

IN HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO 508 OF 1986

FARAH.....APPELLANT

V

REPUBLIC.....DEFENDANT

JUDGMENT

November 28, 1986 Mbaluto J delivered the following judgment.

The appellant was convicted on 3 counts, two of stealing stock contrary to section 278 and one of assault causing actual bodily harm contrary to section 251 of the Penal Code. For each of the first two counts he was sentenced to serve the mandatory 7 years imprisonment with 3 strokes and on count 3 he was imprisoned for 3 months. The terms of imprisonment on all the counts were to run concurrently. His appeal is against the convictions and sentences on all three counts.

The particulars on count 1 allege that on January 24, 1986 at Gatunyaga Ranching Company in Kiambu District the appellant stole one cow valued at Kshs 2,000 the property of Samuel Gichia Mwege and the particulars in count 2 allege that on January 24, 1986 at the same place he stole 21 goats valued Kshs 7,000 the property of Wamengi Ngare.

The evidence in support of the charge relating to the theft of the goats was from PW 5, PW 7 and PW 9. A careful evaluation of the evidence reveals that all PW 5 admitted having assisted the appellant to get a place to keep the goats. He was a butcher and knew that the appellant owned no goats but by his own admission he took the trouble to persuade another man PW 7 to keep the goats in his house. Accordingly to the evidence of police constable Duncan Wachira (PW 8), the person who was found with the goats (PW 6) said he was keeping them for PW 5.

PW 7 admitted keeping the goats in his house and giving three of them to PW 9 and his turnboy. This was done in the absence of the appellant. Surely if PW 7 thought that the goats belonged to the appellant, he could not have been so willing to give away 3 of them to PW 9 without the appellants authority. In my view all the three witnesses PW 5, PW 7 and PW 9 were in one way or the other involved in the theft of the goats and in those circumstances their evidence implicating the appellant should have been treated with great circumspection. That the learned trial magistrate did not do so in his judgment was fatal to the conviction. He truly failed to warn himself of the dangers of relying on the evidence of these three witnesses who obviously knew more about the matter than they told the court. For example the only witness to be called in support of the 1st count ie the alleged theft of the cows PW 6 is said by PW 8 to have been found with the stolen goats; yet his witness in his evidence implicating the appellant in the theft of the cow said absolutely nothing of the goats. This makes his evidence suspect. Moreover the appellant is alleged to have been arrested by the local sub-chief and PW 6 who is a youthwinger. PW 6 was implicated in the theft of the goats by PW 8 it was in my view unsafe to base a conviction of the theft of the cow on the incorroborated evidence of this witness.

For the above reason I am not satisfied that the two counts of stock theft contrary to section 278 of the Penal Code were proved to the degree required in criminal cases. The conviction were therefore unsafe and must not be allowed to stand. Accordingly the appeal against conviction on count 1 and 2 is allowed, the convictions quashed and the sentence meted out set aside. The appellant is to be set free forthwith

unless otherwise lawfully held.

As regards the conviction on count III I have carefully reviewed and evaluated the evidence in support of this charge fully satisfied that there was more than ample evidence from the complainant PW 3, PW 4 and PW 10 to prove the charge of assault causing actual bodily harm. The conviction was therefore sound and I affirm it. The sentence of 3 months imposed upon the appellant was not manifestly excessive and neither was it arrived at by application of wrong principles. I would therefore dismiss the appeal against convictions and sentence on count III in its entirety. Orders accordingly.

November 28, 1986

MBALUTO J