



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 186 OF 2013**

**NARICIS MGHALU MWANDAGHA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the Original Conviction and Sentence in the Criminal Case No. 405 of 2013**

**of the Senior Principal Magistrate's Court at Voi – Hon. Wahome - SPM)**

**JUDGMENT**

**NARCIS MGHALU MWANDAGA** hereinafter referred to as the Appellant was Convicted and Sentenced to three (3) years imprisonment for the offence of stealing stock contrary to section 278 of the Penal Code.

The particulars of the charge were that:-

**“On the 6th day of June, 2013 at Mbololo Location Taita Taveta County stole three (3) heads of cattle valued at Ksh. 65,000/= the property of GLADWELL MKACHARO MANAMBO”.**

The brief facts of this case are that on the 6th day of June, 2013 the Complainant handed over to the Accused her three(3) cows to take to the grazing fields. He was to look after the cows among others and return them home in the evening. In the evening he returned some of the cows but the three(3) were missing. He informed the Complainant that they had gone missing in the grazing fields but they would return home by themselves but this did not happen. After concerted efforts to search for the cows were made without success, the matter was reported to police and the Accused was arrested and later charged with this offence.

In his Judgment the trial magistrate at page 13 line 25,

***“In the mind of the Court, the Accused failed to look for the cows because he knew that they could not be found as he had stolen them and probably sold them to third parties. Going by the circumstantial evidence I have no doubt that the Accused stole the complainants heads of cattle”.***

In the Court of Appeal case of JAMES MWANGI –Vs REPUBLIC Criminal Appeal No. 33 of 1983 it was held,

***“In a case depending on circumstantial evidence, in order to justify, the inference of guilt, the incriminating facts must be incompatible with the innocence of the Accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt ..... In order to draw the inference to the Accused guilt from the circumstantial evidence, there must be no other co- existing circumstances which would weaken or destroy the inference”.***

In the present case, the Appellant was given the three (3) heads of cattle among others to take to the grazing fields and return them. He took them to the fields for grazing and upon returning home explained that the three(3) cows were missing but they would return by themselves but they did not.

Apart from his alleged non participation in the search for the cows there is nothing else to indicate that he sold and or converted them into his own use. In his sworn statement he told the Court that together with his brother they had gone searching for the missing heads of cattle in the neighbouring slaughter houses, but all in vain.

The circumstantial evidence before the court did not irresistibly point to the guilt of the Accused. The explanation the Accused gave was reasonable.

The upshot is that the Conviction of the Accused for the offence of stealing stock contrary to section 278 of the Penal Code was not safe. The appeal has merit and its allowed.

The Conviction is hereby quashed and the Sentence of three (3) years is set aside.

He is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **28th** day of **October, 2014**.

.....

**M. MUYA**

**JUDGE**

**28TH OCTOBER, 2014**

**In the presence of:-**

Learned Counsel for Director of Public Prosecution Mr. Jami

The appellant present

Court clerk Musundi