



**REPUBLIC OF KENYA**

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

**HCCRA NO. 27 OF 2018**

**WILSON KIPSANG KOSGEI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the conviction and sentence of the Senior Resident Magistrate's Court at Tamu (Hon. P. K. Rugut SRM) dated the 14<sup>th</sup> March 2018 in Tamu SRMCRC No. 204 of 2016)***

**JUDGMENT**

The Appellant, **WILSON KIPSANG KOSGEI**, was convicted for the offence of **STEALING STOCK** Contrary to **Section 278** of the **Penal Code**. He was then sentenced to 10 years imprisonment.

1. In his appeal, the Appellant submitted that the evidence tendered by the prosecution witnesses was not honest.
2. He noted that there was no direct or indirect evidence linking him to the alleged offence.
3. He also said that the witnesses had not identified the persons who had allegedly robbed the Complainant of his cows. In the absence of photographic evidence, which would have linked him to the offence, the Appellant submitted that the trial court ought not to have convicted him.
4. He further added that although there was an alleged confession tendered by his co-accused, the said confession was not produced in court.
5. The other issue that was raised by the Appellant was in relation to the value of the animals which were allegedly stolen from the Complainant.
6. Apparently, the cows were valued at Kshs.106,000/=; Kshs.240,000/=; and Kshs.250,000/=.
7. In the light of the glaring inconsistencies, the Appellant submitted that the conviction was unsafe.
8. The other element of inconsistencies is said to have been in relation to the time when the cows were recovered. Apparently, the time ranged from 6am to 8am.
9. Finally, the Appellant faulted the prosecution for failing to call some essential witnesses. Those are the persons who joined the Complainant in tracing the cows, soon after the Complainant had raised an alarm.
10. In particular, the Appellant said that the Assistant Chief and the Village Elder ought to have been called as witnesses.
11. In answer to the appeal, the learned State Counsel, Miss G. Barasa submitted that the prosecution did not need to produce any photographic evidence at the trial.
12. She added that the robbery took place at night and that the cattle were recovered before day break. In those circumstances, the Respondent contends that it would have been impracticable for the scene of crime officers to take photographs at that hour and in the sugarcane plantation which is in a valley.
13. The Respondent also pointed out that the Appellant was arrested only some 4 hours after they had robbed the Complainant.
14. Finally, the Respondent insists that there are no essential witnesses who were not called by the prosecution.

15. In determining the appeal, I have re-evaluated all the evidence on the record, and I have drawn my own conclusions therefrom.
16. The Complainant testified that he did not see the faces of any of the 6 thieves who entered his compound on the material night.
17. However, he said that he identified the thieves from the jackets they were wearing.
18. According to the Complainant, he and other persons tracked the cattle. At the same time, the Complainant alerted the Assistant Chief.
19. The Assistant Chief testified that the Complainant did alert him about thieves who had forcibly taken cattle from the Complainant's home.
20. It was the testimony of the Assistant Chief that he alerted both the DO and the DO1 about the robbery at the Complainant's home.
21. He also notified the OCS Chemelil about the incident.
22. **PW3**, Inspector Peter Asumani was based at the Chemelil Police Post. Once the police officers got information about the robbery at the Complainant's home, **PW3** led a team from the Police Post in tracking the cattle.
23. When they reached some sugar plantation, they met one of the suspects, and they interrogated him. The said suspect led the police into the farm at Ruga, where they recovered the cattle.
24. At the time, the cattle were recovered, the Appellant was present, securing and guarding the cattle.
25. **PW4**, Inspector Barnabas Samoei was attached to the Miwani Division. He was phoned by **PW3**, who informed him about the robbery at the Complainant's home.
26. At the material time, **PW4** was based at the Ngeta AP Post.
27. His role was to seal the area which was the anticipated escape route for the cattle which had been stolen from the Complainant.
28. When the police stopped the first suspect, he was not in possession of the cattle. But it is he who led the police to where his accomplices were securing the cattle, in a valley, within a sugarcane plantation.
29. The said cattle were recovered, and the suspects including the Appellant, were arrested.
30. The Complainant arrived after the Appellant was arrested.
31. However, he positively identified the cattle which had been recovered.
32. The Appellant and his accomplices did not lay any claim of ownership to any of the cattle.
33. Secondly, the Complainant identified the suspects by the jackets which they were wearing when they had raided his home.
34. At the time of the said raid, the robbers used torches which they used to light up the access to the Complainant's home. The said light enabled the Complainant to clearly see the jackets worn by the robbers.
35. Considering that the Appellant was arrested only a few hours later, whilst still wearing the same jackets, and because the robbers were found in actual possession of the stolen cattle, I find that the learned trial magistrate was right in applying the doctrine of recent possession.
36. Accordingly, I find that the conviction was sound.
37. Although the prosecution could have called more witnesses if it wanted to do so, I find that any additional witness would not have added any essential evidence.
38. In other words, no essential witness was left out by the prosecution. I so hold because the evidence adduced was already sufficient to sustain a conviction.
39. It is noted that the witnesses gave inconsistent evidence concerning the value of the cattle which were stolen. However, I find that such inconsistency did not in any way diminish the otherwise cogent evidence that led to the conviction.
40. In the result, I find no merit in the appeal. I uphold both conviction and sentence.
41. The appeal is dismissed.

**DATED, SIGNED and DELIVERED at KISUMU this 20<sup>th</sup> day of December 2018.**

**FRED A. OCHIENG**

**JUDGE**