



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
HIGH COURT CRIMINAL APPEAL NO. 54 OF 2015
(CONSOLIDATED WITH CR. A. NO 55 & 56 OF 2015)
(CORAM: J. A. MAKAU – J.)

SYLVESTER OWINO OLOO 1ST APPELLANT

CHARLES OUMA ODWASI 2ND APPELLANT

MORRIS WANDERA MAKOKHA 3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence in Criminal Case No. 341 of 2012 in Ukwala Law Court before Hon. R. M. OANDA – AG. P.M.)

JUDGMENT

1. The Appellants **SYLVESTER OWINO OLOO, CHARLES OUMA ODWASI** and **MORRIS WANDERA MAKOKHA** formerly 1st, 2nd and 3rd accused in the Principal Magistrate's Court at Ukwala Criminal Case No. 341 of 2012 were jointly charged with Stealing Stock contrary to **Section 278 of the Penal Code**. The particulars of the offence are that on 18th May 2012 at Yenga Sub-Location in Ugenya District within Siaya County, jointly stole one cow valued at Ksh.20,000/= the property of **CLEOPHAS MESO ODUOR**. The appellants jointly faced an alternative charge of Handling Stolen Goods contrary to **Section 322 of the Penal Code**. The particulars of the alternative count are that on 4th August 2012, at Lwanya Village, Butula District within Busia County, otherwise than in the course of stealing, dishonestly retained one cow knowing or having reasons to believe it to be stolen goods.
2. The Appellants were tried, convicted and sentenced to pay a fine of Ksh.20,000/= each in default to serve two (2) years imprisonment.
3. The Appellants were aggrieved by the conviction and sentence which provoked them to prefer their respective appeals, namely CR.A. No. 54 of 2015, Sylvester Owino Oloo V. Republic; CR. A. No. 55 of 2015, Morris Wandera Makokha V. Republic and CR.A. No. 56 of 2013; Charles Ouma Owasi V. Republic. The three appeals were consolidated and proceeded as Criminal Appeal No. 54 of 2015 and the appearance of the appellants are as they did at the trial Court.
4. In summary the appellants grounds of appeal were as follows:-

“a) The Learned Magistrate erred in law and fact by delivering a judgment that failed to

conform to provisions of the law and consequently occasioned injustice to the appellant.

- b) The Learned Magistrate erred in law and fact by convicting the appellant when the prosecution's case had never been proved beyond reasonable doubt.*
- c) The Learned Magistrate erred in law and fact by convicting the appellant who had explained beyond reasonable doubt that the head of cattle the subject of the charge had been lawfully acquired and belonged to one of the appellants.*
- d) The Learned Magistrate misdirected himself as regards the doctrine of recent possession without considering the intervening period of nearly 3 months and consequently arrived at an unfair conclusion.*
- e) The Learned Magistrate erred in law and fact by convicting the appellant in regard to the allegedly stolen and recovered head of cattle that had never been presented to Court at the time of plea and had not been released with an order of Court.*
- f) The Learned Magistrate erred in law and fact by convicting the appellant on the basis of photographs that had been taken by an unauthorized person and in clear contravention of the law.”*

The appellants therefore pleaded with the Court to quash the conviction, set aside the sentence and set them at liberty. The appellants were represented by Mr. Wanyama Learned Advocate while the State was represented by Mr. Ombati Learned State Counsel.

5. Being the first appellate court I shall subject the entire evidence adduced before the trial Court to a fresh examination and analysis and make my own determination. I am alive to the fact that I neither saw nor heard any of the witnesses and so I cannot comment on their demeanor. I am in this regard guided on the duties of a first appellate Court by the Court of Appeal decision of **Kiilu and Another V. R. (2005) 1 KLR 174** which provides:-

“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.”

6. The complainant **Cleophas Meso Oduor, PW1** testified that on 18.5.2012, past midnight he woke up and found a commotion in his cowshed. He proceeded to check and found two of his animals missing. He found one of them outside the fence but the other was not present. PW1 raised alarm but only two people came. He discovered the fence had been interfered with. They then started a search for the missing animal. They traced the track upto Oduma area and lost it. The following day PW1 reported to the Assistant Chief, Mr. Richard Ooko Osiago and Ukwala Police Station. That on 4.8.2012 he received a call from Bumala Cattle Market, that the missing white cow was paraded for sell. He informed his neighbour and Assistant Chief and he proceeded to Bumala Cattle Market. On arrival the caller told him the person who was selling the cow was Mr. Sylvester Owino Oloo, the 1st appellant and he had just left the market. He was informed the animal was handed over to Lwanya and he followed the direction to Lwanya and on the way he met an elder who directed him to Mr. Owino's home, the 1st appellant. They introduced themselves as buyers and the 1st appellant asked for Ksh.19,000/=. PW1 asked about the history of the cow and he was told it had given birth three (3) times. He examined the cow and came to the conclusion that, the white cow in the 1st appellant's possession was his stolen cow. PW1 declared the cow was his own. PW1 asked the 1st appellant for a rope so that they could drive the cow to Bumala Police Station which he obliged. The 1st appellant went to his home but he never returned, then PW1 called Police from Bumala Police Station. The Police arrived accompanied by vigilantes from Bumala area and took the cow. The 1st appellant and the others were later arrested. The cow was photographed on 5.8.2012 and released to the complainant. PW1 identified the photographs as MFI P 1 (a), (b), (c) and (d). PW1 stated he had been with the animal for 7 years and it had small teeth and a small udder. During

cross-examination PW1 testified that the cow is white in colour which in PW1's language is "**Dibo**". He admitted white cows are many in the world. He stated the 1st appellant told him the cow had given birth thrice but he did not tell PW1 how the cow had acquired the cow. He stated that while at Police Station they learned from Mohamed Juma, the 1st appellant had escaped however Mr. Mohamed Juma, did not record a statement. PW1 stated that his cow at the time it was stolen was in-calf, but when he got it, it had miscarried and was very sick and a veterinary officer was called. He stated that the cows in their area are never branded. He testified the animal was released to him before it was brought to Court as it had been photographed in absence of the accused.

7. **PW2 Richard Ooko an Assistant Chief** of Yenga Sub-Location, testified that on 19.5.2012, PW1 went to his office and informed him, his cow white in colour, had been stolen. He advised PW1 to report to Police. He later informed PW2 to have got information from a caller from Bumala where to get his cow. That PW1 and PW2 with others were led to where the cow was PW1 examined that cow and confirmed that it was his cow. That when accused heard that, he ran away. PW2 went to Bumala Police Station and reported. The cow was driven to Bumala Police Station. The 1st appellant was subsequently arrested and led PW2 with others to the home of the 2nd and the 3rd appellants who were also arrested. During cross-examination PW2 testified that the 1st appellant said the 2nd appellant had given him the cow. He admitted in Bumala Market under Busia County a receipt is issued on purchase of animal through the Market. He was shown receipt marked MFI D1 – 1.

8. **PW3 No. 83371 P.C. Francis Erot**, testified that on 4.8.2012 he received a report of cow theft from PW1. That he called a colleague and upon interrogating the reportee they proceeded to a place where PW1 identified the cow. That they arrested the people with the animal and took them to Police Station. That on 5.8.2012 the cow was photographed. On cross-examination PW4 testified that in company of PW1, PW2 and two officers they proceeded to home where the cow was and he arrested all the appellants from the said home. He testified some photographs were taken by a photographer citizen rather than by a Police Officer and O.C.P.D. made a decision the cow be released to the complainant. He stated the complainant gave description of the animal. That the cow they recovered was white with long horns.

9. **PW4 No. 71763 P.C. Moffat Migwi** testified that on 6.8.2012 he was instructed to investigate the matter in which it was alleged theft had happened between 18/19 May 2012. He recorded PW1's statement as he had received photos of the animal from O.C.S. Ukwala Police Station. He proceeded to charge the appellants with the offence and that he later took photographs for certification. On cross-examination PW4 testified that the cow was white and had about 12" horns. That the cow has been released after the photos on instructions of O.C.S. He stated he escorted the photos to the scene of crime officer for certification at Kisumu on 16.4.2014 adding the scene of crime officers are supposed to take photos at the scene. PW4 produced the photos as exhibits P 1 (a), (b), (c) and (d).

10. The Appellants upon being put on their defence each of the appellant opted to give sworn defence.

11. **DW1 Sylvester Owino Oloo**, the 1st appellant testified that he is a businessman and deals in buying and selling animals. That he operates from Amukura and Konyonzo Market and sells animals at Bumala. That on 3.8.2012 on arrival at Lunga, the 3rd appellant stopped him and told him he had an animal to sell. They agreed at price of Ksh.16,700/= and he paid him in the presence of a witness one Abwire. DW1 left the animal with Abwire who was to take the animal to Bumala Market. That on 4.7.2013, he was at Market with some animals for sale but he did not sell them and went back home with the same. That at mid-day two men came and asked about the animal and claiming it to be theirs. DW1 told them he had bought the animal from the 3rd appellant. DW1 went to the 3rd appellant who advised him to go to Police as the animal was his. They went to Ogara's home, who had the receipt. That they were arrested and taken to Bumala Police Station, later to Sega and Ukwala and charged with the offence. He stated the cow was white in colour. During cross-examination he stated the 3rd appellant sold the cow to him.

12. **DW3 Morris Wandera Makokha** testified that he did not steal the animal, as in may 2012 he was at Kisumu. In June 2011, he went to his uncle DW2 and asked him to buy him a cow, that he send him Ksh.11,500/= in July 2011, that on 14.8.2011 he received information his uncle DW2 had bought him a cow. On 18.8.2011 he took the animal to his place and stayed with it for one year. The cow was white in

colour and his had no receipt. That on 3.8.2012 he sold the cow to the 1st appellant at Ksh.16,700/= who is a buyer and seller of livestock. That the cow was taken to Bumala Market on 4.8.2012 and the 3rd appellant was also at the Market looking for another animal which he bought. That at 4.30 p.m. he received information about this matter and proceeded to home of the 2nd accused and was arrested. He insisted he did not commit any offence as the animal belonged to him, stating he did not see the animal in Court. On cross-examination he stated the animal was bought on his behalf and he did not get a receipt.

13. **DW2 Charles Ouma**, the 2nd appellant testified that on 13.8.2011, he bought a cow at Kshs.10,300/= from Bumala Market on behalf of his nephew, the 3rd appellant as he had send him money to do so. He bought a white cow with a twisted tail. He was issued with a receipt but it was spoilt when his clothes were being washed but stated that he has a photocopy of the receipt exhibit D1. That he gave the cow to Juka to drive to his home when it stayed for 4 days before the 3rd appellant went for it. That on 4.8.2012, he was arrested. He denied having committed the offence.

14. **DW4 Sebastian Wawire** testified that he knows the appellants who come from the same village with him. That on 13.8.2011 at 10.00 a.m. while at Bumala Market the 2nd appellant asked him to drive home an animal. He did so. He stated he took the animal at the 3rd Appellant's place and was there for a year. That on 3.8.2012, the appellant who had bought the same animal from the 3rd appellant asked him to drive it home and the next day he took the animal to Owino. He stated the appellant had not stolen the animal.

15. At the hearing of the appeal the Counsel for the appellant's put in a written submission and highlighted on the same. He emphasized that the key issue in his appeal relates to the fact that the judgment was not properly analyzed and issues framed; that the Court erred in arriving at the wrong conclusion, that the Court did not specifically specify under what count the appellant was convicted, that the offence was not proved to the required standard, that the exhibit, thus the purported stolen cow was not produced, that the complainant failed to identify the cow as his own, that the 3rd appellant claimed ownership of the cow having been in possession since 2011, that the ingredients of the offence were not proved, that the evidence of the prosecution or identification of the cow was insufficient and contradictory, that the doctrine of recent possession was not applicable in this case and that the photograph was not properly taken and produced referring to **Section 78 of the Evidence Act**. The Learned Counsel for the appellant referred Court to the following cases **R V. Deakin (1972) 1WLR 1618, Mwema V. Republic (1984) KLR 480, and Thahabu Ibrahim V. Republic (1983) KLR 608**.

17. The State in opposing the appeal submitted the identification was proper as per exhibit P 1 (a), (b), (c) and (d) which photos were produced without objection by the appellants, that though the photographs are supposed to be taken by the Scene of Crime Officers and confirm the same, they were certified and admitted without objection, that the complainant did not describe the cow as pregnant contrary to appellant's Counsel contention, that on Doctrine of Recent Possession he submitted a duration of 3 months is not a long time relying on the case of **Erick Otieno Arum V. R. CR.A 85 of 2005 (Kisumu)** and **Case of Arnold Odhiambo Ogolla and Calvin Juma Komogo V. R CR.A. 364 of 2008 (Nairobi)** He urged the Court to dismiss the appeal, uphold the conviction and confirm the sentence.

18. Whether the trial Courts judgment conform to basic requirement for writing judgment? The Appellants faults the Learned Magistrate's conviction for not conforming to the basic requirements for writing judgment and the appellants urge as such they were prejudiced, as failure to do so resulted in a conviction which lacked proper analysis and evaluation of the evidence. The appellants contend the judgment does not identify the charges laid against them, the issues relevant for determination, that the judgment failed further to state whether the accused were convicted on the main charge or on the alternative charge or on both.

19. **Section 169(1) of the Criminal Procedure Code** deals with the contents of a judgment and specifically provides:-

“Sec. 169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be

written by or under the direction of the presiding officer of the Court in the language of the Court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it.”

20. **Section 169 (2) of the Criminal Procedure Code** states in case of conviction the judgment shall specify the offence of which and Section of the Penal under which the accused is convicted and punishment the is sentenced to.

21. I have very carefully perused the Learned trial Magistrate's judgment and it is evidently clear that the Learned trial Magistrate in his judgment he did not comply with **Section 169(1) C.P.C. and 169 (2) of C.P.C.** in that his judgment does not contain point or points for determination, the decision therein and the reason for the decision. That upon conviction the Learned trial Magistrate erred by failing to specify the offence of which and the Section of the Penal Code under which the appellants were convicted and the punishment to which they were sentenced as per the mandatory requirement of **Section 169(2) of C.P.C.** That whereas the appellants may not be prejudiced by none-compliance with **Section 169(1) of C.P.C.** as I shall analyze and evaluate the evidence and take up points for determination and make my decision and give reasons for the same, I find that the failure by the trial Magistrate to comply with **Section 169(2) C.P.C.** and more specifically by failing to specify the offence of which and the section of the penal code under which the accused persons were convicted and sentenced were prejudiced. That failure rendered the conviction unclear and ambiguous due to failure to adhere to provisions of **Section 169(2) of C.P.C.** The trial Magistrate in his judgment stated:-

“I find them guilty as charged. The participated jointly in the commission of the offence charged and I convict them accordingly under Section 215 of the C.P.C.”

The accused were charged with **Stealing Stock Contrary to Section 278 of the Penal Code** with alternative charge of **Handling Stolen Goods Contrary to Section 322 of the Penal Code.** In view of the trial Court's judgment it is obvious the appellants do not know whether they were convicted of the main charge or the alternative charge or both. I find the judgment prejudiced the appellants and the error is incurable, as from the judgment it is impossible to understand, for what offence the appellants were found guilty and convicted.

22. Whether the prosecution's case against the appellants was proved to the required standard thus beyond reasonable doubt? In the main charge of **Stealing Stock Contrary to Section 278 of the Penal Code**, the prosecution was required to prove that the thing stolen is one of the animals listed under **Section 278 P.C.** and even to prove that the stolen thing is property of the complainant and that at the time of theft the appellant were seen by someone.

23. In the instant case the alleged theft took place on 18.5.2012 past midnight, when the cow was stolen and the thieves were not seen at the material night. The complainant averred further that he traced the cow at the 1st appellant's home on 4.8.2012, after somebody informed him about it. He claimed the cow had no identification mark or brand and was identified by its “white” colour and claimed he had been with it for 7 years. He further stated the animal has small teeth and a small udder. He stated by the time he got the cow it had miscarried and was very sick and a veterinary doctor was called. PW2 testified PW1's cow was white, whereas PW3 did not state the identification marks of PW1's cow, except that it was white with long **horns**. PW4 said it was white with 12” horns.

24. The 2nd appellant testified that on 13.8.2011 he bought the cow in question at Bumala Market on behalf of the 3rd appellant at Ksh.10,500/=, that the cow was white with a twisted tail. He produced a photocopy of the receipt as exhibit D1 dated 13.8.2011 showing the mark of the cow as “Dibo” which PW1 confirmed means “white” colour. That DW4 confirmed the particulars of the cow and taking it to the 3rd Appellant's home. The 3rd Appellant testified the cow was his after he had instructed the 2nd Appellant to buy it for him. That he got the cow 18.8.2011 and stayed with it for a year before he sold it to 1st appellant on 3.8.2012 in the presence of DW4 who drove it to the 1st appellant's home. DW4 was also at the market when the 1st appellant who is livestock dealer was selling the cow. DW4 confirmed

that the cow in question stayed at the 2nd appellant's home for 1 year. DW4 testified the appellants had not stolen the cow. The 3rd Appellant testified that the cow was white and denied having stolen the cow.

25. The Learned trial Magistrate in his judgment did not address himself on the crucial issues of the identification of the purported stolen cow to ascertain that indeed it was complainant's cow and not that of the 3rd appellant who had it bought for him by the 2nd appellant and thereafter he sold it to the 1st appellant. The trial court did not analyze and evaluate the evidence before he convicted the appellants. The complainant identified the cow as his because it was white, with small teeth, and small udder whereas the 2nd appellant claimed the cow and identified it by its "Dibo" colour thus white colour with a twisted tail. The cow was not branded by any of the parties. The complainant's evidence was contradicted by PW3 and PW4 who talked of the cow having long horns whereas the complainant never mentioned that his cow having such features. The cow was released by Police before the Court took plea and what was produced before court was photographs taken by a private citizen. The photos could not show the small teeth and udder the complainant was talking of, nor could trial Court know the tail was twisted or not as alleged by the appellants.

26. In the world all over white cows are many and the identification by mere "white" colour is not sufficient evidence of ownership of a cow. In the case of **Dedan Kimathi & Another V. Republic Criminal Appeal No. 53 of 2013 Court of Appeal at Nyeri** addressed itself thus:-

"It was incumbent upon prosecution to prove that the maize which was found in the appellant's possession belonged to the complainant. Maize is a staple food in most households and as such it is readily available."

From the evidence of the prosecution, the prosecution failed to prove that white cow which was found at the 1st appellant's possession belonged to the complainant. I take judicial notice that white cows are kept in most of household in Kenya and are readily available in open livestock Markets and with a special brand one cannot claim any white cow to be his. In the present case this could be a case of mistaken identity in view of the fact that the complainant's cow was stolen on 18th May 2012 whereas the 3rd appellant's cow was bought on 13.8.2011 and he did not depart with its possession till on 3.8.2012 when he sold it to the 1st appellant.

27. In the case of **Godana Adano & 2 Others V. Republic HCCRA 41 of 2014 (Meru)** the two judge bench stated:-

"PW1 purported to identify the recovered goats, sheep and donkey using a mark on the animals. In the instant case, we find that a mark on part of the animal, unless it is so special that no other person could have made it on their animals is not sufficient proof that they were the deceased's goat and sheep ---."

28. In view of the above I am satisfied the complainant's attempt to identify the cow by its God's given "white" colour is not and cannot be a sufficient proof that the cow belonged to him. The cow indispute has therefore not been proved to belong to the complainant. The cow was released by Police to the complainant and as the court had no opportunity of physically seeing the cow it could not correctly state the photograph taken by an ordinary citizen as opposed to a gazetted officer was sufficient identification of the cow. The photos had nothing special to show that they were of the same cow and not of any other cow bearing in mind the photographs as were taken in absence of Scene of Crime Officers and by a private photographer.

29. I have found that the prosecution failed to prove the charges against the appellants to the required standard of beyond reasonable doubt.

30. Whether the doctrine of recent possession applied to the appellants case? In the case of **Godana Adano & 2 Others V. Republic** (supra) a two judge bench stated:-

"The trial Court seemed to rely on the doctrine of Recent Possession in convicting the appellant, that

doctrine is easily applicable, where the prosecution established that:-

- (1) The property was found in possession of the accused.**
- (2) That the property was positively identified by the complainant,**
- (3) That the property was recently stolen from the complainant”**

31. The learned trial Magistrate in his judgment stated:-

“The complainant was able to identify the animal and some photographs taken before being handed over to him. Accused persons were not seen stealing the animal but were nevertheless found in possession of the same ----”

32. From the trial court's judgment he seems to say the complainant was able to identify his cow. The question is how? By its “white” colour and photographs? PW1 purported identification of the cow by its “white colour” and not by any “mark” or “branding” in my view was insufficient unless there was evidence that in the whole of Kenya no other cows could be found with similar colour. I have already noted that the complainant was able to identify the cow in question as his own and not of any other person including the appellants. The identification of the cow was not positive and full proof. The evidence of PW1, PW2 PW3 and PW4 clearly points to the fact that when the cow was found it was in the possession of the 1st appellant and not the 2nd and 3rd appellants. It is therefore not correct as found by the trial Court that the cow was found in possession of all accused persons and that they kept on passing over the animal from one person to the other. The other issue is how recent was the recovery made? The complainant stated his cow was recovered after 3 months had passed. The State submitted that it was a short time, whereas the appellants stated it is a long time. The 3rd appellant claimed the recovered cow was his and he had sold it to the 1st appellant. The 2nd appellant stated the cow belonged to the 3rd Appellant having bought it on 13.8.2011 for the 3rd appellant. Whether or not the period is recent would depend on how fast an item can change hands. Some items change hands easily while other don't. In this case, 3 months is a long time taking into account that cows are sold locally by any person and that there are several open markets where people can easily access the cows offered for sale. That there are no regulation as to where cows can be sold as they can be sold in open markets or at homes or in public auctions. In this case, 3 months is quite a long time and this court cannot find with certainty that the appellants were in Recent Possession of the cow, and specially having created doubt to identity of the cow as its recovery could have been based on mistaken identity of the cow by the complainant.

33. Whether the trial Court erred in law and fact by convicting the appellant's on the basis of photographs that had been taken by an unauthorized person and in contravention of the law? The charging of the appellants at Ukwala Police Station and their subsequent arraignment was on the basis of the statements and photographs taken at Bumala Police Patrol Base which were then transmitted to Ukwala Police Station. PW3 testified the photographs were taken by a photographer from Sega who was not a Police Officer. PW4 testified that he escorted the photos to the Scene of Crime Officer for certification at Kisumu and that was done on 16.4.2014. PW1 had testified on 25.2.2014, when the photos were marked as MFI P1 (a), (b), (c) and (d). That by then the photos did not have certification, hence the prosecution took steps to have the defects rectified by having them certified by Scenes of Crime Officer, who had not participated in their being taken and printing. The officer was made aware the photographs were not taken at the Scene of Crime, and were taken by an unauthorized photographer who was not a Police Officer and a gazetted one, to take crime photos but went ahead with the certification. The Officer Scene of Crime Officer who belately certified the photographs, knew he had not participated in the chain process of producing the photographs to enable him give a valid certification under the law as regards the photograph. In actual fact he knows nothing about the said photographs as he did not witness its taking and production.

34. **Section 78 of the Evidence Act (Cap 80) laws of Kenya** provides:-

“(1) In criminal proceedings a certificate in the form in the schedule to this Act, given under the

hand of an officer appointed by order of the Director of Public Prosecution for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein

(2) The Court may presume that the signature to any such certificate is genuine.

(3) When a certificate is received in evidence under this section the Court may, if it thinks fit, summon and examine the person who gave it”

35. In view of the evidence of PW1, PW3 and PW4 on the taking or making and preparing the photographic print from exposed film the trial Court upon receipt of the certificate in evidence under the above section. Should have summoned and examined the person who made the certification. Failure of the person who did certification to have given evidence and confirm that he prepared the photographs or the same was done in his presence under his direction made the whole process a nullity. The certification done by the Scenes of Crime Officer to rectify the errors initially made by Police allowing a stranger to take photo, prepare and print them in my view was invalid and his certification cannot give him any validity. The photographs were not valid for the trial. The trial Magistrate under the law and remain so. The proceedings and any decision based on the unlawfully prepared and printed photographs were and are invalid. The trial Magistrate's judgment should not have been based on the unlawfully prepared and printed photographs.

36. **All in all having given due consideration to all evidence before the trial Court, there is doubt as to whether the recovered cow belonged to the complainant. That as held by Court of Appeal in the case of Joan Chebichi Sawe V. Republic CR.A. No. 2 of 2002 suspicion alone, however strong, cannot be a basis for a conviction. For all these reason, I give the benefit of doubt to the appellants. The conviction was unsafe. I accordingly quash the convictions and set aside the sentences. The appellants are set at liberty forthwith unless otherwise lawfully held.**

DATED AT SIAYA THIS 15TH DAY OF MARCH, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 15TH DAY OF MARCH, 2016.

In the presence of:

Mr. Wanyama for the Appellant

M/s. Odumba for State

Appellants- Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

J. A. MAKAU

JUDGE

