

DECIDED
12 October 1994

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(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, admitted recovery 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 KISHERO 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 on: i [..i von support by DW3 KISHERO HIPAWA, but... ".ioo, :o;4 EJlrJ:U I:JSOI" It\ 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 hardly challenge the fact that the destruction was committed by the 0 .c6mplainants cattle and 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 theft t" him 7 after t!1,J ~1,p;c:1l::1nts 1 b.d taken the animal. The circumstances under which 1 t!10 said animal:3,ls Wero taken by the appellants 1 aro conspicuously on a colliding course, - PW1 and PW2 husband and wife respectively 1 their joint in;;er::,st being t-i preserve their pr:-:,»0rt,yrsa~1in:3 t.he animals were taken under the JP.ts and stolon. But the Ten-Cell Leader DW3 KISHERO M:IPP,WA 1 had t;lis t., :::-,3l0vantly say:- 11Tho c1mplainant was brought to me by Basalu (2nd accu :rnd) , as it was in the (V)Oning, ::: lid not view the farm. I went t" vi-3'W th0 farm the next day, it was destroyed. We went back home, and I left the matter among the parties, i.O., Basalu, M1-Jandus Lu.ha-&3- - 2nd accused 1 s father 1 and la tor tLcy ,ume t" in:torm :::10 that they 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 tll o and g,·a ts be taken 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 the report at mine, tb. t I was required to go to the Police and that PVil had gone there to report, '1.hon I went to Pr,li co, I \las told tlla. t tho accus:ids ,!,ad stolon from tlie complainant., I resist3rl 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 matter upon t: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 given. oonfi.rmatory supp~rting evidence by DW5 MA SELE SI-lmLL, With respect tr. tho trial W.agistr-a:ti 1 althbgh he .bad the advantage of seeing, and hearing the Ht tnossos - testify; and therefore better placed to pass judgment 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 oommanded him to do., A ffor 1 an omnipresent oppnrtuni ty of scrutiny, l'lf the evidence 7 I ha.vo not cultivated myself, to p,3rsuade myself to believe that the appellants .D\13 1 DW4, D\15 were telling lies. .And their credibility, 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 tirms 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.no.e, -2- that a m3,n Nho takon pr,ss3ssio11 of _pr-.porty 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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