



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APEPAL CASE NO. 99 OF 2016**

*(Being an appeal arising from Kitale Chief magistrate's court*

*criminal case No. 1291 OF 2016 delivered by P.W. Wasike*

*Resident Magistrate on 13/10/2016)*

**ENOCK SIFUNA SIMIYU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. **Enock Sifuna Simiyu** was charged with the offence of **Stealing stock contrary to section 278 of the Penal Code**. The particulars were that the appellant on the **11<sup>th</sup> day of March 2016** at **grass land area within Trans Nzoia County jointly with others not before court stole one cow valued at Kshs 90,000/- the property of Joel Otieno Abok**.

He faced an alternative count of **handling stolen goods contrary to section 322 (1) of the penal code** in that on the **12<sup>th</sup> day of March 2016** at **Kapkateny area within Bungoma County otherwise that in the course of stealing dishonestly retained one cow with black and white patches knowing or having reasons to believe them to be stolen goods**.

2. After a full trial he was convicted of the main charge and sentenced to four (4) years imprisonment. Being dissatisfied with the judgment he filed this appeal raising only one ground of appeal namely:

**i) That the trial court failed to note that the prosecution side did not prove its case beyond any reasonable doubts, hence shifting the burden of proof to the appellant.**

3. When the appeal came for hearing the appellant relying on his written submissions stated that the prosecution case was weak and was not proved to the required standard. He attacked the evidence of PW2 saying it was not credible. He wondered why the owner of the cow did not testify.

4. The State through Mr. Kakoi opposed the appeal. He submitted that PW1 was the owner's care taker, and he noticed one Freshian cow missing. He alerted neighbours.

Pw2 saw the cow at kapkateny market with the appellant who was selling it at Shs 38,000/-. This price

aroused suspicion and PW3 arrested him. The cow was recovered and identified by PW1. He was of the view that the sentence of 4 years was not harsh.

5. The evidence on record shows that **PW1** was a caretaker at the home of Dennis Afande. The missing cow belonged to Dennis Afande. PW1 went out to check on the cows on 11<sup>th</sup> March 2016 4 am and noticed one Freshian (white and black) missing. It was hornless, and had been untied and taken with the rope. He screamed and neighbours came. He noted the place where the wire had been cut and followed footsteps in vain. He went to Chwele market with other 2 workers of neighbouring farms. They did not trace the market or slaughter house.

6. They reported to the market chairman. The next day PW1 got a call from Kitale police station asking him to go there, as a cow that had been found at Kapkateny and a person arrested. He responded and he went to Kapkateny police post with officers. He found the cow on the AP compound with a different rope. The cow was released to him after being photographed. He also identified it in the photos (Exhibit 1 a & b). It was valued at Shs 75,000/-. The person who had been arrested with the cow was called out and he identified him as the appellant.

7. **PW2 Gilbert Simiyu Ayiela** is the chairman of cattle vendors as at Chwele market. He testified that PW1 had come to the said market on 11<sup>th</sup> March 2016 with a report of a missing cow but it was not traced at the said market. On 12<sup>th</sup> March 2016 he saw a vehicle Toyota Car KAA 079 B heading towards Kapkateny, the direction he was headed for the market. On this vehicle was a cow, which answered to the description given by PW2. He followed the motor vehicle and the cow was alighted. He inquired as to where they got the cow. He was told it was from Trans Nzoia and he was shown a movement permit, and told the cow was being taken to Namilembe Kapkateny for rearing.

8. To PW2's surprise it was taken into the market. The seller was accepting as low as Kshs 38,000/- and the buyers and vendors were up in arms and they started beating up the seller. PW2 became suspicious and he reported the matter to the police. The person, the vehicle, and the cow were arrested. The cow was photographed. The Motor vehicle in question had 3 people i.e driver, conductor and the person with the cow who was the appellant.

9. **PW3 PC Thomas Chacha** testified that on 13<sup>th</sup> March 2016 1.00 pm he was within the Kapkateny market, on a personal issue. He received a report of a suspected cattle thief. The suspected thief was the appellant who he gave his names as Enock Sifuna Simiyu. He told him the cow was his, and had come to sell it. He took him and the cow to Kapkateny police post. The complainant was traced from Kitale, and he came with a police officer and the cow was handed over to them.

10. **PW4 PC. Sammy Kimanzi** from Kitale police station and who is the investigating officer herein explained the report by PW1. Later PW1 went with him and 2 other officers to Kapkateny police post. They found the cow in question and photos (Exhibit 1 a & b) of the cow were taken and it was released to PW1. The suspect was brought to Kitale and charged. The suspect is the appellant.

11. The appellant in his sworn statement of defence testified that he is a motorcycle rider at Lukhome. That on 11<sup>th</sup> March 2016 he was at Lukhome for a fundraising, when police officers came and accused him and others of taking alcohol. They were arrested and placed in cells. All others were released on bond but he remained alone and was brought to Kitale police station, and later charged.

In cross-examination he said he never saw the complainant in court. He denied being found with the cow, saying that (PW3) had a problem with him.

12. As a first appeal court, this court has a duty to reconsider the evidence afresh and make its own conclusion, while bearing in mind that it did not see or hear the witnesses. The court of appeal in the case of *Mwangi V Republic [2004] 2 KLR 28* stated this of the duty of a first appeal court.

***“ 3. It is not the function of the first appellate court merely to scrutinize the evidence to see if***

*there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact the the trial court had the advantage of hearing and seeing the witness."*

13. Having considered the evidence on record, ground of appeal and submissions I find three issues to fall for determination.

- i) Whether PW1's cow was stolen.
- ii) Whether ownership was proved.
- iii) Whether the appellant was found in possession soon thereafter .

**Issue no. I) Whether PW1's cow was stolen.**

14. In his testimony pw1 said he is the farm manager for Dennis Afande. He takes care of the Farm which has ten (10) cows.

On 11<sup>th</sup> March 2016 3.00 am he checked on the cows and they were all in the cowshed where he had tied them. When he went back at 4 am he found one Fresian black and white cow missing. He screamed and alerted neighbours. It was searched for in vain.

My finding is that PW1 was a special owner of this cow and he confirmed it missing.

**Issue No. ii) Whether ownership was proved.**

15. PW1 was able to describe the cow to PW2 when he went to Chwele market to look for it.

The description PW1 gave to PW2 was detailed such that when he saw the cow on the motor vehicle he was suspicious and keenly followed it. PW1 also identified the cow to the police, and to the court by the photos. Since the recovery of the said cow no one has come out to lay claim to it, not even the appellant.

I therefore find that ownership was proved.

**Issue No. iii) Whether the appellant was found in possession soon thereafter .**

16. The cow went missing on 11<sup>th</sup> March 2016. Efforts were made to trace it from that time. On 12<sup>th</sup> March 2016 the cow was recovered at Kapkateny market, being offered for sale. The offer price was too low until the vendors were suspicious and started beating up the person who had the cow.

He was rescued by a police officer (PW3) who happened to be at the market at the time.

17. PW2 who had followed the vehicle with the cow, had keenly looked at it and became very suspicious when:

- i) The cow was not taken for rearing as he had been told. Instead it was taken into the market for sale.**
- ii) The price offered was far too below the market price. The person selling was ready and willing to take shs 38,000/- when the price was shs 50,000/-**

60,000/-.

PW2 Himself buys and sells cows, so he knows the market rates.

18. The person who was found selling this cow was identified by PW2 and PW3 who were at Kapkatenyi market at the time of this incident, as the appellant.

PW4 confirmed that when they went to Kapkatenyi market the person they found having been arrested was the appellant.

The appellant in his defence and submissions has denied being the owner of the cow and he has denied having been found with the cow. He infact says he was arrested while attending a fundraising and accused of taking alcohol.

He never called any of his friends to testify, to confirm he was arrested from a fundraising. He blamed PW3 for his woes.

He however never questioned PW3 about this grudge and what it was about. He did not say anything about it in his defence.

19 The appellant never said he had any grudge with PW2 , yet PW2 is the one who played a major role in this recovery, of the cow.

The court of Appeal explained the steps to be taken or what should be considered before a court can rely on the doctrine of recent possession as a basis of conviction in a Criminal case. This is in the case of **Arum Vs Republic [2006] 1 KLR 233, in which it was held;**

***“1. Before a Court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof;***

***a) that the property was found with the suspect;***

***b) that the property was positively and properly of the complainant;***

***c) that the property was stolen from the complainant;***

***d) that the property was recently stolen from the complainant.***

***2. The proof as to time will depend on the easiness with which the stolen property can move from one person to another.***

***3. In order to proved possession there must be acceptable evidence as to search of the of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot be suffice, no matter from how many witnesses.***

***4. In case the evidence as to search and discovery is conflicting, then the Court can rely on the adduced evidence after analysing it and accepting that it considers it to be correct and an honest version.”***

20. I have found the present case to fall within the four corners of the Arum case, in that the cow was found with the appellant, PW1 positively identified it, the cow was stolen from the cowshed where PW1 had tied it with others, the cow was recovered within 48 hours of its disappearance. The appellant laid no claim to it. The prosecution evidence is very consistent. The appellant did not give any explanation for the possession of PW1's stolen cow.

21. I am satisfied that the purpose of the plan to dispose of the cow as soon as possible was to

permanently deprive the owner of the said cow. I find the principal count of stealing stock proved.

22. In passing sentence the court should have considered the fact that the cow had been recovered and restored to the owner and the appellant was a first offender.

23. The appeal on conviction is dismissed. I set aside the sentence of four (4) years and substitute it with three (3) years imprisonment, from the date of conviction.

Orders accordingly.

Delivered, signed and dated on 30<sup>th</sup> day of August 2017 at Kitale.

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**H. ONG'UDI**

**JUDGE**

**In the presence of;**

**Ms Kagai fro Mr kakoi for the State**

**Appellant present**

**Kirong – Court Assistant**

**Court: Judgment delivered in open court.**

**Right of Appeal explained.**

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**H. ONG'UDI**

**JUDGE**

**30/8/2017**