



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Madan, Miller & Potter JJA)

CRIMINAL APPEAL NO. 53 OF 1981

BETWEEN

MWITA WAMBURA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Madan JA This is yet another second appeal arising out of the first appeal being summarily rejected by the High Court under Section 352(2) of the Criminal Procedure Code.

We commend for the attention of the learned judges of the High Court, our judgment delivered earlier today in James Obiri, Criminal Appeal No 58 of 1981(Kisumu), where we stated in detail the practice to be followed when considering summary rejection of a criminal appeal, The appellant was convicted of stealing stock contrary to Section 278 of the Penal Code, and sentenced to seven years imprisonment, two strokes and a five year reporting order. The appellant’s memorandum of appeal in the High Court was on the basis of identification as to whether the two head of cattle, a cow and a heifer, found in his possession belonged to him or the complainant, the appellant also claimed that he had both identification marks and veterinary stamps from Narok District and Rift Valley Province on the two head of cattle.

When the question of identification of stolen property is raised in a memorandum of appeal as it was in this case the appeal ought not to be summarily rejected unless it is so clearly a frivolous ground of appeal as to be totally ineffective. It is common knowledge that however ardent the complainant is in recognizing stolen property as his, cases of mistaken identification frequently occur.

The appellant gave to the court the identification marks of the two allegedly stolen cattle which were found in his possession — South Nyanza mark on the left side of the neck, “N” on left side of the hump, “O” on the left hind leg, “R” on the right side of the hump, two lined fire marks on the right side of the stomach, and two more on the left hind leg.

He said both ears had several cuts all round, with the cow cut at the tip. He said the heifer had one curved line fire mark on the right side of the stomach, and two lined marks at one end; also, there was a lined burnt mark across the nose and the left ear was cut off half-way. The court viewed the cattle. The right ear of the cow had four cuts and the left ear three cuts.

There was a veterinary mark SS2; there were two lined marks' on the left and right hind legs, a fire mark on the hump and two fire marks on the front right leg across; there were two fire marks on the right cheek, the left hind leg had something that looked like the figure 3. The heifer's left ear was cut half way. There was one fire mark curved going from the right hind leg to the right side of the stomach, and another similar one on the left side. The front legs had two parallel burnt marks. There were fire marks from the nose, both ears and one fire mark on the right and left sides of the ears.

The magistrate said that some of these marks were mentioned by the parties, ie the complainant and the appellant. He said he did not think there was a veterinary mark SS2 anywhere in Kenya unless he was given evidence to that effect. This was a misdirection for he qualified himself as a veterinary marks expert without any basis. He himself saw the mark on the cow. There was no evidence before him that it was a spurious mark, or that there was no such veterinary mark SS2 anywhere in Kenya. It may well have been the South Nyanza veterinary mark mentioned by the appellant. Therefore, the magistrate was not justified in saying that he did not see the South Nyanza veterinary mark on the cattle.

The magistrate also did not give any consideration to the marks on ears, the hump, the hind legs, the curved lined fire marks on the right side of the stomach which the appellant described and which the magistrate saw for himself on the cattle. The appellant's description of the marks on the cattle was so detailed and so close that it raised the possibility of his claim of ownership being true. The complainant's description of the marks on the cattle was nowhere as detailed and as definitive as that of the appellant. Although the complainant talked of a veterinary mark on the right ear, he produced no identification mark or veterinary stamp in respect of it which as a prudent owner of cattle he should have had in his possession.

The appellant was entitled to the benefit of the doubt. The appellant was convicted of stealing six head of cattle although only one allegedly stolen cow and one heifer were seized from his possession. State counsel did not support the conviction. We think it would be unsafe to allow the appellant's conviction to stand. We quash it, set aside the sentence and the reporting order.

The appellant is to be set at liberty.

As **Miller** and **Potter JJA** agree, it is so ordered.

Dated and Delivered at Kisumu this 30th day of November 1981.

C.B.MADAN

.....

JUDGE OF APPEAL

C.H.E.MILLER

.....

JUDGE OF APPEAL

K.D.POTTER

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR