



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 495,496 & 497 OF 1977 (CONSOLIDATED)

1. MUCHOKI MRIMA

2. MUSYOKA KAMUTI

3. MARIMUM MURIU.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

On 30th September 1977, when these three consolidated appeals came up for hearing before us, we quashed the convictions of all the three appellants for stock-theft and set aside the sentences passed upon them. We substituted, in lieu thereof, convictions for simple theft, contrary to section 275 of the Penal Code, and fined each appellant Shs 300, the total of fines to be paid over to the complainant as compensation. These fines having been paid, we ordered the appellants to be released forthwith.

Before we give our reasons, we consider it pertinent to make some observations on the petitions of appeal before us, all of which have been drawn and filed by Mr Ndeto Mututo, counsel for the appellants, and all of which are identical in terms. They have caused us concern since they are quite unsatisfactory and of no useful assistance to us in deciding these appeals. The first ground of appeal of each appellant is that the prosecution had not proved its case beyond reasonable doubt; but that does not make us any wiser. What the shortcomings of the prosecution case were, or if there was any conflict of evidence, or contradictions or inconsistencies in these evidence of various prosecution witnesses, or if the identification of the stolen animal had not been properly established has not been specified. The second ground of appeal is that the prosecution has not proved all the essential elements of the charge; but, again, which particular element has not been established has not been specified, and we are none the wiser after perusing this ground of appeal.

Under section 350(1) of the Civil Procedure Code, every appeal to the High Court shall be made in the form of a petition in writing. We are of the view that the use of the words “memorandum of appeal”, as in the present appeals, should be stopped, and the more appropriate words “petition of appeal” must henceforth be used in all petitions of appeal.

However, dealing with the substantial issue we have raised, section 350(2) of the Criminal Procedure Code requires that every petition of appeal shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred. We have emphasised what we consider is the operative word of this requirement. Unless an appellate court knows exactly what is the

alleged shortcoming of the lower court, a petition of appeal will not serve much useful purpose.

In *Mutemba s/o Rutehenda v R* (1953) 20 EACA 276, the Court of Appeal for East Africa ruled that a petition of appeal should bear an intelligent relation to the facts as revealed by the evidence and should not degenerate into a stereotyped form. In *Riano s/o Lenalaimer v R* [1960] EA 960, the Court of Appeal held that it is not a sufficient ground of appeal to allege that a conviction was bad in law, or that a conviction was against the weight of evidence, and where an appellant is represented by counsel he will not be allowed to argue any point under a general ground of appeal. In *Osongo v The Republic* [1972] EA 170, the question arose whether a judge could summarily reject an appeal under section 352(2) of the Civil Procedure Code where it was not a ground of appeal that the verdict was against the weight of evidence. In dealing with it, Spry V-P observed at page 171:

We think that what the judge of the High Court has to do, and did in this case, is to look at the substance of the grounds of appeal and that if, fairly looked at, they amount to no more than a submission that the conviction is against the weight of evidence and the judge is satisfied that the evidence is sufficient and that there is no material raising a reasonable doubt that the conviction was right, he may summarily dismiss the appeal.

As the petition of appeal stood, and had it been so warranted by the record, these were fit appeals for summary dismissal.

The position in England is similar. In order to succeed an appellant must show that under the circumstances of the case the verdict is unsafe or unsatisfactory. It is not a sufficient ground of appeal to allege that the verdict is against the weight of evidence: *Aladesura v R* [1956] AC 49. This decision was approved in *Riano s/o Lenalaimer (supra)*. Nor is it sufficient merely to show that the case against the appellant was a very weak one: *R v McNair* (1909) 2 Cr App Rep 2; nor is it enough that members of the Court of Appeal feel some doubt as to the correctness of the verdict: *R v Simpson* (1909) 2 Cr App Rep 128 (and see *Archbold's Pleading, Evidence and Practice in Criminal Cases* (38th Edn), pages 919 and 920).

The third and final ground of appeal is that the sentence was harsh and excessive. The custodial sentence awarded was the minimum laid down by the law for stock-theft, and this argument could only apply to the award of twelve strokes of corporal punishment to each of the appellants. Had the counsel submitted that, the appellants being first offenders and in the circumstances of the case, the magistrate should have considered alternative forms of punishment like probation or discharge or that he could not be said to have exercised his discretion properly in that he did not at all apply his mind to the alternatives open to him, the counsel would have been on much sounder grounds.

However, as the Court of Appeal stated in *Okeno v The Republic* [1972] EA32, 36:

An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala v R* [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424.

This we had done. The evidence was that the complainant's cow had strayed and got lost. When it was later seen, it was already dead and was being skinned by the three appellants. The possibility of it having been killed by wild animals could not be ruled out. However, even after the appellants had been informed that the dead cow belonged to the complainant, they carried away its meat and hid it. Therefore, they were clearly guilty of simple theft, contrary to section 275 of the Penal Code. However, the complainant and the appellants were all related, and subsequently when they got together it was agreed that the appellants

should jointly pay Shs 900 to the complainant as compensation for the cow. However, the appellants did not fulfil that promise, and the complainant reported the matter to the police. We considered that, in view of these circumstances, it was just and equitable that a conviction for simple theft be substituted and that each appellant be fined Shs 300, the total sum being paid over to the complainant as compensation.

Although it does not arise directly out of this appeal, we deplore the attitude of some counsel who attempt to file two or even more petitions in one single appeal. Section 350(2) of the Criminal Procedure lays down that an appellant shall not be permitted, at the hearing of the appeal, to rely on any ground of appeal other than those set forth in the petition of the appeal, subject to certain exceptions. That section also makes provision for amending a petition of appeal, and we expect those provisions to be adhered to strictly.

Order accordingly.

Dated and Delivered at Nairobi this 5th day of October 1977.

S.J.WICKS

S.K.SACHDEVA

CHIEF JUSTICE

JUDGE