

UGANDA / JUDGMENT

Rex v Ngelenu (Cr. Conf. Case No. 67/1939) [1938] EACA 162 (1 January 1938)

[1938] EACA 162

COURT

East African Court of Appeal

BEFORE

Lucie-Smith, J. (Kenya), Sheridan CJ, Thacker J

CASE / FILE NUMBER

Cr. Conf. Case No. 67/1939

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Before SIR JOSEPH SHERIDAN, C. J., LUCIE-SMITH, J. and THACKER, J.

REX. Prosecutor **$\mathbf{v}$** **KIMUGE ARAP NGELENU. Accused****Cr. Conf. Case No. 67/1939**

Stock and Produce Theft (Levy of Fines) Ordinance, 1933, section 10 -Possession of stock in a proclaimed district in circumstances which may reasonably lead to the belief that such stock has been stolen—"Affirmative proof"—Extent of onus probandi laid on accused person.

The appellant was found in a proclaimed district in possession of two cows which had been stolen. The further facts appear from the judgment.

Held (13-4-39).—That in order to discharge the onus cast upon him by section 10 of the Stock and Produce Theft (Levy of Fines) Ordinance, 1933, a person proved to have been in possession of stock in a proclaimed district in circumstances which reasonably lead to the belief that such stock had been stolen must prove that his possession was with the authority or consent of the owner or his authorized agent. (Conviction confirmed.)

Phillips, Crown Counsel, for the Crown.

Accused present.

SIR JOSEPH SHERIDAN, C. J.—Section 10 of the Stock and Produce Theft (Levy of Fines) Ordinance, 1933, enacts: "If any stock is found in the possession or on the premises of any person in a proclaimed district in circumstances which may reasonably lead to the belief that such stock

has been stolen, such person shall be deemed to have stolen the same and shall, unless he proves affirmatively (the onus being on him) that the possession was lawful, be liable to the penalties prescribed for theft". This section is of a very drastic nature and it is well known that the reason for its enactment was the prevalence of stock thieving in certain districts. An even more drastic provision is found in section 4 of The Coconut Industry Ordinance (Cap. 153, Vol. III of the Laws of Kenya, at p. 1758) which reads: "Any person found in possession of coconuts in the following circumstances shall be deemed to have stolen them unless such person shall prove affirmatively (the onus being on him) that the possession was lawful and shall on conviction be liable to the penalties as laid down in section 5 of this Ordinance—(a) On any coconut plantation or in the immediate vicinity thereof, except with the authority and consent of the owner or his authorized agent; (b) Conveying or carrying coconuts which may be reasonably suspected to have been stolen". To bring an accused person within the provisions of section 10 three elements are necessary. Firstly the possession or the premises on which the stock is found must be in a proclaimed district; secondly the finding must be in circumstances which may reasonably lead to the belief that such stock has been stolen, by which I understand that the belief must be such as that a reasonable man would entertain such a belief; thirdly the onus is on the accused person to prove

affirmatively that his possession is lawful and in order to discharge that onus he has, in my opinion, to prove that his possession was with the authority or consent of the owner or his authorized agent. This construction may seem to be very drastic, but it has been observed that the language of section 4 of Cap. 153 is even more drastic and one has always to consider that the Legislature set out to deal with a state of affairs which could not be met by ordinary legislation. And besides, the severity of the provision may be said to be modified by the second element of the offence, viz. that the circumstances in which the possession is found have to be such as to lead to a reasonable belief that the stock has been stolen, before the accused person is to be called on to account for the possession. So far as individual hard cases are concerned it would seem that they would be dealt with either by a decision not to prosecute or by a nominal or modified sentence in the event of a prosecution followed by a conviction. In the present case the short judgment of the magistrate shows that all three elements were present and that the case is not one for a nominal or modified sentence. The judgment is as follows: "The onus is on the defendant who does not deny having been found with the cows in his possession or that it was in "a proclaimed district", to prove "affirmatively that the possession was lawful". He says he was brought them by Arap Kipkwoiyu. Arap Kipkwoiyu admits this. But accused, seeing that the cattle were branded, having been many years a cattle owner and squatter, and having said he did not want them, kept these cows for two or three months without making the slightest enquiry about them; he kept them in fact until they were found by the police. It is to me incredible that he should have so accepted the guardianship of these cows if he were not so doing to assist persons who had obtained them unlawfully and knew himself that they had been so obtained. I am unable to find that he has produced "affirmative proof" of his lawful possession and convict under section 10, Ord. XVIII/1933.

I would therefore confirm the sentence.

LUCIE-SMITH, J.—I concur.

THACKER, \$J.-I\$ concur.

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