



REPUBLIC OF KENYA

Shinda & 2 others v Republic

High Court, at Kisii

April 11, 1991

Patel J

Criminal Appeals Nos 12, 13 & 24 of 1991

Criminal Law – stock theft – appellants alleging to have been voluntarily given 11 heads of cattle by the complainant as compensation for those allegedly stolen by the complainant – whether retention and eventual sale of the cattle amounted to theft.

The appellants were jointly charged with stock theft contrary to section 278 of the Penal Code.

Three of the accused persons who were police officers were acquitted by the trial court on the ground that they were merely carrying out the orders of their superior.

The evidence on which the appellants were convicted was that they in the company of other men went to the home of the complainant looking for some stolen cattle.

It was the appellant's defence that they traced the cattle tracks up to the complainant's home and upon being asked why the tracks of the stolen animals ended in his home he could not offer any satisfactory information. The police therefore decided to arrest him as a suspect.

The complainant, it was alleged, offered to give away some 11 heads of cattle as compensation for the lost animals which was agreed but he was all the same arrested and later released.

Meanwhile the 11 heads of cattle were given to a one Elizabeth whose animals had been stolen to keep awaiting the tracing of her stolen herd.

It was her evidence that she kept them for six months with no claim and the police later advised her that she could deal with them as she desired. She therefore sold them. In convicting Elizabeth (3rd appellant) the trial court said that since she had sold the cattle while knowing that they did not belong to her, it must be concluded that she appropriated the cattle to permanently deprive the complainant of them and this amounted to theft.

Held:

1. The cattle were given to the 3rd appellant with the knowledge of the police who asked her to keep them and later allowed her to deal with them as she wanted. She never knew that they had been stolen from the masai complainant.
2. If what the police and the two appellants said about the voluntary giving away of the cattle by the complainant were to be true the allegation of theft and the finding to that effect are demolished.

Appeal allowed.

Cases

No cases referred to.

Statutes

Penal Code (cap 63) sections 278, 322(2)

Advocates

Marwa for the 1s & 2nd Appellants.

Mr Gumo for the Respondent.

April 11, 1991, **Patel J** delivered the following Judgment.

Appeal Nos 12, 13 and 24 of 1991 are consolidated. The three appellants, Kuria civilians were jointly charged with four police officers for stock theft, contrary to section 278 of the Penal Code. The alternative count against all the seven accused persons was that of handling stolen property, contrary to section 322(2) of the Penal Code. The first three accused were convicted of stock theft, whereas the fourth, sixth and the seventh accused were acquitted. The fifth accused died during the Court of the trial.

The evidence for the prosecution was that some 50 Kuria civilians, which included the second and the third accused (1st & 2nd appellants) went to the home of the Masai complainant (PW1) looking for some stolen head of cattle. The police officers (accused Nos 4-7) were in their police uniforms armed with their rifles. The Kuria tribesmen were armed with bows, arrows, spears and rungun. The said group took away 11 head of cattle of the complainant by force. The complainant was also arrested by the four police officers. He was taken to the police station but was released later. The 1st accused Elizabeth (the third appellant) was convicted because she admitted that the said 11 heads of cattle were given to her and later she sold them away.

All accused persons made their defences on oath. The 1st accused (Elizabeth) said in her defence that her 11 head of cattle were stolen on the night of 8th July, 1987. She raised an alarm and reported the matter at Kehancha police station and the chief. The Chief gave her a letter to take to GSU at Nyamutiro. She returned at 3 pm to find the 11 head of cattle from Masailand in her *boma*. The next day she went to Kehancha police station, the police informed her to keep the said cattle for few days till her stolen cattle were traced. She denied knowing that the 11 Masai head of cattle were stolen. It is in her evidence that the cattle remained with her for six months. She added that she was informed by an inspector at Kehancha Police Station that she can deal with the cattle the way she wanted as they were as payment to her by Masai for her stolen head of cattle. Later she sold away the cattle as she needed money. She never knew the actual owner of the cattle. She would not have known him because she was not in the group of the 50 Kuria civilian trackers.

In convicting Elizabeth, the learned magistrate said that since she knew that the cattle did not belong to her and she sold them away, it must be concluded that she appropriated the said cattle and permanently deprived the complainant of his cattle and this amounted to theft. With the utmost respect, this finding cannot be supported. The cattle were given to her with the knowledge of the police who asked her to keep them and later allowed her to deal with them as she wanted. She never knew that they were stolen from the Masai complainant, if indeed they were so stolen. She was in touch with the police after finding the cattle in her *boma*. There was no evidence, it is clear, of the required *mens rea* on her part.

I take the appeals of the 2nd and third accused persons together. Both of them, I find were in the group of some 50 civilians who went to the home of the Masai complainant at around 8 am on 9th July 1987 in the company of the four police officers who were the co-accused in the case. The defences of these two

appellants were that they had heard the screams of Elizabeth during the night when her cattle were stolen. They joined the rest of the villagers and the four police officers to track down the thieves following the foot prints. The prints led them up to the home of the complainant whom the police officers interrogated. The complainant enquired as to the number of the cattle stolen and was informed that they were. The police asked the complainant to explain how the footprints ended in his home. The police decided to arrest him. The complainant had, according to the 3rd accused, over 500 head of cattle. After the interrogation by the police the complainant, according to them, voluntarily selected 11 head of cattle and then gave them away. They all then left with the cattle, the police and the complainant whom the police took to the police station.

The evidence of the three surviving police co-accused is in support of what the two appellants had said. According to the said police officers they were with the group of Kuria tribesmen when they all marched that early morning on the 9th July, to track down the footprints of Elizabeth's cattle. They confirmed that they ended up at the complainant's homestead. The said police officers told the complainant that they had arrested him. They continued to say that some other Masais came there from the neighbourhood and they wanted to talk with the group of the Kurias. After they did so the complainant told the police that he would give his 11 head of cattle to replace the loss instead of going to the police station and so saying he selected the 11 head of cattle and handed them over voluntarily to the Kurias. They (the police officers) still arrested the complainant as suspect for the theft of Elizabeth's cattle and took him to the police station. Later the complainant was released.

In convicting the two appellants, the learned magistrate said that both of them well knew that the 11 head of cattle in question did not belong to Elizabeth. He further added that PW5 in his evidence had said during cross examination that he (PW5) almost fought with the third accused when he threatened to take the complainant's cattle by force and further that it was second accused who drove the cattle away. The learned magistrate also said that the second & third accused who were neighbours of Elizabeth assisted in driving away the complainant's cattle in the joint effort to deprive the complainant of his said cattle. In acquitting the three police officers (I note that the learned magistrate in his judgment found the fourth police officer who was accused No 5 not guilty although he had died before the time for him came to make his defence and as such at the date of the judgment he was quietly resting in his grave) the learned magistrate said that they were acting upon instructions of the officer commanding Kehancha Police Station and that their behaviour was consistent with their duty. He added that they interrogated the complainant and arrested him and there was no evidence that they intended to deprive the complainant's cattle.

I have considered the evidence against the appellants and their defences. I find it totally impossible to support the convictions recorded against them. On the evidence for the prosecution it was not established as to who actually drove the cattle to the home Elizabeth.

Even if one were to accept that the two appellants must have assisted the others in the group in doing so the fact remains that this was done under the very nose of the police officers whom the learned magistrate acquitted saying that they were acting in the course of their duties and he believed them. These police officers were in fact saying to the magistrate in their evidence with one voice that the complainant and his Masai group after discussions with the Kuria group voluntarily gave away the 11 head of cattle in question. There is no specific finding by the court below that the police officers lied when they said no. If what the police and the two appellants said about the voluntarily giving away of the cattle by the complainant were to be true the allegation of theft and the finding to that effect are demolished. The fact that the police, who knew well that the cattle were with Elizabeth from the 9th July onwards, made no effort to retrieve them from her would go to suggest that the complainant had given away the cattle. It is not possible to believe that the cattle were taken away by force from the complainant by some people that morning when the police officers were present there at the time with their rifles loaded.

For the above reasons I allow the appeals and quash the convictions of the appellants. The sentences are set aside and it is ordered that the appellants be released forthwith unless otherwise lawfully held.