



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 86 OF 2009**  
*(Appeal from conviction and sentence of the Senior Resident Magistrate’s Court at Mumias in Criminal Case No. 1432 of 2007 [C. N. NDEGWA ESQ., SRM])*

**JOHN SAKWA RAPANDO** .....  
..... **APPELLANT**

**VERSUS**

**REPUBLIC** .....  
..... **RESPONDENT**

**JUDGEMENT**

**1. JOHN SAKWA RAPANDO** was charged with two offences and in Count I it was that of stealing stock contrary to S.278 of the Penal Code and in the alternative, handling stolen property contrary to S.322 of the Penal Code. He faced a second count of bar breaking and committing a felony contrary to S.396 (a) of the Penal Code. He was convicted and sentenced to serve five (5) years imprisonment on each of the main counts and the sentences were to run concurrently. He has now appealed against both his conviction and sentence but at the hearing, he sought leniency on sentence only.

**2.** I have read the record of evidence before the subordinate court and with regard to Count I, and the alternative to it, PW4, **Mustafa Tangati Nambiri** stated that on 22.12.2007 at 2 a.m. he was woken up by a disturbance in the cattle shed. He went there and found that a cow was missing. He woke up his family and a search for the cow was commenced. Later in the day, he was informed that the cow and a suspected thief were at Bookers Police Post. He proceeded there and identified the cow. PW3, **Cpl. Benjamin Wechuli** photographed the cow and produced the photographs as evidence.

**3.** PW5, **P.C. John Ogutu Ujiji** received the report of the theft of the cow on 22.1.2007 at Bookers Police Post and the suspect having been arrested by Community Police the Appellant allegedly told him that he had been arrested while holding a cow which an unknown person had told him to hold. He decided to charge the Appellant with the offence of stealing the cow.

**4.** In his defence, the Appellant stated that on 20.1.2007 he was drunk and went to visit an unnamed “colleague” at Bookers Police Post and a vigilante group arrested him and locked him up at the Post. Later, he was charged.

**5.** Regarding Count II, the evidence of PW1, **Joseph Muguho Nyangweso** was that on 25.1.2007, the Appellant was employed by him as an assistant at his bar in Shibale but he disappeared during the night and Kshs.20,900/= and 2 Nokia phones were found missing. On 21.12.2007, he was informed that the Appellant had been arrested with a stolen cow. Neither the cash nor the phone allegedly stolen from the bar were ever recovered.

**6.** PW2, **Abel Anene Atuti**, a cashier employed by PW1 confirmed the break in at PW1’s bar on the night of 25.11.2007.

**7.** No witness testified about any investigation into the alleged offence of bar breaking and to my mind, the offence was not proved beyond reasonable doubt. In fact there were too many gaps in evidence. I say so because the alleged break in was on 25.11.2007 while the Appellant had already been arrested and was in custody for the offence of stealing stock. In his judgment, the learned trial magistrate found that his

disappearance after the break in was evidence of prior criminal conduct. Sadly, there was no such evidence on record and the fact that no police officer connected the Appellant's arrest for stealing stock with the other offence committed later dealt a fatal blow to the case for the prosecution.

8. Returning to the charge of stealing stock, that the Appellant was arrested with the stolen cow is a fact he never denied. The doctrine of recent possession applied to his situation and in the case of **Simon Mwangangi vs R. Cr. Appeal No. 330/2006(u.r.)**, the Court of Appeal explained that where an accused person was unable to explain how he came to be in possession of recently stolen items, then he was either the thief or a handler thereof.

9. In this case, the Appellant's explanation was untenable and unreasonable. In fact in his defence he failed to address that issue or respond to the statement by PW5 that he had stated when arrested that he had been asked to hold the cow by an unknown person and that he was actually arrested in possession of it.

10. In the end the charge of stealing stock was proved beyond reasonable doubt.

11. On sentence, it was held in **Ogola vs Owuor (1954) EACA 270** that;

***“The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James vs. R. (1950) 18 EACA 147 it is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case R. vs. Shershawsky (1912) CCA 28 TLR 263.”***

12. The above reasoning was adopted as I do in **Peter Walubengo vs R. Cr. Appeal 284/2007 (U.R.)**. That Court of Appeal decision is binding and in the circumstances of this case, the Appellant was arrested with the stolen cow and he has no remorse at all. S.278 creates a maximum penalty of fourteen (14) years for the offence of stealing stock. Five (5) years is not excessive and I see no reason to interfere with the learned trial magistrate's discretion in that regard.

13. In conclusion, while allowing the Appeal in respect of Count II and quashing the conviction and setting aside the sentence imposed, the Appellant's appeal in respect of Count I is dismissed and the sentence of Five (5) years imprisonment is affirmed.

14. The Appeal is determined in the above terms.

15. Orders accordingly.

***Delivered, dated and signed at Kakamega this 4<sup>th</sup> day of November, 2010.***

**ISAAC LENAOLA  
J U D G E**