



Kitifia v Republic

High Court, at Mombasa July 10, 1992

Omolo J

Criminal Appeal No. 76 of 1992

July 10, 1992, Omolo J delivered the Judgment.

I have consolidated the appeals of Papai Yaramo Ngoholo (Papai) and Makunga Kitifia (Makunga). The two of them were among a group of 3 people who were jointly charged before the resident Magistrate at Voi of two counts of stock theft contrary to Section 278 of the Penal Code, and one count of trespass in the National Park Contrary to Section 13(2) (a) of the wildlife Conservation and Management Act. In addition Papai was charged on a third count with being unlawfully present in Kenya contrary to Section 13(2) of the Immigration Act. They were convicted on all these counts and sentenced accordingly. The two of them now appeal against their convictions.

On the two charges of stock theft, two boys Zengete Maweu (PW.1) and Wambua Thomas Mutunga (PW.2) were looking after their parents' cattle on the 10th June, 1990. It was the evidence of the two boys that while in the grazing field they were attacked by a group of 3 Masais who after chasing away PW.1, escaped with the cattle they were herding. PW.2 was left to go after he had been taken with the stolen cattle for some distance. The theft took place in broad daylight at about 10 a.m. PW.1 and PW.2 swore that these two appellants were among the 3 people who took away the cattle from them. The matter was reported to the game rangers at Jipe Camp and it was the evidence of 3 game rangers, Ekusi Louwaposi (PW.6), Nathan Kiraka (PW.7) and Boas Waiswa (PW.8) that upon receiving the report they borrowed a vehicle at Jipe Camp and after driving for about 10 kilometres within Tsavo National park, they came upon 3 people driving away the cattle. On seeing them the 3 people left the cattle and started to run away, but they were chased and all the 3 were caught. It was the evidence of these 3 witnesses that the two appellants were among the 3 people they chased and caught, and that at no time during the chase did the three disappear from their sight. When put to their defence, the appellant Makunga chose to say nothing in his defence while Papai alleged in an unsworn statement that he was arrested at 9 a.m. while taking cattle to graze at Salaita area. According to him he was arrested because he was found in the game park. Papai said that he was not arrested in the manner alleged by PW.6, PW.7 and PW.8. The learned magistrate believed the witnesses for the Republic and disbelieved the unsworn statement of Papai. In her judgment, however, she wrongly says that because Makunga had chosen to keep silent, he was to be taken as having admitted the truth of what the prosecution said against him. That was clearly a misdirection because in a criminal trial, an accused person is entitled to elect to say nothing as Makunga did and such an election does not in any way mean that the accused admits the charge or the allegations made against him by the prosecution. On the evidence however, it is clear that the appellants were guilty of the offences charged against them. Although PW.1 and PW.2 only made dock identification of the two appellants, their evidence was fully supported by that of the 3 game rangers who swore that they found the 3 appellants driving away the cattle towards Tanzania. The 3 witnesses stated that they did not know any of the 3 people they found with the cattle, and it is clear from the evidence that it was PW.6, PW.7 and PW.8 who arrested the two appellants on the 10th June, 1990, and the two appellants were arrested by those witnesses at around 3 p.m. It is true that the animals with which the appellants were arrested were not produced before the court as each appellant complained in his grounds of appeal, but the photographs of the animals were produced and the photographs were identified by all the witnesses who could have been expected to identify them. The 3 wardens said that they arrested the appellants in possession of the animals and the appellants were taken to Jipe camp with the animals. The prosecution should have photographed the animals before releasing them to their respective owners, but it is to be remembered that large herds, in all 77 beasts, were involved. Once the evidence of PW.6, PW.7 and PW.8 was believed, and there was no reason in not believing them, then it is obvious that the appellants were arrested while

driving away the cattle and those were the same animals which had been stolen from PW.1 and PW.2 on that day. PW.1 and PW.2 were also certain tht these two appellants were among the people who took away their cattle and as the trial magistrate pointed out the theft was in borad daylight, and PW.2 in particular was with the appellants for a considerable period of time as he was made to go with them for some distance before being released. The two counts of stock theft were proved against each appellant beyond a reasonable doubt. On the 3rd count of trespass in the National Park, it is clear the two appellants were found in the park and they were there for illegal purpose viz. walking through the park with stolen cattle. They obviously trespassed in the National Park. The charge of unlawful presence in Kenya against Papai was never proved as it was merely alleged that he had no identity card or nay other identifying document. Lack of possession of an identity card cannot mean that a person is not a Kenyan. A Kenyan can fail to register and that is a different offence under the Registration of Persons Act, but cannot by itself make a person a non- Kenyan. The Republic does not support the conviction of Papai on that charge. I accordingly dismiss the appeal against convictions on the first, second and 3rd counts. But I allow the appeal of Papai against conviction on the charge of being unlawfully present in Kenya, quash the conviction recorded thereon and set aside the sentence and order of repatriation imposed there.

The sentences imposed on the charges of stock theft and trespass are reasonable and I need not interfere except that the learned magistrate failed to impose corporal punishment on the 1st counts of stock theft. Corporal punishment is mandatory under section 278 of the Penal Code. I now order that each appellant shall receive 1 stroke of the cane on each of the two counts, viz. counts 1 and 2, making a total of 2 strokes of the cane against each appellant. These shall be my orders on the two appeals.