



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL NO. 97 OF 2009

*(Appeal from conviction and sentence of the Senior Resident Magistrate's Court at Butere
in Criminal Case No. 215 of 2009 [G. O. OYUGI ESQ., RM])*

BENARD MUSULA
BOI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT
DENT

JUDGEMENT

1. The Appellant, **Benard Musula Boi** was charged with the offence of stealing stock contrary to S.278 of the Penal Code. It was alleged that on the night of 21st and 22nd March, 2009 at Buyonga village, Mundeku Sub-location, Kisa Central Location in Butere District, he stole two cows valued at Kshs.24,000/=, the property of **James Obiero Omukuba**. In the alternative that he was found in possession of the two cows contrary to S,322 (2) of the Penal Code.

2. The evidence tendered in support of the charge was that on the morning of 22.3.2009, PW1, **James Omukuba Obiero** and PW2, **John Ouko Temba** woke up only to realize that two cows had disappeared during the night. They shouted for help and with the help of members of the public, they searched for the same but in vain. They made a report to the village elder, one **Adambwa Okoti** and on 23.3.2009, they were informed that the cows were at Butere Police Station and they went there and identified them. None of them had known the Appellant prior to the incident.

3. PW3, **Issa Mutende Obungole**, the village elder of Eshivinga village stated that on 27.5.2009, he went to Butere Police Station and he saw a photograph of the stolen cows and he expressed no knowledge of them. He also confirmed that they did not belong to the Appellant who was from his village.

4. PW4, **PC Paul Rotich** and PW6, **Sgt. Solomon Salu** received the report of the stolen cattle on 22.3.2009 and they set about to look for them. At a river bank in Shinamwenyuli Sub-location, they allegedly found the Appellant grazing two cows and when he saw the officers, he dropped his grazing stick (Exh.1) and abandoned his sandals (Exh.2) and fled. They pursued him, arrested him and took him

to Butere Police Station together with the cows and PW1 identified them as his stolen cattle.

5. PW5, **Cpl. Christopher Samoei**, was the one who led PW1 and PW2 to the yard at Butere Police Station where the cows had been secured and they identified them as belonging to PW1. He later framed the charges against the Appellant.

6. In his defence, the Appellant denied the offence and stated that he was arrested at his home on 22.3.2009 and denied being in possession of the stolen cows. His father, Wycliffe Wanga, testified in his support but did not state on what date the Appellant was arrested save that he was arrested at home.

7. The learned trial magistrate found that the charge against the Appellant had been proved beyond reasonable doubt and convicted him before sentencing him to serve seven (7) years imprisonment.

8. In his Appeal against conviction only, he has protested that the evidence on record was not sufficient to sustain the charge and in my view and from an analysis and evaluation of the evidence, there is no doubt from the evidence of PW1 and PW2 that on the night of 21st and 22nd March 2009, two cows were stolen from their home. There is also no doubt that the next day the cows were recovered and taken to Butere Police Station by PW4 and PW6. There is no reason to doubt their evidence in that regard and PW5 was present when PW1 and PW2 identified the cows as the stolen ones.

9. The contested issue is whether the Appellant was found by PW4 and PW6 on 22.9.2009 while grazing the cows or whether he was unlawfully arrested at his home and improperly charged. The alibi defence in my view holds no substance at all because the evidence of PW4 and PW6 was consistent as to the Appellant's arrest and no grudge on their part has been alleged. In any event and to be fair to the two officers, PW3, an independent witness was called to identify whether the cows belonged to the Appellant and he stated that they did not. I am therefore satisfied that the Appellant was indeed arrested while handling the stolen cows and his alibi defence does not dislodge that strong evidence against him. His father, most likely than not was only bailing out his son and I see no credible answer to the charge in any event.

10. Was the Appellant the thief? He was certainly found herding the stolen cows which were satisfactorily identified as belonging to PW1. He never laid claim to them and yet his conduct was not consistent with innocence. Why did he abandon the cows, his grazing stick and sandals if he was innocent? In **Isaac Kahiga vs R. Cr. Appeal No. 272/2005**, the Court of Appeal held as follows;

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly; that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.”

11. I am wholly in agreement and I am in any event bound by the statement which is the correct exposition of the law. In this case, the Appellant was indeed found with the stolen cows and having given no reasonable explanation as to how he came to be in such possession and having not laid claim to them

as his, he could only be presumed to be the thief.

12. In the end and since sentence is not being challenged, and it being lawful in any event, the Appeal has no merit and is dismissed.

13. Orders accordingly.

Delivered, dated and signed at Kakamega this 4th day of November, 2010.

ISAAC LENAOLA

J U D G E