

19941012 TZHC Tabora

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DECIDED
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*1,~ ~G ---Ifs~, , I Sc 1 •\ nJ THE HIGH couaT oF •nuz.ur1l AT TABORA .HTELL/I TE J~DI CTICN .
('1n B011;i RillGI ST""tly) (HC) CRIMINAL li ?l:FAL NO •. 85 OF 1990 ORIGINAL CRIMINAL Cfl SE
NC., 311 OF 19.85 CF THE DISTRICT COURT OF SEilJY.'iNGA DISTRICT \ T SHITTYli l'Wfl F.W.K.,
YUTIK.:1SI •• Esq., llDSID:EHT IllAGIST&{TE l\MiH{DU LUIIA GA ,, o •. , ••••,, •.,
• o • /\ r,-,:11.ANT (Original .Accused) VERSUS THE REFUBLI C o o. • • RESi..-
ONDEijT (Original t'rosequ tor) J U Jl_Q_ M E N T gcharge: O?.ttlG theft c/s 265 of the tenal Code
Cap. 16. KA TITI,. J. Bofore Shinyang=.i. District Court, were two 2.ccused persons namely, -1-
MW.ANDU s/o LUHiCM, !'l.nd -2- BU8';LU s/o LUE.~G.:\\ 1 as first and second accused persons
respectively, facine the char;e of oattlc theft c/s 268 of the ?anal Code 01~• 16 At the end of a short
judicial dny, tho s:l.id. accused persons, Were found guilty as ohargod, convicted, and o.c1.ch
sentenced to five years imprisonment, - a sentence f:0110wed. by the usuctl st=ltutory
compensation order, that the said oon vi ctcd _p0rscns, shall oompensa te tho compl.inan t Shs.
5,000 / =, for the unreooverad n,nim!'1.l s,, Tho s'id convicts aggrieved., .bavo th::ough the
services .Advocate Mg.i.ssa appealed, and t!10y shall be 09,llod tho appellants, and the grounds of
a,Pp83.l, that pose subs''bnoo, and deserve the Courts precious attention, are as follows:-

- (ii) That the learned J., misdirected himself, in convicting the two appellants on theft whereas the animals in issue, were awarded to the appellant, by a lawful Village GOM and elders taraza.
- 2 (ii) The learned trial Magistrate, misdirected himself, by convicting the two appellants on theft whereas the animals in issue, were awarded to the appellant, by a lawful Village GOM and elders taraza. The learned Senior Magistrate did not consider the appellant's claim of right, without mentioning the facts of this case as covered by a narrow compass but still the same illuminating, all the judicial way. On the 6/8/1989, the appellants discovered that their potato farm (17m x 15m), had been destroyed - there is no dispute on this however; accordingly, FWL SIMON MBOGO, the complainant, and his wife went to their home; fuming and complaining, that the complainant's potato had destroyed the said shamba, and forcefully took away two cows and two goats, five sheep, as compensation, and hence FWL reported to the P.O. - PW3 CD 163 D/CPL. SalfSON who arrested the appellants, allegedly of the animals. However, the appellants severally murdered, mainly winning till after the discovery, of the

destruction of property, by the complainants cattle and they reported the matter to the Ten-Cell L...ad... - IMJ KISHEBO TU • .ldl!, wL~ c...ivrnad the elders meeting, and had the parties to settle the matter of Court, and hence the appellants taking of the cattle.. Tbs version is :lot onli [.i von .support by DW3 KISHEBO HIPAWA, but... ".ioo, :o;4 EJlrJ:U I:JSOI"lt\ 7 ai:d :};!5 ;'S:JLE} S"i~LL, [Jl.'10 similar confirmation evidence, c,3 • Th.J Jerial E.!l&Lstrat0. rojset:-1d J~~,0 dcfonc::i 1 and dan 5 erously went out of lli :::, iv;i,~r 1 1·Jj_ thou t th roue;i.1.1 y- d.i _::est.L: G tho pr ,::;ecu ti on evidence, and giving a d:iti:t'u.l jt::licial oh:tnc'), to ;/J doforce, and convicted. It is ~o · bG concord that the applicant Jan ts =,:::a;~ farm, was destroyed by cattle and it is liardly challenge 1 th2.t sac~1 Clo;:1tructi -n was committed by the 0 .c6mplainan ts ca ttl et It is 2q1-1..ally co.:1:f' ounc..ing c "n tr:-:versy, that the appellants vJJrc 3,rrested by ?;-i3, col102::;_ Jo::it upn the complainants report, 0 of cattle thoft t" him 7 after t!1,J ~1,p;c:1l::1nts 1 b.d taken tho aniID3.ls. The circumstanc:ls under which 1 t!10 said anim:3,ls Wero t3.ken by the appollan-ts 1 aro co:ispiouously on a colliding course, - PW1 and PW2 husl::and anrl. Wife rwspectiv<iily 1 their joint in-;er::,st being t-i proserve their pr.-:;»0rt,yrsa~1in:3 t.he animals were taken under th.JP.ts and stnlon. But the Ten-Cell Loader DW3 KISHERO M:IPP,WA 1 had t;lis t., :::-,3l0vantly say:- 11Tho c1mplaina.nt was brought to me by Busal u (2nd accu :=rnd) , as it was in tho ()VOning, ::! :lid not view the farm. I went t" vi-3'W th0 farm the noxt day, it was dostr("\yed. We went back hom0, a.nd I left tho matter among tho parties, i.O., Basalu, M1-Jandus Lu.ha-&3- - 2nd accused 1 s fatlle.r 1 a.nd la tor tLcy ,ume t" in:torm ::10 that thoy had a, cre0d that Simon ,;a, /S l c""t-1 2 i;ra ts, and 5 s.lrno,t:>e Wo ndcrodt}1a t tl10 c'1 ttl o and g,·a ts be takon kg~th0r wi tl: 3L:,op be tra.okod a, Nay fr,...,m tho Kraal,. o:f :ithe complainant

- .;.... - - - - Whan I had goac1 to Kolandot-" iiospi tal 7 I found tho ropor t at mine, tb. t I was roqui rod to go to t.hc Poli'oo 1 and that PVil had gono thoro to re pert:, '1.hon I went to Pr,li co, I \las told t11a. t tho accus::ids ,!,ad stolon from tl1e cnmplainant., I rosist3rl to that." Ant1. DW4 E:::ntJRY s/o MUSOMA had this to similarly say:- WG thon C"n 70nod. a11 :il c:.orl y maotin g in :Jl1i ch PW1 w:ls call od and tho accusodsc 1 Tho mt:oting 1 c,ft tho ma ttor upon ti:o accuscds and Simon to c.1ocido and they t~.0~1 said, b,::iforo us, tLat th::;y had agroo upon coJ":1p0nsation - 1 rettlo 1 2 geatA and 5 s.he::ip. Tho a:)ovo ovid0:1co was gi vo:i. oonfi.rmatory supp~rting ovidenco by DW5 MA SELE SI-lmLL, With respect tr. tho trial W.agistr-a:ti 1 althbugh he .bad the advan-ta.go of seeing, and hooring the Hi tnossos - testify; and therefore better placed to pass judgm::int on their credibility, it scorns tn m0, this .trial M:i.gi.strata squandered his oppr.rtu.ni ty of judicially playing the role, that this opportunity oomnanded him to do., A ftor 1 an omnipresent oppnrtuni ty of scru t~y, l'lf the ovidence 7 I ha.vo not cultivated myself, to p,3rsuade myself to believer tha. t the appellants .D\13 1 DW4, D\15 were telling lies. .And their credi bili ty, is even enlienced by the fact, that 1 ·tl-1ese days r,f our times, such elders meetings 301 ve more p:::,blems 1 tiic-1,n tb.o co,_uts can dr·, and therefore there· • .. 4 should be notbng :3-er,...g3,ting in acting as such pri"r t-, this case. The curre:1.c; of our tirr.esr is forging alF:ard, to deviate disputes from cnurts, decriminalise some, and. have them s:-1 ved through media ti on,

and :reconcil tuati.on, and at l:"lcal love.l, such elders are invaluable assets., I am from ~lie above minded to think, indeod crm trary tr the view, of the trial J.'a 6istrate, that the complainant v,as neither honest with the Pnllo-2, nor 1·Ji-tb the Court,. I am cor.viced in my sane mind, that it was following, a.:ld consequence upon oonciJ.lia tory in torven ti ~n, by the leders meeting, and a[;reemen-t botwcen t':1,,:i p::1.: ties, that the C""mplai.riant compensate 1 . that the appella~1 ts,,L the appellants ,felt the liberty, t~ take the anirral s. It Woll!tld soem tLer<ifore, that the apl)ellants took the animals believing reasonably that, the said animals were their rightful cnmpeaa.tion in kind, as mutually A- greed, up-in reconciliatory in terven ti on by elders. It is viorth remembering for dutif·,11. an,f. judicial application, the provisions of section 9 of the Ps.nal Code - t.hat a person is not criminally responsi blc, in respect -f an of:f-inc3 relating t; prr,perty, if the act dona, with respect to th-3 said property, was done in tLe ox9rcise of an honest claim of risht, and without intsation to d0fraurl - alsn sea the_ ca_se_ of MAKAMB,~!.,Y.s.~. ~~-· .. "09]9) EoG.~!...? _~~."io In :,thor words, oonsidering definition nf theft - Soction 258 of th·0 P::mal Code Cap?· 16 1 tW:'I things aro conspicuously clear, -1- tJ-~t fraud is inconsist0nt -with th-.) claim of right made in .. good faith, to do tho :.tot complained d and it' is not conspicuous on this ov:i.de.noe, -2- that a m3,n Nho takon pr,ss3ssio11 of _pr-.porthy which ho roally boliovos to be his 0111n, 03,n not bo said to bo taking it fraudul en tlye In this re so, the appellants having takon cattle, on tho authoriity of reconciliation effected , th0v ~ prior to t,1at,L c·ould not be said to .bay:~i bad tHe constitutive mansroa at allo J:~ho ch:l.rge 1 was n:-~t proved beyond roasonablo doubt. The appeal is all owed 1 co.a vi cti.ons qua sh,0d, and .Jon.ton cc sot a sidoo Tho appollan ts to be roloasod, unless othorwis0 logi,lly holdc, Delivorod this 12th day of Octob0r, 1994,, t:~::~~ E. W~ KA TITI~ JiJDG,j

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