

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: Nyalali, C.J., Mwakasendo, J.A. and Makame, J.A.)

CRIMINAL APPEAL NO. 21 OF 1979

B E T W E E N

1. JOHN MOLLEL)))
2. NDOIVA LEKUTA) APPELLANTS

A N D

THE REPUBLIC RESPONDENT

(Appeal from the Judgment of
The High Court of Tanzania
at Arusha) (Mnzavas, J.)
dated the 15th day of June, 1978,

IN

Criminal Appeal No. 233 of 1977

JUDGMENT OF THE COURT

MWAKASENDO, J.A.:

The two appellants, JOHN MOLLEL and NDOIVA LEKUTA, were jointly charged with one NDIBIJANI LESIANI before the District Court of Monduli on one count of cattle theft contrary to section 268 of the Penal Code. They were all found guilty of the offence and sentenced to five years' imprisonment. On appeal to the High Court NDIBIJANI LESIANI's appeal succeeded but that of the two appellants failed hence this appeal to this Court. The two appellants' appeal to this Court rests essentially on one main ground of appeal, that is, that the first appellate Court erred in forming an unbalanced view of the evidence and reaching a decision which was insupportable if the defence was duly taken into account. Mr. Ntabaye, learned Principal State Attorney appearing for the respondent Republic, did not support the conviction of the appellants.

The facts relating to the charge as found established by the two lower courts can be briefly stated. On or about the 23rd day of August, 1975, at about 3.30 p.m. one TAIKO LASANE (P.W.1), hereinafter referred to as "the complainant", a resident of Engaruka village in Monduli District discovered that his three head of cattle were missing. He immediately raised an alarm and while a search for the missing head of cattle was being conducted by his sons and neighbours, the complainant went to report the matter to the police. On 26th August, 1975, Police Constable ROWLAND (P.W.3), accompanied by LENGARUKA LUMUNEW (P.W.2), the son of the complainant, found one of the complainant's stolen head of cattle among the herd of cattle belonging to one JOHN MOLLEL. And on continuing with their inquiries, they found the second of the stolen head of cattle among a herd belonging to NDOIVA LEKUTA. The third of the stolen head of cattle was subsequently found wandering in the bush. As regards the head of cattle found among the two appellants' herds, it is worth to observe that the two witnesses, ROWLAND and LENGARUKA LUMUNEW were quite emphatic that neither of the appellants was present at the time the stolen head of cattle were seized from their respective herds of cattle and that the two appellants' relatives who were herding the respective herds of cattle at the time readily admitted that the head of cattle found among their respective herds strayed into and joined their respective herds which were then grazing in the fields. Upon these facts the two appellants and NDIBAJANI LESIANI were arrested and jointly charged on one count of cattle theft contrary to section 268 of the Penal Code. JOHN MOLLEL, the first appellant, in his defence on oath told the trial District Court how at noon on 26th August, 1975, while he was at the Tanzania Military

Academy premises in Monduli he got a report that his father's herd of cattle had been stolen. On going to one John Ngao's home he found his father's herd of cattle under the custody of the police. The police asked for his father and on being told that he was away, they asked him to follow them to the police station. When interrogated about the stolen head of cattle which was found among his father's herd, MOLLEL denied any knowledge of how the alleged stolen head of cattle had strayed into his father's herd of cattle. Mollel called one defence witness - MARTIN SKEYEANI - whose short testimony before the trial court was as follows:-

"I live at Ngaramtoni Arusha, before that I lived at Nengun'gu. I know John Mollel as we lived in the same kraal. I was the herdboys. I remember one day I took our cattle to the water at Rasharasha Dam and there I saw a cow. That cow entered our herd. After a while I saw Masai driving the cattle and I ran home and reported of the theft. John was at T.M.A. working and I reported to him. We followed the cattle and found them with the police and he returned the weapon home.".

On being cross-examined by the prosecution MARTIN SKEYEANI said:-

"I took my cattle for water at 1.00 p.m. I was alone. I found the one cow at the Dam drinking water. I was grazing at the corner of Rasharasha sign post, near the start of Mailitisa road. I was grazing alone. There were two Masais. The cow was black with a white spot at the forehead. I did not see other herds near me.".

Appellant NDOIVA LEKUTA in his defence in affirmation told the trial court the following story:-

"I live at Leishaine where I am a peasant and herdsman. I remember on 26/8/75, I took out my cattle and escorted children to the soldiers' farm and I saw one cow coming from the front and I asked the children if they knew the cow and they denied to have known it. I left the child with our cattle and the one which entered and went home. At home I met the ten cell leader and reported to him - so that when the owner comes he should not say we have stolen it. I told him the colour of the cow. He told me that I accompany him to Monduli where he will report. I came to Monduli alone at 1.00 p.m. and as I did not find him I reported. On my way home I saw an old man who

told me that he saw our cattle being driven by Police and Masai. At Co-operative Machine I met the cattle which I told police that they were mine. I also told the police how the cow came there. He gave me our cattle and I handed them to a relative to take home. I came with police and cows to police station. At police I told them that it was the cow I had come to report. We were locked up but released in the evening. We were then charged in court from that date."

In answer to questions put by the court, NDOIVA said:-

"I reported to Lesika at 8.00 a.m. I saw the cattle at 7.30 a.m. It came from Leshaine hill. My report at police station was recorded at 1.00 a.m. I left home at 11.00 a.m. I heard that our cattle had been seized at about 4.00 p.m."

We may note in passing that the prosecution, for reasons best known to themselves, did not consider it fit to cross-examine NDOIVA on his explanation as to how one of the alleged stolen head of cattle strayed into his herd of cattle.

Be that as it may, Mr. D'Souza, learned counsel for the two appellants has vigorously criticised the trial District Court and the first appellate Court for forming what he has described as 'an unbalanced view of the evidence and reaching a decision which was insupportable, if the defence was duly taken into account'. We think counsel's criticism of the two lower courts' decision is well founded. The learned District Magistrate in his judgment at page 17 of the transcript, after dealing with the case against NDIBIJANI LESIANI considered the evidence against the two appellants in these words:-

"Two of the cattle were found in 2nd and 3rd accused's herds while the 3rd cow was found alone in the bush. But the places they were found were nearby 1st and 2nd accused's kraals. I cannot imagine how the cattle could direct themselves to Monduli 50 miles away while there were several Masai villages along. I cannot say they got lost and came to Monduli without being directed by a person or persons. Hence I hold that they were stolen. The remaining question is who stole them. Are the accused connected by the evidence to be the thieves or not. If not who should be held responsible. If we say they are not liable then the complainant gave a false information that his cattle were stolen. I do not find how I should criticise the prosecution evidence as testified that it left doubts to establish its case."

With respect, we cannot accept that this line of reasoning can arise on the primary facts disclosed from the evidence on record. It seems quite clear to us that the question whether complainant's three head of cattle were stolen was settled beyond any dispute by the evidence of the complainant and his son. And while we agree that the three head of cattle could not wander on their own 50 miles away from the usual grazing grounds, we can see no justification to infer from this that the two appellants stole and drove the three head of cattle from Engaruka to their respective villages 50 miles away, in view of the fact that ESOTO SIMA (P.W.4) did not see any of the appellants at the cattle auction where the three head of cattle were allegedly sold. The learned District Magistrate in his judgment then dealt with the defences put forward by the two appellants. He unceremoniously dismissed their explanation as to how each came in possession of the alleged stolen head of cattle in these words:-

"Second accused denied to tell the court how many cattle were taken for grazing that morning for they do not count but the child said 31. He hid the amount with intent to deny any excess cow found. Worse still one of the stolen cow was found in his herd. How could it direct itself to the herd? Now it was driven.

Third accused in the usual manner denied theft but agrees that when he escorted D.W.3 he saw the stolen cow and allowed it to remain in his herd. The witness said when accused gave him his cattle the cow he termed as new cow was there and did not like to stay with other cattle.

The combing of the evidence of the prosecution I am satisfied that what has been testified leaves no doubt to find the accused not guilty of the offence. I reject their defence and say as said behind that the cows were found in their herd and they are guilty of this offence for the cattle could not travel the 50 miles and direct themselves to their herds without being led."

With respect to the learned trial District Magistrate, we are unable to see any significance in the fact that the two appellants let the alleged head of cattle remain in their

respective herds. We consider their conduct in this regard reasonable. If any support for our view on this aspect of the matter be required one need look no further than the complainant's own testimony when cross-examined by the present second appellant. He is recorded as saying: "If I find a lost cow among my cattle I shall rear it until owner comes. If he does not it becomes mine." We may only add here that we cannot see anything in any of the extracts from the learned District Magistrate's judgment set out supra to indicate that he had any clear appreciation of the evidence given by the two appellants in their defence. For if he had had even a nodding acquaintance with the salient features of the defence, we cannot comprehend how he could have failed to see that their explanation as to how each came to be in possession of the alleged stolen head of cattle amply answered the prosecution's allegations on the matter.

Turning now to the judgment of the first appellate judge, we note that the learned first appellate judge dismissed the two appellants' appeal in three brief paragraphs and having said he saw no good reason to differ with the trial court's "assessment of credibility of the witnesses and finding of fact", he went on:-

"Under the doctrine of recent possession a person found in possession of recently stolen property is deemed to be the thief or a guilty receiver unless he advances a reasonable explanation as to how he came to be in possession of the property. Appellants' explanation was clearly not reasonable.".

With respect, for reasons fully adumbrated above, we cannot agree that the two appellants' explanation as to how they came to be in possession of the stolen head of cattle was unreasonable. We are, in any case, unable to accept the view that the evidence led by the prosecution, in particular

the evidence given by the complainant, his son and ESOTO SIMA (P.W.4) which evidence the court incidentally accepted, would, when fairly and properly weighed together with the two appellants' explanation on the matter lead any reasonable tribunal to draw an irresistible inference that the two appellants were guilty of stealing the complainant's three head of cattle. In the result, we allow this appeal, quash the conviction, and set aside the sentences imposed on the two appellants and order their immediate release from prison unless they are incarcerated therein on some other lawful matter.

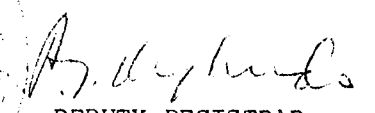
Dated at Arusha this 22nd day of November, 1979.

F. L. NYALALI
CHIEF JUSTICE

Y.M.M. MWAKASENDO
JUSTICE OF APPEAL

L.M. MAKAME
JUSTICE OF APPEAL

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


DEPUTY REGISTRAR