



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**HIGH COURT CRIMINAL APPEAL NO. 57 OF 2013**

**PHILIP KIPKOECH SIGEI.....1<sup>ST</sup> APPLICANT**

**JULIUS KOSKEI KIPKOECH.....2<sup>ND</sup> APPLICANT**

**ANDREW SIGEI KIPKEMOI.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. Andrew Sigei Kipkemoi (1<sup>st</sup> appellant/ 1<sup>st</sup> accused), Philip Koech Sigei(2<sup>nd</sup> appellant/ 2<sup>nd</sup> accused and Julius Koskei Kipkoech (3<sup>rd</sup> appellant/3<sup>rd</sup> accused were jointly charged with the offence of stealing stock contrary to section 278 of the Penal Code Cap 63 Laws of Kenya at Kilgoris PMCC Court Criminal Case No. 71 of 2013. The particulars of the charges were that on the 21<sup>st</sup> January, 2013 at Shartuka area of Transmara West District within Narok County they jointly stole 10 heads of cattle valued at kshs. 30,000 the property of Saningo Tasur.

2. The 3 accused also faced an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code Cap 63 laws of Kenya. The particulars of the alternative charge were that on the 24<sup>th</sup> January, 2013 at Murken area of Transmara East District within Narok County jointly otherwise they in the cause of stealing dishonestly received or retained two cows valued at kshs. 60,000 knowing or having reasons to believe them to be stolen.

3. All the accused persons pleaded not guilty to the offences and trial ensued.

4. PW1 was Saningo Tasur, the complainant. He recalled that on the material day that is 21<sup>st</sup> January, 2013 in the morning, his cattle went off to graze for pastures with his two herd boys i.e Julius and Stephen. That once the cattle had grazed as they were being driven back, one of the calf's started making noise looking for its mother and that is when they discovered that 10 cows were missing from the herd. They made attempts to search for the said missing cattle but to no avail.

5. Afterwards, he informed the chief one Tangoi who also embarked on the search but to no avail. However, on 23<sup>rd</sup> January, 2013 they were informed that a cow was recovered only to soon discover that the same belonged to one (Olotile) as his were still missing. That notwithstanding, on the same day, he got a phone call from a chief by the name Shadrack informing him that there were 2 cattle found in 1<sup>st</sup>

accused boma. On receiving the said phone call, he immediately boarded a motorcycle and went to Murken. On arriving at Murken he was told to wait and soon after 2 of this cattle were brought by askaris and the chief and he in turn identified them by a mark on the ear i.e. it had 3 cuts. By that time, the accused persons were already arrested and were in custody.

6. Lastly, he confirmed that prior to his cattle being stolen he did not know the accused's persons.

7. PW2 was Jonathan Tankoi the assistant chief of Shartuka. He corroborated PW1's testimony that on 23<sup>rd</sup> January, 2013 they were searching for stolen cattle and while at it they received information from Assistant chief Shadrack Kirui that 2 other cattle had also been stolen. Together with the Assistant chief Shadrack Kirui they went to the 1<sup>st</sup> accused house (near the house) and found two cattle which were suspected of being stolen at around 6.00a.m. in the morning. They also found a black female cow(pregnant) and a calf.

8. They drove the two animals to the A.P. Camp and PW1 came and reported that his 10 cattle were missing. He (PW1) then identified the 2 cattle i.e. (pregnant cow and calf) as his. He identified the photographs of the said cows as MFI-P1 and P2 and identified 2<sup>nd</sup> accused as a suspect whom they had arrested.

9. Lastly, he contended that he was not familiar with the 2<sup>nd</sup> and 3<sup>rd</sup> accused but he infact knew the 1<sup>st</sup> accused as he used to see him in Murken.

10. PW3 was No. 50589 P.C. James Ngunjiri attached to Kilgoris Police Station. He recalled that on 24<sup>th</sup> January, 2013 he was in his work station when he got information from OCS that persons had been arrested and were at Murken.

11. On proceeding to Murken, he found some prisoners and cattle had been recovered. He also revealed that he was the one who wrote witness statements and interrogated some village elders. Apparently, the complainant (PW1) had about 300 heads of cattle, the accuseds had stolen split the cattle and they kept one each. While interrogating the accuseds, accused No.2 and 3 contended that the cattle they were found with belonged to accused 1 while accused 1 contended that the cattle actually belonged to 2<sup>nd</sup> and 3<sup>rd</sup> accused. He produced the photographs he took of the cattle as PExhibit.1 and 2. However, he also revealed that the cattle were found next to 1<sup>st</sup> accused house but that they never reached 2<sup>nd</sup> and 3<sup>rd</sup> accused homes.

12. PW4 was No. 940230446 Corporal Raphael Okengo based at Muyen Division. He told the court that on 24.1.2003 he was in his work station when four persons i.e. chief of Mogondo sublocation, Shartuka chief Manyara and some informers came to complain that on 21<sup>st</sup> January, 2013 cattle had been stolen and driven to Murken area.

13. Immediately other officers and himself embarked on investigations on the matter and acting on information of an informer and the area chief, they were led to 1<sup>st</sup> accused home. On arrival at 1<sup>st</sup> accused home, they found accused first asleep. On identifying themselves a police he (1<sup>st</sup> accused) opened the door and in turn they told him to lead them to his cattle boma enclosure.

14. At the cattle boma, they found one brown female cow which the 1<sup>st</sup> accused insisted was his. This was around 8.30p.m.

15. Afterwards, the Shartuka chief immediately telephoned the complainant who identified the said cow as his. On the same night they also went to 1<sup>st</sup> accused mother's house and found 2<sup>nd</sup> and 3<sup>rd</sup> accused sleeping there. (Apparently on their way to 1<sup>st</sup> accused mother's house, they found two cattle in between the two houses). Of the two cows found one was black and the other was white stripped. On recovering the cattle they proceeded to the police station.

16. Later, the complainant came and identified his cattle. He also revealed that the 1<sup>st</sup> accused was a brother to the 2<sup>nd</sup> accused and the distance between 1<sup>st</sup> accused and his mother's house was 50metres apart.
17. Later after arresting all the accused persons, the 1<sup>st</sup> accused said that he never knew of the cattle and implicated his wife as the one who knew about it. He also confirmed that 2<sup>nd</sup> and 3<sup>rd</sup> accused stated that they never knew about the cattle.
18. PW5 was Shadrack Kiplagat Kirui the assistant chief of Mogondo. He recalled that on 22<sup>nd</sup> January, 2012 he got a call from PW2 informing him that his (PW2) cows had been stolen in his area about 13 of them and that he (PW2) needed his help in investigating. He used his informers and got word that the cattle were at 1<sup>st</sup> accused home. He in turn informed PW2 of the same and PW2 came accompanied by the complainant. On arrival of PW2 and complainant, together they went to the police from Murken D.O's office and then left for 1<sup>st</sup> accused home.
19. On arrival at 1<sup>st</sup> accused home, they found him asleep and on asking him to show them the cow, he led them to his boma and it was then that pW2 identified one brown cow as he was familiar with it since it emanated from his jurisdiction. Apparently it turned out that the said cow came from PW1's family. Eventually the owner of the brown cow came in the morning.
20. Afterwards they searched and found two other cows i.e. two black cattle a female and a bull which belonged to PW1. PW1 identified the same from the ear cuts. Later, they drove the said cows to the Divisional officer who in turn called police to take statements. He also recalled that they found 2<sup>nd</sup> and 3<sup>rd</sup> accused sleeping in 1<sup>st</sup> accused's mother's house although they denied knowing anything about the cattle. He also confirmed that 1<sup>st</sup> and 2<sup>nd</sup> accused were brothers from the same mother and the distance between 1<sup>st</sup> accused and his mother's house was like 60m apart. This marked the close of the prosecution's case.
21. After carefully considering the evidence that was placed before him, the trial magistrate ruled that the prosecution had adduced sufficient evidence to warrant all the three accused persons to be put on their defences. Each of the accused persons in turn chose to give an unsworn testimony with no witnesses.
22. DW1 was Andrew Sigei) he acknowledged the fact that on the maternal day, he was woken up by the police at 1.00a.m and when they inquired about his cattle he in turn took them to his cattle boma. According to him he stated that they, claimed that he had stolen cattle and they indeed found one cow which did not belong to him. Apparently he contended that when he had arrived home, he had been informed that one cow had strayed and followed his herd. After getting the said cow from him, the police arrested him and took him to the Divisional Office's office.
23. He however reiterated that he only knew Imanyara's cow that had strayed into his home and alleged that he had gone to report the same to the Divisional Officer's office but he did not find the chief.
24. DW2 was Philip Kipkoech Sigei he denied the charges facing him and stated that he knew nothing about them.
25. DW3 was Julius Koskei who also denied the charges facing him and stated that he knew nothing about them.
26. In its judgment the trial court found all the 3 accused persons guilty of the main court and noting that despite the fact that the 3 accused persons were first offenders, cattle rustling was a subject of criminal disturbances among the tribes around the area of jurisdiction and his role as a court needed to manifest itself. Hence, he sentenced each of the accused persons to be sentenced to 7 years imprisonment.
27. Each of the accused now appellants being aggrieved by the above conviction and sentence chose to

prefer an appeal to this court. In their memorandum of appeal each appellant has filed a separate petition of Appeal citing grounds inter alia that the charges against them were not proved beyond reasonable doubt by the prosecution.

28. When the above appeal came before me on 3<sup>rd</sup> February, 2015 the 1<sup>st</sup> appellant herein Andrew Sigei Kipkemoi submitted that by admitting that indeed there was a cow that had stayed into his boma, that he did infact take the cow to the area chief, he did not find him and only found administrative police who in turn advised him to go back with the cow and if there was any complain about a lost cow, they would come to his compound.

29. The 2<sup>nd</sup> appellant herein Philip Kipkoech Sigei submitted that the charges when read to him, the witnesses were not talking about stock theft but when the witnesses gave evidence, their evidence was on escape only.

30. The 3<sup>rd</sup> appellant herein Julius Koskei Kipkoech submitted that the police did not arrest them with any cattle but only found one cow in the 1<sup>st</sup> appellant's boma.

31. The above appeal was partly opposed by the state. Mr. Otieno learned counsel for the state partly opposed the above appeal by submitting that even though no one saw the three appellants stealing the cattle, the trial court applied the doctrine of recent possession. In convicting the 1<sup>st</sup> appellant, regarding the 2<sup>nd</sup> and 3<sup>rd</sup> appellant he submitted that the evidence on record supports the charge as the two were sleeping in a house 60 metres away from the 1<sup>st</sup> appellant's house.

32. Although he submitted that nothing else connects 2<sup>nd</sup> and 3<sup>rd</sup> to the theft, the 2<sup>nd</sup> appellant is a brother to the 1<sup>st</sup> appellant and they were living in the same homestead. Thus he submitted that applying the doctrine of recent possession the 2<sup>nd</sup> and 3<sup>rd</sup> appellant conviction was unsafe and conceded the same. However, regarding the conviction of the 1<sup>st</sup> appellant, he urged the court to confirm the same.

33. As a first appellate court, it is my duty to evaluate a fresh the evidence that was tendered before the trial court and arrive at an independent determination in the matter, remembering only that I do not have the privilege of seeing and hearing the witnesses who testified in the lower court. See generally **Pandya –V. R [1957] E.A. 336; Okeno v. Republic [1972] E.A 32 and Selle & Another –vs- Associated Motor Boat Co. Ltd & Others [1970] E.A. 123.**

34. The state has already conceded to the conviction and sentencing of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants as improper since the doctrine of recent possession used by the trial magistrate to convict the 1<sup>st</sup> appellant could not be used against them as they were not actually caught with the cattle since the said cattle was found in between the 1<sup>st</sup> appellant's house and the place where the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were sleeping which was about 60 metres apart.

35. What about the 1<sup>st</sup> appellant? Does the evidence against him convince this court that the charge against him of stock theft using the doctrine of recent possession been proved against him?.

36. In the case of Stephen Njenga Mukiria & another vs. R in Nakuru Criminal Appeal No. 175 of 2003(unreported) the court addressed as to how and when the doctrine of recent possession is applied and held:-

*‘.....the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, what the item he had in his possession had been stolen, had been stolen a short period prior to possession, that the lapse of time from the time of the loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is rebuttable presumption.*

*That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn. That he either stole it or was a guilty receiver.....” (see Mangi v. R (1989) KLR 225.*

37. In the instant case we have the evidence of the prosecution witnesses starting with the two area chief's who testified as PW2 and PW6 respectively and PW4 who happened to be the investigating officer.

38. PW2 stated in chief that when they went to 1<sup>st</sup> appellant's house they found 2 cattle out of the boma but just near. PW4 who was the investigating officer stated the following when they went to 1<sup>st</sup> appellant's homestead cattle boma:-

*‘He led us to it we found one brown female cow. It was 8.30o.m. he instructed that the cow was his’*

*‘On 2<sup>nd</sup> and 3<sup>rd</sup> appellant he stated:-*

*‘We went to a house belonging to Andrew’s mother. We found 2<sup>nd</sup> and 3<sup>rd</sup> accused’s sleeping there. We had their names earlier.*

*.....we found the cattle between Andrew’s house and the mother. One was black and the other white stripped. We recovered the cattle’.*

39. This only means that what connects the 2<sup>nd</sup> and 3<sup>rd</sup> appellants to the charges was the fact that they were both found in the 1<sup>st</sup> appellant's mother's house which was about 60m away from the 1<sup>st</sup> appellants house and the 2 cattle recovered were found in between the two houses and NOT inside the 1<sup>st</sup> appellant's mother house where the 2<sup>nd</sup> and 3<sup>rd</sup> were sleeping. Thus the conceding of the 2<sup>nd</sup> and 3<sup>rd</sup> appellant appeal by the state is quite obvious as there was nothing to implicate the fact that they were in actual possession of the 2 cows that were recovered between the 1<sup>st</sup> appellants house and that of his mother.

40. Now turning to the 1<sup>st</sup> appellant as I have established above both PW2 and PW4 stated that indeed a cow which had been stolen was actually on 21<sup>st</sup> January, 2013 had been recovered on 24<sup>th</sup> January, 2013 in 1<sup>st</sup> appellants compound.

41. In his defence, the 1<sup>st</sup> appellant has offered an explanation to the evidence that a cow was found in his compound by contending that acknowledging that he was aware of a stray cow that had joined his herd in his boma and had infact according to his defence testimony reported the issue to the Divisional officer's office. The chief was not there but there were askaris.

42. Thus the 1<sup>st</sup> appellant in my humble view in as much a a cow was found in his compound he has rebutted the prosecutions' evidence that the said cow actually strayed to his compound. Furthermore, the 1<sup>st</sup> appellant can also not be convicted of the charge of stock theft since the particulars of the charge were never proved as the complainant in the present charge sheet was not the owner of the cattle found in the 1<sup>st</sup> appellant's boma.

43. For the foregoing reasons the above conviction and sentencing of the 3 appellants cannot stand. They are hereby quashed and the 3 appellants be and are hereby set free unless otherwise lawfully held.

44. Order accordingly.

Dated and delivered at KISII this 27<sup>th</sup> day of March, 2015

**C.B. NAGILLAH,**

**JUDGE.**

**In the presence of:-**

Appellants in person.

Ms. Clara for the respondent

Edwin Mongare Court Clerk.