



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL CASE NO. 41 OF 2015**

**(Being an appeal arising from Kitale Chief Magistrate's court in criminal case No. 1465 of 2014 delivered by J.M. Nang'ea Senior Principal Magistrate on 16/3/2015)**

**GEOFFREY WANJALA WAFULA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

1. **Geoffrey Wanjala Wafula** “ the appellant” was charged and convicted of the offence of Stealing stock contrary to section 278 of the penal code. He was sentenced to serve 4 years imprisonment.
2. He filed this appeal raising four (4) grounds of appeal namely;
  - i) **That the trial magistrate erred in law and facts by failing to issue court order despite his application to arrest a thief who stole the said cattle.**
  - ii) **That the learned trial magistrate erred in law and facts in failing to consider that the investigation done was reckless.**
  - iii) **That the learned magistrate erred in law and facts in law and facts in failing to consider his defence without any proper ground.**
  - iv) **That the whole judgment was against the weight of evidence.**
3. When the appeal came for hearing the appellant furnished the court with written submissions which I have gone through. They are actually points of mitigation. In brief he is asking the court to reduce the sentence for him. He is not challenging the conviction.
4. The state through Mr Kakoi opposed the appeal on both conviction and sentence. He submitted that the complainant PW1 tethered his Fresian cow and left but next found it missing. The appellant was found with it. The appellant had no authority to sell it. His intention had been to permanently deprive PW1 of the cow. That the sentence of 4 years was lawful, he submitted.
5. As a first appeal court, this court must reconsider the evidence afresh and arrive at its own independent decision **See Okeno V Republic 1972 EA 32 & Kiilu V Republic [2005] 1 KLR 174.**
6. **PW1 Oscar Standa Musiya** testified that he tethered his cow on 15<sup>th</sup> April 2014 and travelled to

Kabolet trading Centre to buy sand. His wife later called to inform him that the cow was missing. He came home and the search began. Reports were made and information trickled in on about two youths who had been seen untying the cow.

7. On 17<sup>th</sup> April 2014 Yano (PW1) and Njenga (PW2) were at Kimilili Market. While there they saw the appellant arrive with the suspect cow and he was approached. He attempted to run away. PW1 identified his cow by the black paint he had placed on the left leg. The appellant was handed over to the local AP Camp. The recovered cow was photographed before being released to him.

8. **PW2 Dancun Njenga** confirmed the evidence of the complainant (PW1) on the cow.

**PW3 Sergeant Fred Simiyu Sirengo** took photos of the complainant's cow on 17<sup>th</sup> April 2014. He supervised the processing of the films and issued a certificate (Exhibit 1 & 2).

**PW4 Police NO. 69284 P.C. Henry Kirui** of Crime branch office Kitale confirmed PW1's report. He received the appellant from Kimilili as a stock theft suspect of PW1's cow.

9. In his sworn statement of defence he stated that on 17<sup>th</sup> April 2014 he was in Kimilili when he was suddenly arrested for stealing a cow which he was shown. He said it was his neighbours who had the cow. A woman and one Job were arrested but later released.

The appellant said he was arrested at Kimilili cattle market.

10. I have considered all the evidence on record. I have equally considered the grounds of appeal and the submissions. It is clear that the appellant is not laying any claim on this Fresian cow. The cow was released to PW1 after it was photographed after the recovery. PW1 searched for his cow for two days. He went to Ndalua and Kimilili market Centres to search for it. He was successful on 17<sup>th</sup> April 2014 when he found his cow.

I am satisfied that indeed this was PW1's cow. It had gone missing and was recovered.

11. The charge facing the appellant is that of theft of PW1's cow.

PW1 and PW2 have through their evidence stated that the person they saw driving PW1's cow into Kimilili market on 17<sup>th</sup> April 2014 was the appellant. He tried to run away but was caught and handed over to the local Administration Police (AP) Camp.

12. The appellant took the officers to the home of a person he alleged to be the owner of the cow. The alleged owner was not found and his wife was arrested but later released. At the end of the day the appellant did not give any satisfactory explanation as to why he was in possession of a stolen cow on the second day of its disappearance. The failure to explain the possession leaves the court with no other inference but that he was the thief.

13. On sentence he has asked to be forgiven for what he did. The maximum sentence for this offence is 14 years. The court considers the fact that the Fresian cow was recovered, and so PW1 did not suffer much loss. The appellant has been in prison since 4<sup>th</sup> March 2015 which is 2 years 5 months 25 days approximately 2 ½ years. His being behind bars for this period is no mean thing considering that he never benefited from the theft. I think he has learnt his lesson.

14. The appeal partially succeeds in terms of sentence only; the sentence is set aside and substituted with a sentence of the period already served. He shall be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed and dated on 28<sup>th</sup> day of August 2017 at Kitale.

**H. ONG'UDI**

**JUDGE**

**In the presence of:**

**M/s Kakoi for the Respondent**

**Appellant present**

**Kirong – Court Assistant**

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

**H. ONG'UDI**

**JUDGE**

**28/8/2017**