

IN THE COURT OF APPEAL OF TANZANIA

AT ILILWA

CCMAM: NYALALI, C.J., MAIAME, J.A., and KICANGA, J.A.

CRIMINAL APPEAL NO. 55 OF 1986

MT 30450 Cpl JULIUS JOHN.....APPELLANT

and

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High
Court of Tanzania at Tabora) (Chipeta, J.)
dated the 31st day of May, 1986

in

Economic Crimes Case No. 15 of 1985

JUDGEMENT OF THE COURT

MAIAME, J.A.:

The appellant JULIUS JOHN was a Corporal in the Tanzania People's Defence Force when he got convicted for cattle theft under section 268 of the Penal Code and the Economic and Organized Crimes Control Act, 1984. This is therefore a first appeal and so this Court is entitled to review and evaluate the evidence afresh.

At the material time the appellant was stationed at Old Shinyanga and was attached to what was described as KJ 174. Close by was 82 KJ which owned four head of cattle which were being herded by P.W.1 JAMES MARWA. On 29th March, 1986, when it had started to rain, Marwa kept the beasts in an open shed but when the rain had ebbed, and he went to see the cattle, he found that they were missing. A search in the immediate surroundings and the neighbouring villages proved futile but a few days later the animals were traced to the cattle pen of P.W.3 LAZIMU NYEMBE at a place called Businda. When P.W.3 was asked he said the cattle had been sold to him by a soldier at Old Shinyanga. He said he did not know the soldier's name but he offered to lead to the soldier's room, which he did. The room turned out to be the appellant's

and by the time the appellant was located and picked P.W.3 was him if already in police custody. The appellant was taken thither and P.W.3 was asked if that was the soldier who had sold him the cattle. P.W.3 said that was his man.

Nyenyé told the court of trial that one day the appellant approached him and said he had four head of cattle he wanted to sell as he wanted to go to his home in Moshi. The appellant made the proposal to him at a cattle dip and at that time he did not know that the appellant was a soldier, only that he had seen him before, at a shop at Old Shinyanga. The appellant was in mufti and because the witness said the appellant told him the animals were his own, they did not belong to the Army, it must be because the appellant had gone on to disclose to him that he was a soldier.

P.W.3 went on to tell the trial court that the appellant took him to his room at Old Shinyanga. P.W.3 told the appellant to drive the cattle to P.W.3's home if they were really his, which the appellant did the following evening when it was raining. P.W.3 purchased the four animals for shs. 8,000/- and took them to his kraal at Busanda where his other cattle were. When about five days later he was told that he had stolen cattle belonging to the Army he explained that they had been sold to him by a soldier he could identify. On the following day the appellant was brought to the Police Station where P.W.3 was. P.W.3 identified the appellant as the person who had sold him the animals.

In his defence the appellant denied having sold any cattle to P.W.3 and said he was surprised and shocked when a person in the lock-up at the police station identified him as being the person who had sold him some cattle. He knew P.W.3 alright, having seen him way back in 1983 when he, the appellant, was working in a shop. Before us the appellant reiterated his defence

and adopted his memorandum of appeal the gist of which was to say P.W.3 had merely framed him up and this P.W.3 was able to do because he knew the appellant before.

Mr. Mtaki, learned State Attorney, urged that P.W.3 was a credible and truthful witness who straight away told the investigators that the animals had been sold to him by a soldier to whose room he led. Mr. Mtaki further submitted that P.W.3 would have had no reason to lie against the appellant. Learned State Attorney conceded, however, that P.W.3 could have been a guilty receiver, or the thief, but argued that in terms of section 142 of the Evidence Act the conviction would not necessarily be bad.

It is clear that the trial court based itself mainly on the evidence of P.W.3 in arriving at the finding that the appellant had stolen the cattle. The court found P.W.3 credible because, it said, among other things, it was satisfied that P.W.3 and the appellant knew each other before and that, when questioned, the witness without hesitation implicated the soldier whose room he knew and who indeed comes from Moshi, as the appellant told P.W.3. The court was also of the view that it was significant that the appellant only 'grudgingly' agreed that he knew P.W.3 and that he told obvious lies that he did not know that there were cattle at the camp.

We have revaluated the evidence and considered the submissions by learned counsel. We are clearly of the view that the fact that P.W.3 immediately implicated a soldier did not necessarily mean that what he said would necessarily have been the truth. As the trial court itself found, P.W.3 had his own interest to serve - to put up an innocent explanation as to how he came by the animals. This he had to do immediately upon being accosted if his story was to stick, so that he would not himself be in trouble.

P.W.3, a cattle owner, should have been on his guard once a soldier in Old Shinyanga, whose home he knew was in Koshi, told him that he had his own cattle to sell. If P.W.3 had the foresight to want to know the appellant's abode, and he took the precaution of making the appellant himself drive the cattle to P.W.3's home, according to the appellant some three kilometres from the camp, we find it amazing that the same cautious person did not have the prudence of getting a receipt from the appellant or, at the very least, making sure that the innocent transaction was witnessed by some people. P.W.3 is on record as telling the trial court: "When he brought the cattle small children were present. My neighbours were not called".

The appellant has explained that he used to work in a shop, so naturally he would be known by many people. He used to see P.W.3 in the shop but he did not know P.W.3 beyond that.

We have no idea what the camp complex is like and how large it is. The cattle belonged to a KJ different from that of the appellant who had nothing to do with cattle. It is not inconceivable that P.W.3 knew before that the house he led people to was occupied by soldiers other than by being taken there by the appellant. He himself lives in Old Shinyanga.

On the evidence, we are unable to say that it was safe to found the appellant's conviction on the uncorroborated testimony of P.W.3.

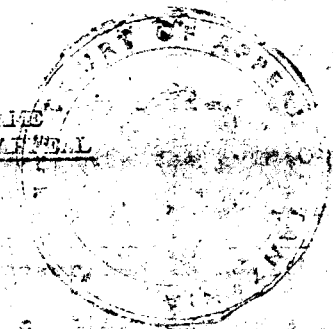
We note that, incidentally, going by P.W.3's evidence, he was sold the cattle in February, 1985, or at the latest on 1st March, 1985, whereas, according to the rest of the evidence, the animals did not disappear from P.W.1's care until on 29th March, 1985.

We have to upset the lower court's decision and allow the appeal. Accordingly the conviction is quashed and the sentence of the five years imposed is set aside. If the appellant is not otherwise in lawful custody he should forthwith be set free.

D, at Mombasa, this 1st day of December, 1986.

F. L. NYALALI
CHIEF JUDGE

L. M. MAMBO
JUDGE OF APPEAL



R. H. KISUMU
JUDGE OF APPEAL

I certify that this is a true copy of the original

[Signature]
J. H. ESCOFFE
DEPUTY REGISTRAR