms. It was police who told him the appellant was among the people intercepted driving the motor vehicle. Further on the night of the incident, he could not tell whether the motor vehicle belonged to the appellant.

9. WILLIAM OKWEMBA (PW3) confirmed accompanying his father to track the missing animals. He too saw the Isuzu Motor Vehicle which was packed by the roadside that night – with its lights off. He noticed that the occupants had army – like clothes. He got close to the motor vehicle and realized that the driver had something, which looked like a pistol. He drew close and recognized the driver was Ezekiel whom he knew. That is when he raised an alarm and informed his parents about his sightings.

10. On 13.08.2013 while on his way home, PW3 spotted the same vehicle parked near Furaha Bar. The appellant, and his co-accused were beside the motor vehicle. PW3 boarded a motor cycle and rushed to inform the police what he had seen.

11. A road block was mounted, but the occupants of the motor vehicle refused to obey police warning to stop and police had to use force to stop it. The other occupants fled but the appellant who was the driver was arrested.

The motor vehicle had saw dust, nine ropes and a wooden plank. A search in appellant's house yielded an empty ammunition box, 2 bush tents, military pull overs, jungle trousers and a bag.

On cross examination PW3 stated that on the night when they were tracing the animals, he saw the appellant inside the motor vehicle which had loaded the animals and the appellant wore army jungle uniforms.

12. PC LAWRENCE NALO (PW2) confirmed receiving a call from PW3 to the effect that he had spotted a vehicle which had been used to steal their cattle, and that the motor vehicle was being driven towards Lumakanda. He gave the number as KAB 588 V.

The police were able to intercept the motor vehicle which was being driven by the appellant. On searching the motor vehicle the police recovered many ropes, saw dust and timber. Police accompanied him to his house where a search recovered 88 pack, two jungle trousers, a military pullover, two bush tents, green military belts, three empty wooden ammunition boxes – all kept in a small room which looked like a store.

On cross examination PW2 stated;

“...When we flagged Ochama down, he attempted to drive off but was blocked by our vehicle...”

13. The appellant later accompanied police to Kitale to show them the other accomplice. Photographs of the intercepted motor vehicle were taken and later produced as exhibit.

14. In his sworn defence, the appellant denied stealing the animals, saying he was only carrying saw dust, and was on his way to split firewood using the motor vehicle in question, when he was arrested.

15. He denied being in possession of the military equipment insisting that he did not know where police got them from.

16. In his judgment, the trial magistrate noted that the appellant in his defence did not address himself to particulars of the charge relating to stock theft, and the evidence that he was seen in military uniform, leaving with the animals that night. Further that PW3 who saw him recognized him as someone he knew and gave his name as Ezekiel. The trial magistrate observed the motor vehicle was intercepted, the appellant was found driving and inside were sisal ropes, saw dust (items said to be used in, ferrying cows on pick-ups).

It was not lost to the trial magistrate that inside the appellant's house was recovered inter alia as military uniforms, his son named Patrick was present; and the appellant did not deny that he had a child by that name.

17. The appellant appeals to this court on grounds which he has referred to as mitigation grounds.” He urges that the sentence meted be commuted to a non- custodial one such as Community Service or Probation. He explains that he has a disabled brother who is sickly with no one to assist, he has children who depend on him and where basic needs like education is now threatened. Also that being a first offender, he deserves better.

18. Basically, the appeal is on sentence only. In opposing the appeal, MS Mumo on behalf of the State submits that the sentence was lenient as the Act grounds for a maximum sentence not exceeding 14 years.

I decline to consider either submissions on conviction as that did not form a ground in the appeal and therefore offends Section 350 (2) of the CPC which provides that;

A petition of appeal shall be signed if the appellant is not represented by an advocate, by the appellant, and, if the appellant is not represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal with the appeal may be served on the appellant or, as the case may be, on his advocate; **and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal.**

19. On sentence, for an offence under Section 278 the Penal Code provides;

If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.

For an offence under Section 324(3) as read with Section 36 of the Penal code, the Penal Code provides;

Any person conveying or having in his possession, or keeping in any building or place, whether open or enclosed, any store being the property of the disciplined forces, which may reasonably be suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, shall be guilty of a misdemeanor.

For an offence under Section 308(2) of the Penal Code, the penalty provides as follows;

Any person who, when not at this place of abode, has with him any article for use in the course of or in connection with any burglary, theft or cheating is guilty of a felony, and where any person charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.

20. Taking into account the nature of the offence, and the nature of the animals, as well as the fact that none of the animals was recovered in agreement with MS Mumo that an 18 months sentence which runs concurrently was extremely lenient. I therefore decline to interfere with the sentence.

The appeal lacks merit and is dismissed.

DELIVERED, SIGNED & DATED AT ELDORET THIS 10TH DAY OF JUNE 2019.

H. A. OMONDI

JUDGE