

REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 470 OF 2013

PETER MAINA MWANGIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Murang'a SRM Criminal Case No. 648 of 2012 – J Wekesa, Ag. SRM)

J U D G E M E N T

1. The Appellant was charged with six counts of **stock theft** contrary to **section 278** of the Penal Code. He pleaded not guilty and was tried. He was convicted of the offences in counts 2 and 4 and sentenced to serve 10 years imprisonment on each count, sentences to run concurrently. He has appealed against both conviction and sentence. Learned State Counsel for the Respondent does not support the convictions.
2. I have read through the evidence as recorded by the trial court in order to evaluate it and arrive at my own conclusions on the same as is my duty as the first appellate court. I have borne in mind the fact that I did not myself hear and see the witnesses, and I have given due allowance for that fact.
3. The Appellant was apparently convicted on the doctrine of **recent possession**, though the trial court did not expressly state so in its judgment. However, possession was not proved to the required standard. The only relevant evidence was by PW1 and PW3. PW1 said that the Appellant sold to her a cow which was **“black with a white hatch on its forehead”**. But the owner of the cow was not called to identify it. All the six cows on the charge sheet were in fact recovered. The failure to call the owner of the cow that the Appellant allegedly sold to PW1, and some other owners of the other cows, was never satisfactorily explained. The trial court was told that the owners were satisfied because their cows were recovered, and that therefore they did not wish to testify. That was not a satisfactory explanation because they were all **competent and comparable witnesses**.
4. The effect of the lack of testimony from the cows' owners was that the cows allegedly stolen by the Appellant were never proved to have been stolen in the first place.
5. As for PW3, he said that he had lost a black cow which he recovered from a home compound. He did not know the owner of the compound. The investigating officer (PW5) stated that he had been told by the Chief that the (the Chief) had recovered stolen cows from a compound belonging to the Appellant's family. The cows had already been removed from the compound by the time PW5 visited it. He did not even establish that the compound belonged to the Appellant.
6. The Chief and the other persons who allegedly recovered the stolen cows did not testify. No reasons were given for their failure to testify.
7. The effect of all these shortcomings in the prosecution case was that no proper link was established between the Appellant and the stolen cows. That link was vital in order to lawfully invoke the doctrine of recent possession.
8. The convictions are entirely unsafe, and learned State Counsel properly did not support them.

9. I will allow this appeal in its entirety. The convictions are hereby quashed and the sentences imposed upon the Appellant set aside. He shall be set at liberty forthwith unless otherwise lawfully held. Those will be the orders of the court.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 28TH DAY OF NOVEMBER 2014

H.P.G. WAWERU

JUDGE