



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 252 OF 2010**

*(From Original Conviction and Sentence in Criminal Case No.1950 of 2008 of the  
Principal Magistrate's Court at Kwale: A.M. Obura – S.R.M.)*

**JOSPHAT MUTIRIA KIONDO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant **JOSPHAT MUTIRIA KIONDO** has filed this present appeal against his conviction and sentence for the offence of **STEALING STOCK CONTRARY TO SECTION 278 OF THE PENAL CODE**. He also faced an alternative charge of **HANDLING STOLEN PROPERTY CONTRARY TO SECTION 322(2) OF THE PENAL CODE**. The particulars of the charge were that:

***“On the 27<sup>th</sup> December 2008 in Kaya Waa Village, Waa Location of Kwale District within Coast Province, jointly with others not before court stole one cow valued at Kshs.10,000/- the property of BAKARI SALIM MWARUNDU”***

The Appellant pleaded ‘*not guilty*’ to the offence and his trial commenced on 7<sup>th</sup> August 2009 at which trial the prosecution led by **INSPECTOR SIBUDA** called a total of four witnesses in support of his case. The prosecution case in brief is narrated by the complainant ‘*Bakari Salim Mwarandu*’ was that on 27<sup>th</sup> December 2008 he was informed by his children that one of his cows, a black cow which was expectant was missing. The complainant began to search for the missing cow. He met **PW2 OMAR BAJI**, the village chairman who told him that he had seen the Appellant carrying a bucket whose contents were covered with a sack. **PW2** noticed that there was blood dripping from the bucket. Acting on this information the complainant went to the stall where the Appellant carried on business as a butcher. He found the Appellant there and recovered the black hooves and the skin of the cow. Police came and arrested the Appellant. **PW3 STEVEN MUREITHI** on his part told the court that on the material day he noticed a foul smell emanating from the room which accused shared with one ‘*Murambi*’. Police came and broke down the door. They recovered inside the black skin from the head of the cow. The 2<sup>nd</sup> accused was also then arrested and taken to the police station. Both were brought to court and charged.

Upon the close of the prosecution case the accused was found to have a case to answer and was put

to his defence. He made an unsworn statement denying the charge. On 23<sup>rd</sup> March 2010 the learned trial magistrate delivered her judgement in which she convicted the Appellant and after listening to his mitigation sentenced him to serve five (5) years imprisonment. It is against that conviction and sentence that the Appellant now appeal. (The 2<sup>nd</sup> accused did not file any appeal).

The Appellant who was unrepresented at the hearing of this appeal chose to rely entirely upon his written submissions which had been duly filed in court. **MR. ONDARI**, learned State Counsel who appeared for the Respondent State made oral submissions in which he urged this court to uphold both the conviction and sentence of the lower court.

The evidence of the prosecution witnesses is that the complainant's black cow went missing on 27<sup>th</sup> December 2008. After launching a search parts of the carcass of said stolen cow was recovered in the stall of the Appellant and the house of the 2<sup>nd</sup> accused. At this point the key question that arises is whether there is enough evidence to prove that the carcass recovered was actually that of the complainant's stolen cow. This is especially important to establish bearing in mind that the Appellant conducted business as a butcher who sold and roasted meat. As such it would not be odd or unusual for him to be found with a cow or carcass meat in his possession. The mere fact that the recovered remains and skin were black does not in my view meet the required threshold of proof. I have no doubt that there are numerous black cows within this Kaya Waa Village not to mention in the country as a whole. There is no other exclusive mark mentioned by the complainant to positively identify the recovered carcass as that of his stolen cow. The complainant stated that the cow which was stolen from him was expectant. There is no evidence that any feature of the recovered carcass indicated that it belonged to a cow that was in calf so to speak. I find that a doubt remains as to whether this recovered carcass was in actual fact the remains of the complainant's stolen cow. The benefit of this doubt must be applied to the Appellant. In the absence of this crucial factor of identification the rest of the prosecution must fall. The mere suspicion that the remains found with the Appellant was the complainant's stolen cow cannot suffice to sustain a conviction. I find that the conviction of the Appellant was not sound and I therefore quash the same. The attendant 5 year sentences of imprisonment are also set aside. This appeal succeeds and the Appellant to be released forthwith unless otherwise lawfully held.

**Dated and Delivered at Mombasa this 10<sup>th</sup> day of March 2011.**

**M. ODERO**  
**JUDGE**

In the presence of:  
Appellant in person  
Mr. Muteti for State