



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 3 OF 2018**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's court in Criminal case No. 2303 of 2017 delivered by P.C. Biwott Senior Principal Magistrate on 8/1/2018)**

**ROBERT MWANGALE MUTORO ALIAS RAJAB.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant was charged with the offence of **Stealing Stock contrary to Section 278 of the penal code**. The particulars of the charge were that **on the 8<sup>th</sup> June 2017 at Masaba village in Kiminini sub-County within Trans Nzoia County, stole one brown cross-breed cow valued at Kshs 20,000/- the property of Selestine Wafula.**
2. The alternative charge was **handling stolen goods contrary to Section 322 (1) (2) of the Penal Code**. The particulars of the charge were that **on the 8<sup>th</sup> June 2017 at Maliki Trading Centre within Kiminini Sub-County within Trans Nzoia County, otherwise than in the course of Stealing, dishonestly retained one brown cross-breed cow valued at Kshs 20,000/= the property of Selestine Wafula having reason to believe it to be stolen property.**
3. He was convicted and sentenced to 4 years imprisonment hence this appeal. The brief background of the evidence and facts presented during trial were that **PW1 the complainant** on 7/6/2017 fed her cow and closed it in the shed at 7.30 pm. When she woke up the following day the shed was broken and the cow missing. She reported the matter at Kiminini police post. Later she was called by the Administration Police at Maliki to identify a recovered cow. The suspect was equally arrested. After the photographs of the cow were taken they released it to her.
4. **PW2 Peter Wamalawa Kauka** said that he was a business colleague of the complainant. He went to buy maize in the morning of 8/6/2017 and he found the appellant arrested with a stolen cow. The person who arrested the appellant was the Seller of the maize to the witness. The appellant could not explain where he had gotten the cow from. After interrogation they found the cow belonging to PW1. She was called by the chief.
5. **PW3 Daniel Poloo** from Kitale police station carried out the investigations and recorded statements from the witnesses. He also took the photographs which he produced.
6. When put on his defence the appellant gave sworn evidence denying the charge. He said that he was on his way from home to Maliki to put cane on the tractor at 5.00 am and as he waited for the tractor 2 men passed by and talked over a cow that was passing by. He was then questioned over the same when they saw scars on his head. He was framed as the thief.
7. On cross-examination he said that apart from him, there were 7 other people around.

**Analysis and Determination**

8. The court has perused the proceedings carefully as well as the submissions by the appellant and the learned State counsel. The learned State counsel conceded to the appeal which in my view was rightly so.
9. From the evidence on record, PW1 did not see the thief. She only woke up in the morning to find the cow missing. She was later called and notified about the recovery.
10. Further none of the witnesses actually and categorically stated that they found the appellant in physical contact of the cow. PW2 stated that he was informed by his supplier/Seller of the grain concerning the incident and when he went to the scene, the appellant was unable to

explain where he got the cow.

11. Possession has been defined in the Black Law Dictionary 10<sup>th</sup> Edition as

***“ The fact of being or holding property in ones power the exercise of dominion over property.”***

12. There is no evidence that the appellant had actual contact over the cow. For example had he tied the Cow? Was he driving it? None of the witnesses was able to explain this. I find no proper witness was able to explain that he was the first to see the appellant with the cow.

13. It is presumed also from the evidence that the scene where the cow was found was a public area which therefore required that evidence ought to have been led to show that the appellant was in actual contact of the cow.

14. For the above reasons the appeal succeeds. The appellant is set free unless lawfully held.

**Delivered, signed and dated at Kitale this 26<sup>th</sup> day of September, 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**26/09/18**

**In the presence of:**

**Mr Kakoi for the Respondent**

**Appellate present**

**Court Assistant – Kirong**

**Judgment read in open court.**