

UGANDA / JUDGMENT

# Rex v Korie (Cr. App. No. 91 of 1938)

## [1938] EACA 197 (1 January 1938)

**[1938] EACA 197****COURT**

East African Court of Appeal

**BEFORE**

Lane, Ag. J, Sheridan CJ, Thacker J

**CASE / FILE NUMBER**

Cr. App. No. 91 of 1938

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**APPELLATE CRIMINAL**

BEFORE SIR JOSEPH SHERIDAN, C. J., THACKER, J., AND LANE, Ag. J.

**REX, Respondent (Original Prosecutor)****KIMWENO ARAP KORIE, Appellant (Original Accused) Cr. App. No. 91 of 1938**

Criminal Law-Cattle theft-Stock and Produce Theft (Levy of Fines) Ordinance, 1933, sec. 10—  
Penal Code, sec. 255—Charge -Conviction.

**Held** \$(23-8-38)\$ .—(1) That in order to establish a case for the accused to answer under section 10 of the Stock and Produce Theft (Levy of Fines) Ordinance, 1933, it is not necessary to prove possession at the time of arrest or even recent possession.

- (2) That when a charge is brought against an accused person where the circumstances are believed by the prosecution to be those laid down in the charge should be framed under that section alone and if the necessary facts are proved the conviction should be had under that section alone. To express the charge in such a case under both section 10 of the Ordinance and section 255 of the Penal Code in one count might amount to duplicity.
- (3) That where the prosecution frames two counts alternately one under section 10 of the Ordinance and the other under section 255 of the Penal Code then in the event of a conviction under section 10 there should be an acquittal in respect of the count under section 255 of the Penal Code and vice versa.

Appellant, absent, unrepresented.

Dennison, Ag. Solicitor-General, for the Crown.

JUDGMENT.—In the course of the hearing of this appeal the question of the proper construction of section 10, Ordinance 18/1933, was argued, the point being whether in order to establish a case for the accused to answer it is necessary for the prosecution to prove possession at the time of arrest or at any rate recent possession.

We are of opinion that all that is necessary for the prosecution to show is that the accused was in possession at some time of stock. in circumstances which may reasonably lead to the belief that such has been stolen. It is not necessary to show that he was in possession at the time of arrest or indeed in recent possession. This point was in fact answered in *Rex v. Kipkoech A. Sururei* (14 K. L. R. 174) where a decision was given on the construction of section 4 of the Stock and Produce Theft Ordinance, 1928 (now repealed), which contained similar provisions to section 10 of Ordinance 18/33.

If the prosecution established a case of possession as indicated above, under section 10 the onus is then cast upon the accused to prove affirmatively that his possession is or was lawful. In the present appeal there are no merits and the appeal is dismissed.

We would add that in cases of this nature the conviction should. properly be expressed as one under section 10 of Ordinance \$18/33\$ alone and not as one under both section 10 of the Ordinance and section 255 Penal Code.

As was pointed out in Circular to Magistrates No. 2 of 1938 a distinct statutory offence of theft is created by section 10 of the Ordinance, an offence which is in its nature different to an offence of theft under section 255 Penal Code by reason of the fact that the onus to account for lawful possession of the stock in question is laid upon the accused. Thus when a charge is brought against an accused person where the circumstances are believed by the prosecution to be those laid down in section 10 the charge should be framed under section 10 alone and if the necessary facts are proved, the conviction should be had under that section alone. To express the charge in such a case under both section 10 and section 255 Penal Code in one count appears to us that it may not amount to duplicity.

It would of course be open to the prosecution to frame the charge in two counts alternatively under section 255 Penal Code and section 10 of the Ordinance. In that event in the case of a conviction under section 10, there should be an acquittal entered under section 255 Penal Code and vice versa. For instance where an accused person is believed by the prosecution to have merely stolen stock and there is no evidence of actual possession by him in a proclaimed district, of such stock at any time, or again where he is believed to have stolen stock in a non-proclaimed district, the charge should be framed under section 255 Penal Code alone and if the evidence warrants it, he should be convicted under that section. But where the accused person is believed by the prosecution to have been in possession in a proclaimed district, whether it is believed in addition that he committed actual theft or not, the charge would be more suitably framed under section 10 of the Ordinance and should the evidence adduced in Court warrant it, a conviction should be recorded under that section.

Regarding the sentences of imprisonment and fine passed and confirmed in this case our view is that it having been pointed out by the magistrate that cattle-stealing in this district is an offence of a peculiar nature our practice in such cases is to interfere as little as possible.

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