

IN THE COURT OF APPEAL OF TANZANIA

AT KILIMA

CORAM: NYALALI, C.J., MAKAME, J.A., and KISANGA, J.A.

CRIMINAL APPEAL NO. 56 OF 1985

MAYENGE KALYEHU & 4 OTHERS.....APPELLANTS

and

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High
Court of Tanzania at Tabora)(Chipeta, J.)
dated the 31st day of May, 1985.

in

Economic Crimes Case No. 30 of 1985

JUDGMENT OF THE COURT

NYALALI, C.J.:

The five appellants, namely, Mayenge Kalyehu, Shabaan Mkingo, Mayala Samuel, Shija Lyimi and Gambu Mboje, hereinafter called as the 1st appellant, 2nd appellant, 3rd appellant, 4th appellant and 5th appellant, respectively, were jointly charged with a 6th person in the Economic Crimes Court at Shinyanga for the offence of cattle theft contrary to sections 56(1), 59(2) and paragraph 12(1) of the first Schedule to the Economic and Organized Crimes Control Act No. 13 of 1984. The 6th person died before the trial commenced. The remaining persons, that is, the 1st, 2nd, 3rd, 4th and 5th appellants were tried and convicted as charged, and with the exception of the 2nd appellant, they were sentenced to nine years' imprisonment each. The second appellant was sentenced to five years' imprisonment. They were aggrieved by the convictions and sentences and hence this appeal to this Court. Before this appeal could come on for hearing, the 4th appellant, that is, Shija Lyimi died in prison. His appeal therefore abated in accordance with the provisions of Rule 71 of the Tanzania Court of Appeal Rules, 1979. The remaining appellants appeared before us in person, whereas the Republic/respondent was represented by Mr. Mtaki, learned State Attorney.

From the proceedings both in this Court and in the Economic Crimes Court, the following primary and secondary facts appear not to be in dispute between the parties to this case: That on the 6th of November, 1984, the appellants, together with their two colleagues who have since died, were apprehended by the police and were taken to Mgalata Police Station in Shinyanga Region and thence to police station in Shinyanga town where they were charged with the offence as already stated. Prior to their arrest, one Nyerere s/o Kitinyire (P.W.1) had been grazing 120 head of cattle when a group of people armed with bows and arrows, and one with a gun, appeared and threatened P.W.1 and stole all the cattle and drove them away. P.W.1 reported the incident to the police who, accompanied by P.W.1 and one Shindano s/o Kitinyila (P.W.2) mounted a search for the cattle and the thieves.

From the same proceedings, it seems the following primary and secondary facts are in dispute between the parties. The prosecution contends that in the course of the police search in a police motor vehicle, P.W.1 and P.W.2 accompanied by policemen came upon a group of people armed with bows and arrows and who were driving away the stolen cattle. These people, upon seeing the police, scattered and began to run away. The police threatened to shoot at the fleeing thieves with the result that the appellants and the two who have died, stopped and were apprehended.

On the other hand, the appellants contend in their defence that they were innocently walking away to a wedding when they were stopped by the police and ordered to get into the police vehicle. They were subsequently taken to the police station for no apparent reason. It is part of the defence case that not a single cow was in the area where the appellants were apprehended by the police. Moreover, the appellants denied being armed with anything at the time they were apprehended.

The first point for consideration and decision in this case is whether the appellants were found driving away the stolen cattle. The trial court accepted the evidence of P.W.1 and P.W.2 and that of the policemen, namely, No. B 1251 PC Gola (P.W.3), and found as a fact that the appellants were among the people found driving away the stolen cattle.

In their separate but similar memoranda of appeal submitted to this Court, the appellants complain about the finding by the trial Court. They argue that since they denied being found in possession of bows and arrows and since they did not resist arrest, the trial court was wrong in convicting them. With due respect to the appellants, there was the evidence of P.W.1, P.W.2 and P.W.3 to the effect that the appellants and their companions were armed with bows and arrows - evidence which connects them to the group of armed thieves who found P.W.1 grazing the cattle earlier on. The same evidence also shows that the appellants did not submit to arrest easily but attempted to run away and stopped only after being threatened to be shot by the police.

We do not think that the learned trial judge and the lay members of the Economic Crimes Court erred in accepting the evidence of P.W.1, P.W.2 and P.W.3 and in rejecting the story given by the appellants. We find it hard to believe that the policemen would just frame up such a case as this against people innocently going on their way. It follows, therefore, that the appeal against conviction cannot succeed and we are bound to dismiss it. But before doing so we have to consider the appeal against the sentence.

In their separate memoranda of appeal the appellants complain that the Economic Crimes Court did not take into account the fact that the stolen cattle were recovered as a point in their favour for a more lenient sentence. In determining the sentences that were imposed upon each of the appellants, the trial court took

into account the youthful age of the 2nd appellant who was 18 years, and the prevalence of the offence in the area concerned. Although it is true that all the stolen cattle were recovered, it has to be borne in mind that the maximum sentence for this offence is fifteen years' imprisonment and that the sentences imposed are well below that maximum.

Bearing in mind the need to impose a deterrent sentence in areas where cattle rustling is rampant, we are not persuaded that the trial court failed to observe any principles relevant to sentencing.

It must follow, therefore, that the appeal against the sentences must also fail.

In the final analysis, therefore, we dismiss the appeal of each appellant in its entirety.

DATED at KAMPALA this 2nd day of December, 1986

F. L. NYALALI
CHIEF JUSTICE

L. M. MAKAME
JUDGE OF APPEAL

R. H. KISUGA
JUDGE OF APPEAL

I certify that this is a true copy of the original

J. H. MSCOFFE
DEPUTY REGISTRAR

