



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 165 OF 2009**

1. JOSEPH INGUTIA  
2. DANIEL AYWA OLUYAYI ..... APPELLANTS

VERSUS

REPUBLIC ..... RESPONDENT

*(Being an appeal from the conviction and sentence of G.O. Oyugi RM delivered on 29/10/2009 in Butere Senior Resident Magistrate Criminal Case No. 559 of 2009)*

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*(Before B. Thurania Jaden J)*

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

The 1<sup>st</sup> Appellant **Joseph Ingutia Andiere** and the second appellant, **Daniel Aywa Oluyayi** were charged with the offence of stealing stock contrary to **section 278** of the **Penal Code**.

The particulars of the offence were that on the night of 14<sup>th</sup> and 15<sup>th</sup> July, 2009 at **Ikoko** village, **Ebubala** Sub Location, **Shiromba** Location in **Butere** District within **Western** Province, jointly stole one cow and one male calf all valued at **Kshs.18,000/=** the property of **Monica Bweya Owaro**.

In the alternative, the 2<sup>nd</sup> appellant, **Daniel Away Oluyayi** was charged with the offence of handling stolen property contrary to **section 322 (2)** of the **Penal Code**.

The particulars of the offence were that on the 17<sup>th</sup> day of July 2009, **Emukhwangi** village, **Ebubala** Sub Location after **Shianda** Location in **Butere** District within **Western** Province otherwise than in course of stealing dishonestly retained one cow and male calf knowing or having reason to believe them to be stolen property.

After a full trial, the 1<sup>st</sup> and 2<sup>nd</sup> appellant and another already before were convicted and sentenced to seven years imprisonment each. The appellants were aggrieved by the conviction and sentence and appealed to this court. Although each of the appellants had filed their respective appeals **H.C.CR.A No. 165/2009** and **H.C.CR.A No. 164/2009**, the two appeals were consolidated and heard as one. This judgment is in respect of both appeals.

The case for the prosecution was that the complainant, PW1 **Monica Bweya Owaro** of **Ikoko** village had on the material day locked her cow and calf in her kitchen for the night. The following day she found the house had been broken into and the cow and the calf were missing. The matter was

reported to the village elder and to the police.

On 17/7/2009, the cow and the calf were traced to the home of the 1<sup>st</sup> appellant. The 1<sup>st</sup> appellant named the 2<sup>nd</sup> appellant as the one who had taken the animals to him before they were sold to one **Peter Majimbo Onindo** (already before court).

The animals were recovered and taken to **Manyulia** A.P. camp then escorted to **Butere** Police Station. The appellants were then charged.

In his defence, the 1<sup>st</sup> appellant, **Peter Majimbo** gave unsworn evidence. No witnesses were called. The 1<sup>st</sup> appellant stated that it was the 2<sup>nd</sup> appellant who took the cows to him to look after them on his behalf. He stated that the animals were not recovered from his home.

The 2<sup>nd</sup> appellant in his defence gave unsworn evidence. No witnesses were called. He stated that he was arrested on allegations of stealing the cattle. He further stated that the two cattle were recovered from the home of one **Peter Majimbo**.

The appellants' grounds of appeal can be summarized as that the prosecution evidence was insufficient and that there was variance between the evidence of prosecution witnesses and the particulars of the offence. **Mr Oroni** for the State relied on the evidence on record.

The complainant (PW1) testified on the question of theft. She did not know who had stolen her animals but identified the same after they were recovered.

The evidence against the 1<sup>st</sup> appellant is that the cow and the calf were seen at his homestead before they were later found at the home of **Peter Majimbo** where they were recovered from. The 2<sup>nd</sup> appellant was mentioned by the 1<sup>st</sup> appellant as the one who took the cattle to the home of the 1<sup>st</sup> appellant before taking them to the home of **Peter Majimbo**. The evidence against the 2<sup>nd</sup> appellant is that of an accomplice. The same required corroboration.

There was no evidence of stealing adduced against the 1<sup>st</sup> appellant. The circumstantial evidence against the 1<sup>st</sup> appellant was that the cow and the calf were first seen in his compound before they were later recovered at the home of **Peter Majimbo**. Whether the 1<sup>st</sup> appellant handled the stolen cows or was involved in the said theft does not come out clearly from the evidence on record.

Although the evidence adduced in the defence case was weak, a conviction is based on the strength of the prosecution case and not the weakness of the defence case.

The prosecution case was not proved beyond reasonable doubts. The appeal has merits. I therefore, quash the conviction and set aside the sentence. The 1<sup>st</sup> and 2<sup>nd</sup> appellant are at liberty unless otherwise lawfully.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Kakamega this **18<sup>th</sup>** day of **April** 2013.

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**SAID J. CHITEMBWE**

**JUDGE**