



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**HCCRA NO. 190 OF 2017**

**SAMUEL KIPSEREM KIPTUI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[Appeal from the original conviction and sentence in Kabarnet Principal Magistrate's Court Criminal Case No. 94 of 2015 delivered on the 8<sup>th</sup> day of April, 2015 by Hon. S.O Temu,PM]*

**JUDGMENT**

1. Appellant was convicted for the offence of stock theft contrary to section 278 of the Penal Code and sentenced to 7 years imprisonment on 8/4/2015. The appellant had been arrested on 30/1/15 and faced alternative charge of handling stolen property contrary to section 322 (2) of the penal code. The subject of the two charges were 10 cows valued at Ksh. 300,000/=.
2. The DPP did not oppose the appeal for conviction for the offence of stealing stock stating that there were no evidence of theft and all the witnesses said they had found the cows with the appellant and he ought to have been convicted for handling stolen property under section 322 (2) of the Penal Code. DPP urged court to exercise powers under section 354 of the Criminal Procedure Code and find the accused guilty of handling the cows and make a decision based on that finding.
3. The appellant urged the court to reduce the sentence stating that he had already served 3 years in prison. In his submission filed in court, the appellant challenged only the sentence as a first offender and pleading that "the above matter emanated from poverty that raged our family and through rehabilitation I have gained skills (as) Grade II holder in carpentry and joinery."
4. In compliance with the duty of the first appellate court, I have reconsidered the evidence by the prosecution and the defence that the appellant had found the cows in the forest at night and took them home and that he had slept as he was drunk.
5. I agree with the DPP that the evidence by the complainant PW1 only testified as to the loss of the animals and the other witnesses PW2, PW3 and PW4 only testified as to what they were told of the recovery of the cows. The only person who could have testified as to the appellant's involvement was one **Timotio** of whom PW3 said :

*"Later we were informed that the cattle had been driven towards Marigat. Timotio later informed me that the cows had been found at Moionin Center. I went to the said place and I had met Timotio and he stated it was the accused that had cows. I had asked the accused whether he knew the cattle's owner and he stated that it was Reuben Chebii. The said Samuel accused herein stated that he was drunk and did not know why he was driving the said cows".*

PW3 does not state that he found the appellant with the cows.

6. The said Timotio who is the only person who could have testified as to the appellant's being found in possession of the cows was not called as a witness.

7. The defence that the appellant had found the cows in the forest raised a doubt as to the appellant's criminal intent in theft of the cows or in handling stolen property. The appellant's admission of some form of involvement in the matter by stating in his written submission that

*"The above matter emanates from poverty that regard our family"*

does not admit theft or the handling charges. See **Mungai v. R (2006) (2) KLR 262.**

8. The trial court erred when it found that;

*“The said cattle were near their home when they disappeared and thus it cannot be true that the accused had found them in the forest as he alleged at night. The animals could have not travelled so far away from home to Moinonin area on their own at night nor did the accused state as to why he was so far away from home that is at Loruk to Moinonin which is several kilometres away”.*

9. There was no evidence that the animals were near home when they disappeared. PW1 testified only as follows;

*“On 30/1/15 my wife had taken the cattle home **from the field** and she let them outside near home. When we wanted to keep them in the shade we found 10 cows missing”.*

It does not state that **the animals had been brought from the field**. The discovery of the missing animals was only made when they sought to keep them in the shade. Indeed, PW4 of the Anti-stock theft said that the complainant had requested to him.

*“That his 10 cows had been stolen on the previous day **from the grazing field**”.*

10. I would find that the evidence presented by the prosecution did not prove the charge of stock theft or the alternative charge of handling of stolen property.

### **Orders**

11. Accordingly, for the reasons set out above, the court find merit in the appeal and quashes the conviction for stock theft contrary to section 278 of the penal code and the sentence imposed by the trial court therefor is set aside.

12. I further do not find that the offence of handling stolen property contrary to section 322(2) of the Penal code charged as count II was proved beyond reasonable doubt.

13. There shall, therefore, be an order for the release of the appellant from custody forthwith, unless he is otherwise lawfully held.

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF JULY, 2018**

**EDWARD MURIITHI**

**JUDGE**

### **Appearances:**

Appellant in person

Ms Macharia Ass. DPP for the Respondent