



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Criminal Appeal 78 of 2012**

**PETER BARASA NGOBOL..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant **PETER BARASA NGOBOLA** was charged in the subordinate court with stealing stock contrary to **Section 278** of the Penal Code. The particulars of the offence were that on 11<sup>th</sup> September 2011 at Imanga village, Buchifi Location in Mumias District within Kakamega County stole two cows valued at Kshs.60,000/= the property of **Beatrice Mulunda Manyasi**. In the alternative he was charged with handling stolen property contrary to **Section 322 (1) (2)** of the Penal Code. The particulars of offence were that on the same day at Maisha Estate Butere township location within Kakamega County otherwise than in the course of stealing dishonestly received and retained two cows knowing or having reason to believe them to be stolen property. He denied both charges. After a full trial he was convicted on the main count of stealing stock and sentenced to serve seven (7) years imprisonment. Being aggrieved by the decision of the trial court, he has appealed to this court against both conviction and sentence. He has raised the following grounds of appeal –

- 1.The charge sheet was defective as he was charged under Section 228 of the Penal Code but convicted under Section 278 of the Penal Code.
- 2.That the trial magistrate erred in convicting him without considering that the charge sheet had cows as exhibits while the photograph that was brought to court had a bull and a cow.
- 3.The trial court (wrongly) admitted the evidence of witnesses who were not in the charge sheet and went further to hear their testimonies thereby rendering the whole trial biased. That he was not given their statements or exhibits that were to be used in the court.
- 4.The trial magistrate erred in law and fact by ignoring the burden of proof as he had exhibited official receipts confirming that he genuinely bought the alleged stolen stock under section 111 (1) and 2 (c) of the Evidence Act Cap 80 Laws of Kenya.
- 5.The magistrate erred in convicting him on scanty evidence which not only lacked probative value but was also fabricative, speculative and uncorroborated.
- 6.That the sentence was harsh.

At the hearing of the appeal, the appellant tendered in written submissions. I have perused the said submissions. He also submitted verbally that the magistrate who tried him did not have jurisdiction.

The learned State counsel Mr. Oroni opposed the appeal. Counsel submitted that the prosecution evidence on record proved the charge beyond reasonable doubt. He further added that the copy of receipt attached to the written submissions of the appellant was not authenticated and stamped by the Yala Town Council. Counsel argued that the appellant was not able to provide an original receipt at the trial and therefore the trial court was right in convicting him.

In response to the State counsel's submissions, the appellant stated that the charge against him was not in regard to the receipt. In any case the prosecution did not seek to disprove or challenge the receipt.

In brief, the facts of the prosecution case are as follows. PW1 **Beatrice Mulunda Manyasi**, a resident of Imanga in Mumias district owned 11 local breed cows which were under the care of a herdsboy. In the evening of 10.9.2011, the herdsboy brought the cows home and she locked the cattle pen with a padlock. The next morning which was 11.9.2011, the herdsboy picked the keys to open the cattle pen but came back shortly thereafter and reported that the padlock to the cattle pen had been opened. PW1 then proceeded to the cattle pen and found two cows missing. One was brown and the other was black with marks on its neck and legs. PW1 informed the village elder PW4, Barnabas Funyikiri and her husband about the incident. PW1 was unwell so the husband of PW1 sent a daughter PW3 **Gloria Atakwa Mulunda** to follow up the matter. PW3 travelled from Kakamega and reported the incident at Mumias Police Station.

On the same 11.9.2011 at 6 a.m., **PC Lachani Haida Babu** PW5 the investigating officer, was called on the phone by an informer who told him that two cows had suspiciously been tied near the informer's home. As he proceeded to the scene, the same informer called him and told him that someone had untied the two cows and was leading them to the slaughter house. When PW5 reached Maisha Estate, he found Peter Barasa Ngobola (the appellant) whom he knew well before, leading the two cows using a rope which was tied to the cows. One of the cows was black with a white spot on the chin and the other was brown. When the appellant saw PW5, he started running away. PW5 rescued the two cows and took them to the police station at Butere. At the time of recovery of the cows PW5 was not aware of any report of lost cows. However, he later learnt that there was a report of lost cows made at Mumias Police Station. The appellant was arrested on 6<sup>th</sup> November 2011. On 31/11/2011 PW5 obtained an extract of the O.B. report from Mumias Police Station made by Gloria Mulunda. The complainant (PW1) later came to the Butere Police Station and identified the two cows from about 20-25 cows which were at the station. Photographs of the two cows were taken. The appellant was initially charged with conveying suspected stolen property. However, after the complainant was known, the initial charge was withdrawn and he was charged with theft of stock and alternatively with handling stolen property.

When put on his defence, the appellant gave an unsworn defence. It was his defence that he was a cattle dealer who sold cows in markets. That on 9.9.2011 he bought two cows at Yala market. He was assisted by two boys. One of the boys John Shambaji returned the cows at 2 p.m. as he had a sick child. However one Eunia Ashikoyo, a wife of a police officer, complained bitterly that the cows had consumed her piece of soap. The issue was resolved through the village elder and the appellant bought the bar soap for the said Eunia. However, at 4 p.m. he (appellant) was called and a police officer ordered that the cows be taken to the police station, which he did not do. On 11.9.2011 Major Chahilu and Boniface Ashikoyo came to his (appellant's) house and took the cows to the police station.

It was his further evidence that later later he went to the police station and produced a copy of the receipt for purchase of the cows but as the OCS was not present, the cows were not released. Later, still the appellant was informed by the village elder that major Chahilu wanted Kshs.15,000/= before releasing the cows. He visited the police station a number of times as well as on 6<sup>th</sup> which was a Sunday. Later that day, he walked to Wambuche Supermarket where he was called by PC Mwenga, Cpl. Mburu and Bonface Ashikoya who arrested and handcuffed him on the instructions of Major Chahilu. He was then charged on 7.11.2011. He stated that it was Major Chahilu who was behind this case. He stated that he had earlier gone to report a matter against one Patrick Mukabana and the police failed to investigate the same and fined him Kshs.10,000/=. He maintained that he did not steal the cows.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved its case and

delivered herself thus –

***“I find the evidence on record sufficient to warrant a conviction. I also apply the doctrine of recent possession. The cows were recovered from the accused on the same morning it was discovered they were stolen. His explanation as to how he got into such possession is not reasonable or even acceptable. The period is too short and if he had in (sic) him suspected stolen property then in the absence of any reasonable explanation he is presumed to be the thief. The chain of events with regard to the theft of the cows is very clear, the same cows are recovered a few kilometres away with the same description. That is not a mere coincidence. This court finds the accused person guilty as charged and proceeds to convict him on the main charge of stock theft C/S 278 of the Penal Code.”***

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences – see **Okeno -vs- Republic [1972] EA 32**.

I will start with the technical points raised on appeal. The appellant complains that the charge was defective. That he was charged under a different section and convicted on a different section. That the charge had cows but the photographs were for a bull and a cow. That the court admitted evidence of witnesses not listed in the charge sheet. I have perused the record. I have perused the charge. The appellant was charged under **section 278** of the Penal Code and in the alternative under **section 322 (1) (2)** of the Penal Code. He was convicted on the main count. That is not a defect. The issue of cows and a cow and a bull are matters of evidence to be proved. That is no defect on the charge. On witnesses, there is no legal requirement that only witnesses who are listed on the charge sheet should testify. I find no defect in the charge. I dismiss that ground.

The appellant complains that the trial court did not have jurisdiction. The record shows that the trial magistrate was a Resident Magistrate. The schedule to the Criminal Procedure Code (Cap. 75) shows that the appellant could be tried by any subordinate court. In my view therefore, the Resident Magistrate had jurisdiction to try the case. I dismiss that ground.

The other grounds of appeal, except that on sentence, relate to whether there was sufficient evidence to sustain the conviction. Though the appellant has talked of contradictions and shortcomings in the evidence, I do not see such contradictions. If there were minor variations in his name and the name of the complainant (PW1), those in my view were clerical or typographic errors. The fact that the padlock to the pen was not broken but merely opened does not also help the appellant. Though he has complained about failure to call essential witnesses, such failure can only assist an accused when the evidence on record is weak – see **Bukenya -vs- Uganda [1972] EA 549**. I find that there was no material witness who was not called to testify.

Where, as in this case, the appellant was seen herding the two cows just the morning they were found to be missing, and he does not deny this, the issue is really whether the doctrine of recent possession applies, and whether the appellant has given a reasonable explanation as to how he came to be in possession of the two cows.

The application of the doctrine of recent possession was considered in the case of **Maina & Others - vs- Republic [1986] KLR 301** wherein the Court of Appeal acknowledged the application of the said doctrine as enunciated in the English case of **R. -vs- Loughin 35 cr. App. R69** in which the Chief Justice of England said –

***“if it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker.”***

In the present case, the appellant was found in possession of the two animals the same morning they were found missing. He does not deny being in such possession. He gives an explanation that he bought them at Yala market the previous day. The cows were clearly identified by the complainant PW1 as belonging to her. Therefore, the doctrine of recent possession applies to the appellant.

Once someone is found in recent possession of stolen property, he has a burden to give a reasonable explanation as to how he came to be in possession of the same. In my view, considering the facts and circumstances of the case herein, the explanation given by the appellant was not a reasonable explanation. He merely attempted to shift blame on others to avoid answering to the charge. He just tried to impute bad faith on the police and the complainant by wild allegations which were not believable. I find from the evidence on record that the appellant was the thief or one of the thieves of the cows. He was therefore properly convicted.

In my view, the sentence of seven (7) years imprisonment was harsh and excessive. The maximum sentence for an offender under Section 278 of the Penal Code is 14 years imprisonment. The appellant was a first offender. The two cows were recovered. I will therefore interfere with the sentence, though I will uphold the conviction.

Consequently, I dismiss the appeal on conviction. As for the sentence, I set aside the sentence imposed and substitute therefore a sentence of imprisonment for a term of three (3) years from the date on which the appellant was sentenced by the trial court.

It is so ordered.

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

**George Dulu**  
**J U D G E**