



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CRIMINAL APPEAL NO 75 OF 1981

BETWEEN

LONGOLEMIK.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged in the court of the Resident Magistrate at Kitale with, in the first count, stealing stock contrary to Section 278 of the Penal Code and in the alternative, in the second count, with handling stolen stock contrary to Section 322(2) of the Penal Code. He was acquitted on the first count, but convicted on the alternative count and sentenced to the prescribed minimum sentence of seven years' imprisonment. Thirteen days after sentence, he was brought back before the same Resident Magistrate and ordered to be subject to five years' police supervision after his release from custody. Learned State Attorney, Mr Chunga, had doubts about the legality of the police supervision order as in his view the learned magistrate was *functus officio* when he made that order. We share that doubt and think the case file should have been submitted to the High Court for the necessary order to be made in its revisional jurisdiction. We propose to say no more about this aspect of the case for reasons which will become apparent.

The facts of the case are as follows. Six head of cattle were stolen from the *boma* of Richard Waswa on May 23, 1979. On June 7, 1979, four of these animals, two cows and two calves, were found in the appellant's *boma* by police officers and members of the Stock Theft Unit. The appellant at once told these people that these animals had been brought to his *boma* by two men called Peter and Lamilin and that he had exchanged them for two of his own steers. He has consistently adhered to this story from the beginning, in his explanations to the persons who arrested him, to Chief Inspector Kibiego to whom he made a charge and caution statement which he adopted at his trial, and in his sworn evidence at the trial. In addition he called three witnesses who deposed that they were among a number of neighbours and elders who were called by the appellant to his home to witness the exchange. They were satisfied after enquiry from Peter and Lamilin that there was nothing wrong with the transaction, and one of the people present drew up a memorandum in writing setting out the details of the transaction. The appellant was unable to produce this document at the trial. He deposed, and there is no reason to disbelieve him, that it was earlier produced in evidence in the No 2 court at Kitale in another case in which he was charged with uttering a false document and acquitted. No attempt seems to have been made to obtain that document from the other court, which we understand is in the same building.

The Resident Magistrate seems to have believed the appellant's story in general, as he found the appellant

not guilty of stealing the animals. In convicting the appellant of handling, the learned magistrate expressed himself as satisfied beyond doubt that when the appellant came into possession of the four head of cattle, he had “more than ample reason” to believe they were stolen. He based this finding on “small but significant” discrepancies in the evidence of the defence witnesses, on the “apparently excessive precautions” taken before the animals were exchanged and on the failure of Peter to supply receipts or other proofs of ownership. On this last point, the appellant had deposed that Peter had told him that he had bought the cattle at Cheptuya Trading Centre and that receipts are not given for sales at the Trading Centre, but only when cattle are sold by auction. This evidence was unrebutted.

The appellant appealed to the High Court, where his appeal was summarily rejected.

On this second appeal, Mr Chunga began by saying that he supported the conviction, but after exhaustively reviewing the evidence he altered his stand, and doubted whether the conviction should be supported. Mr Chunga cited the case of *Kipsaina v Rep* [1975] EA 253, in which it was held that a person charged with handling was entitled to be acquitted if his explanation was reasonable and possibly true. In this case the trial magistrate obviously accepted the appellant’s explanation as reasonable, as he acted on it in acquitting him of stealing the cattle and in convicting him of handling. He did not believe the explanation to be true in that he rejected the appellant’s assertion that he did not know or have reason to believe that the cattle were stolen. We again share Mr Chunga’s doubts, this time as to the propriety of the appellant’s conviction on the handling charge. The discrepancies in the evidence of the defence witnesses, which unfavourably impressed the trial magistrate, were in our view such as could be expected from honest witnesses, giving evidence to the best of their recollection of events which had taken place nine months earlier. For it to be held that the appellant had taken “apparently excessive precautions” to satisfy himself that the animals were not stolen property seems to us not to justify an adverse inference being drawn. The appellant’s evidence as to the absence of receipts in the case of cattle bought at the Trading Centre was unrebutted.

In all these circumstances, we think that the appellant’s explanation for his possession of the stolen cattle was reasonable and possibly true. That it was untrue was not, in our view, established beyond reasonable doubt.

We are of the opinion that he is entitled to the benefit of that doubt, and that he should not have been convicted of handling.

We accordingly allow this appeal, quash the conviction for handling, contrary to Section 322(2) of the Penal Code and set aside the sentences of seven years imprisonment and five years police supervision passed on the appellant.

Dated and delivered at Nairobi this 24th day of March, 1982.

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR