



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 29 OF 2010**

*(From Original Conviction and Sentence in Criminal Case No.  
94 of 2009 of the Senior Resident Magistrate's Court at Kaloleni: S.R. Wewa R.M.)*

**FREDRICK NGWAWE ..... 1<sup>ST</sup> APPELLANT**

**FONDO GONA ..... 2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The two Appellants herein namely **FREDRICK NGWAWE** (hereinafter referred to as the 1<sup>st</sup> Appellant) and **FONDO GONA** (hereinafter referred to as the 2<sup>nd</sup> Appellant) both filed this appeal challenging their conviction and sentence by the subordinate court on a charge of **STEALING STOCK CONTRARY TO SECTION 278 OF THE PENAL CODE**. The particulars of the charge were:

**“On the 26<sup>th</sup> March 2009 at Chalani Village, Kaloleni Location in Kaloleni District within Coast Province jointly stole one bull valued at Kshs.14,000/- the property of KARISA BAYA KAFINYE”**

Both Appellants entered a plea of **‘not guilty’** to the charge and their trial commenced on 9<sup>th</sup> July 2009. The complainant **KARISA BAYA** told the court that on 26<sup>th</sup> March 2009 his wife **FURAHA KARISA PW2** had taken their herd out for grazing. When **PW2** led the cattle to drink one of the cows got lost. **PW4 KAZUNGU NYANJE** told the court that on the material date he noticed a new cow with his herd. He questioned the 1<sup>st</sup> Appellant who was his herdsboy and the 1<sup>st</sup> Appellant told him this cow had gotten mixed with their herd. **PW4** told him to leave it in his home as he tries to trace the owner. Later the bull went missing and the 1<sup>st</sup> Appellant could not explain its whereabouts. He later led police to 2<sup>nd</sup> Appellant whom he alleged he had given the said cow to for sale. Both Appellants were thereafter charged with the offence of stealing stock.

The trial magistrate convicted both Appellants and sentenced each to serve 7 years imprisonment.

The fact that the complainant lost his cow is not in any doubt. This is corroborated by his wife **PW2** who was out herding their cattle on the material day. Both describe the said cow as brown/black in

colour. **PW4** told the court that on the same day he noticed a strange cow in his herd. He questioned the 1<sup>st</sup> Appellant who was his herdsman. The 1<sup>st</sup> Appellant claimed this strange cow had gotten mixed in with their herd. **PW4** decided to try and trace the owner of the cow, but when he traced **PW1** the cow was missing again. The 1<sup>st</sup> Appellant led police to the 2<sup>nd</sup> Appellant whom he claims he had given the cow to sell. Both were arrested and charged. **MR. ONSERIO** learned State Counsel did concede the appeal with respect to the conviction of the 2<sup>nd</sup> Appellant. I fully agree with this decision. No evidence touches on the 2<sup>nd</sup> Appellant at all and no prosecution witness has mentioned him. It is only his co-accused the 1<sup>st</sup> Appellant who implicated the 2<sup>nd</sup> Appellant in this matter. He claimed to have taken the cow to the 2<sup>nd</sup> Appellant to sell. There is no evidence that the 2<sup>nd</sup> Appellant ever received this cow much less that he sold it. The only evidence against him is the uncorroborated testimony of a supposed accomplice. Such evidence cannot form the basis of a conviction. I do allow the appeal of the 2<sup>nd</sup> Appellant and quash his conviction.

With respect to the 1<sup>st</sup> Appellant the State has opposed the appeal. However upon my own independent assessment the evidence against the 1<sup>st</sup> Appellant is also less than satisfactory. All that is certain is that he was the herdsman of **PW4**, and that he came home with a strange cow. The fact that this cow later went missing from the home of **PW4** cannot be blamed on the 1<sup>st</sup> Appellant. The circumstances in which the cow went missing are unclear. No witness saw the 1<sup>st</sup> accused lead the cow away and neither was the said cow recovered in the possession of the 1<sup>st</sup> Appellant. The charge has not, in my view been proved against the 1<sup>st</sup> Appellant beyond all reasonable doubt. In the circumstances the conviction was unsound and I do not hesitate to quash the same. Finally this appeal succeeds. Both convictions are quashed and their 7 year sentences are hereby set aside. Each accused to be set at liberty forthwith unless otherwise lawfully held.

**Dated and Delivered at Mombasa this 7<sup>th</sup> day of March 2011.**

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

In the presence of:  
Both Appellants in person  
Mr. Onserio for State