



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Law, Miller & Potter JJA)

CRIMINAL APPEAL NO. 68 OF 1981

BETWEEN

JAPHETH OSUNGA WALOME.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted of stealing one head of cattle, contrary to Section 275 of the Penal Code, and was sentenced to 9 months imprisonment, by a District Magistrate at Siaya. He did not appeal to the High Court, but through an advocate he applied to the High Court asking:

- a) for bail pending appeal, and
- b) for the case to be disposed of on revision.

The learned judge (Scriven J) expressed the view that the conviction was sound, as he could see no “patent omission or misdirection on the magistrate’s part, such as to require revision, and he pointed out that if he were to revise the case, he would be bound to hold that the appellant was in effect (although charged under the wrong section) charged with stock theft, for which offence, the minimum statutory punishment is 7 years imprisonment. He dismissed the application. The appellant has appealed against that order. It should be noted that he has never lodged an appeal against his conviction. His complaint is that the judge should not have rejected his application for the case to be revised. In our opinion, the appellant’s appeal is based on a misconception.

Revision is a discretionary remedy. Where the revisionary jurisdiction is exercised, a right of appeal lies under Section 361(7) of the Criminal Procedure Code, but where the judge declines as was in this case to exercise that jurisdiction, then there is no right of appeal. A judge is not bound to accede to an application for revision, all the more so if he has reason to think that the applicant was proposing to appeal as was the case here, as he had included an application for bail pending appeal in his application for the case to be revised. Furthermore, subsection (5) of Section 364 of the Criminal Procedure Code, makes it clear that a party who has a right of appeal, like the appellant in this case, cannot insist on the case being entertained in revision, although the High Court is not of course precluded from exercising its revisionary jurisdiction *sui motu* if it thinks fit, even if the aggrieved party has a right of appeal, see *Republic v Ajid Singh* [1957] EA 822

We doubt if we have jurisdiction in this matter, although the learned judge purported to give leave to

appeal. But even if we have jurisdiction, we see no merits in this appeal, which we order to be dismissed.

Dated and Delivered at Kisumu this 1st day of December 1981.

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

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR