



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 114 OF 2009

(Appeal against both conviction and sentence of the Senior Resident Magistrate’s Court at Butere in Criminal Case No. 371 of 2009 [G. O. OYUGI, RM])

DANIEL OYWA

OLIYAYIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant herein, **Daniel Away Oliyayi** was charged with the offence of handling suspected stolen property contrary to **S. 322(2)** of the Penal Code. It was alleged that on 25.4.2009 at Ikokho village, otherwise than in the course of stealing, dishonestly retained one bull knowing or having reason to believe it to be stolen property. He was convicted and sentenced to serve five (5) years’ imprisonment and his appeal is against both conviction and sentence.

2. The evidence on record is as follows;

3. On 25.4.2009 at 5 a.m. a bull was stolen from the home of PW1, **Joseph Majimbo**. He was unable to identify any of the thieves immediately but when he raised an alarm, the Appellant was apprehended nearby and the bull recovered and both were taken to Manyulia AP Camp.

4. **PW3, Humphrey Amwayi Andala**, was one of those who responded to PW1’s cry for help and was present when the Appellant was apprehended. **PW4, Raphael Rumba Adengo**, a village elder, went to PW1’s home after the incident and reported the same to the Assistant Chief who later escorted the Appellant and the stolen bull to Manyulia AP Camp

5. I have read the Petition of Appeal and I note that there is no doubt that the Appellant was arrested at the scene soon after the incident of theft of the bull and in his defence he stated that he merely responded

to the call for help by PW1. Without shifting any burden to him, that defence was incriminating. The only issue to address is whether he was found handling the stolen bull. To my mind, when a person is found moments after a theft, holding a stolen animal and he is unable to explain himself, then he is either the thief or a handler thereof. It was conceded by PW1 that he was unable to identify the Appellant during the theft and so it can only be true that the charge of handling stolen property was proved beyond reasonable doubt.

6. On sentence, I agree that it may have been harsh in the circumstances and while dismissing the Appeal on conviction, I will reduce the sentence to the period already served and order that the Appellant be released unless he is otherwise lawfully held. I do so because S.322 (2) provides for a maximum sentence of fourteen (14) years and I think that five (5) years was too harsh in the instant case.

7. Orders accordingly.

Delivered, Dated and Countersigned at Kakamega this 2nd day of February, 2011.

ISAAC LENAOLA

J U D G E