



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 139 OF 2011**

*(An appeal from the Judgment of Hon. G. O. Oyugi delivered on 2<sup>nd</sup> September, 2000 in Butere Senior Resident Magistrate's Court*

*Criminal Case No. 521 of 2010)*

**STEPHEN MASINDE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was charged before the subordinate court with a main count of stealing stock contrary to Section 278 of the Penal Code. The particulars were that on the 12th August, 2010 at around 11.00 p.m. at Emusunguri village, Shiraha Sub-location in Khwisero District within Western Province stole one cow valued at Kshs.10,000/= the property of Jackson Amboka Andenje. In the alternative, he was charged with handling stolen goods contrary to Section 322 (2) of the Penal Code. The particulars of the alternative charge were that on the same day, time and place otherwise than in the cause of stealing, dishonestly received one cow knowing or having reason to believe the same to be stolen goods.

He denied the charges. After a full trial, he was convicted on the main count and sentenced to serve 7 years imprisonment. Being aggrieved by the decision of the trial court, he has now appealed to this court. He filed grounds of appeal as well as written submissions. His grounds of appeal are as follows -

1. That the appellant pleaded not guilty to the proceedings hereof.
2. That the trial magistrate erred in law and fact when he accepted a charge sheet that was not genuine but rather defective.
3. That the trial magistrate erred in law and facts when he entertained prosecution witnesses whose testimonies were marred with a lot of discrepancies and contradictions.
4. That the trial magistrate erred in law and facts when he ignorantly accepted a value that was not explained to defence as purported value of the cow.
5. That the trial magistrate erred in law and facts when he failed to detect that a crucial exhibit was omitted by the prosecution which amounted to shoddy investigation.
6. That the magistrate was careless.

At the hearing of the appeal, the appellant relied on his written submissions, which I have perused.

The learned prosecuting counsel, Ms Opiyo opposed the appeal. Counsel submitted that there was sufficient evidence on record to sustain the conviction. The exhibit was identified and produced by PW4. The charges were explained in Kiswahili and the appellant fully participated at the trial. That the value of

the cow was given in the charge sheet.

The brief facts of the case are that on the night of 12th August, 2010 at around 11.00p.m. PW1 Jackson Amboka was at his house when he heard one of his cows making noise. He had three cows in a cow shed. He came out of the house and noticed that someone was driving away one of the cows. He used a torch to see what was happening. The cow and that person were about 100 metres away. He and his wife screamed and the person started running away, leaving the cow, valued at Ksh.10000/= behind. PW2, who was the son of PW1 came out of his house due to the screams of PW1. Together they chased the culprit and restrained him about 200 metres away. They reported the incident to the village elder Silas Etemesi Ochieng who was PW3, who advised that they report the matter to the police the following morning. PW1 and PW2 restrained the appellant until the next morning and reported the incident at Khwisero Policed Post. The appellant was then arrested and charged.

When put on his defence, the appellant said that he did not steal the cow.

Faced with this evidence the learned trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. He convicted the appellant and sentenced him to serve 7 years imprisonment.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record afresh and come to my own findings and conclusions, taking into account that I did not have the opportunity to see the witnesses testify and determine their demeanour. See the case of **Okeno -vs- Republic [1972] EA 32.**

I have re-evaluated the evidence on record. The incident occurred at night. The appellant has, on appeal, stated that the charge sheet was defective. I do not see any defect on the charge sheet. It was signed by the officer-in-charge of Khwisero Police Post as well as the magistrate on 16/8/2010. With regard to the value of the cow, that value was stated on the charge sheet. Such value is just an estimate and cannot per se be a reason to declare the charge to be defective. In any case adult cows could be of value of much higher than Kshs.10,000/=. I hold that the charge is not defective.

Was there sufficient evidence that the appellant stole the cow? The evidence on record is that the cow was driven by somebody from the cowshed. That person was not the owner. After an alarm was raised, that person attempted to run away leaving behind the cow. In a chase that followed, the appellant was apprehended.

In his defence, he merely stated that he did not steal the cow. It was a short defence of one sentence. In cross-examination he had suggested that he was merely passing by the area when he was restrained.

The evidence on record, in my view, establishes that the appellant was the one driving away the cow. He was not lost sight of. He was restrained nearby. Though it was at night, PW1 had a torch. The appellant does not claim to have been elsewhere that day. I find and hold that the learned magistrate was correct in finding that the appellant was the one driving away the cow. I also hold that he did not have the permission of the owner to remove the cow.

Though the appellant was found with a cow shortly after he had removed it from the cowshed, in my view the offence of theft was completed. This was because he had already managed to remove the cow from the possession of the owner which was the cowshed. In my view theft was committed within the definition of **section 268** of the Penal Code. I find that the Prosecution proved its case against the appellant beyond reasonable doubt. I uphold the conviction.

I now turn to the sentence. The appellant was a first offender. He was sentenced to serve 7 years imprisonment. The maximum sentence for the offence is 14 years imprisonment. The cow was recovered. In my view, taking into consideration all the circumstances of this case, the sentence of 7 years imprisonment is on the higher side. I will interfere with the same. I will reduce the same to 4 years imprisonment.

Consequently, I dismiss the appeal on conviction. The conviction of the trial court is hereby upheld. However, I set aside the sentence and order that the appellant will serve four (4) years imprisonment from the date he was sentenced by the trial court.

*Dated and delivered at Kakamega this 22nd day of November, 2013*

**George Dulu**

**JUDGE**