



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**

**Criminal Appeal 52 of 2005**

**JAMES MATUNGU SANDUKU ----- APPELLANT**

**V E R S U S**

**REPUBLIC ----- RESPONDENT**

**J U D G E M E N T**

The Appellant was charged with the offence of stock theft contrary to **Section 278** of the Penal Code. The particulars of the charge were that the appellant together with another co-accused on the night of 23<sup>rd</sup> and 24<sup>th</sup> April, 2003 at EFUNDULA Village, East Wanga Location in Butere/Mumias District, Western Province, jointly stole one female Heifer brown in colour valued at Kshs.8,000/= the property of Suleiman Olwenya Akungwi. The Appellant also faced an alternative charge of handling stolen goods contrary to **Section 322 (2)** of the Penal Code.

The appellant was convicted of the offence of stock theft and sentenced to 96 months imprisonment. He preferred this appeal and relied on the following grounds of Appeal:-

- i. That the Appellant did not plead guilty.
- ii. That he is a stock trader and has been in the business for 12 years.
- iii. That he bought the cow without knowing that it had been stolen.
- iv. That he is remorseful and prays for leniency.

Mr. Karuri , learned State Counsel opposed the appeal and submitted that the appellant was found with the cow one day after the theft. The appellant admitted to have been in possession of the stolen cow in his defence but stated that he was a livestock trader. Learned State Counsel further submitted that the sentence is excessive in the circumstances.

The prosecution case was that the complainant, Suleiman Olunya Akungwi, (PW1), was asleep at his home on 23/4/2003 when at about 1.00 a.m. he heard his cows making noise. He came out to check but found one of his cows missing. He notified his brother PW2. The following day, 24/4/03 the complainant and his brother checked at the local markets but did not find the cow. On 25/4/2003 the complainant went to Bungoma market and found the cow with the appellant. PW4, Lucas Khaemba, was the Chairman of the Bungoma Market and he assisted in having the cow recovered and handed back to the owner. The appellant who had the cow mentioned the 2<sup>nd</sup> accused as the person who had given him the cow to sale for him on 24/4/2003.

I do note that Section 200 of the Criminal Procedure Code was not complied with. The case was started by C.M. Mwebi, Senior Resident Magistrate who took the evidence of PW1, PW2 and PW3. The matter was mentioned before O. Ochieng, DMII (Prof) on 2/7/2004. The magistrate fixed the case for hearing for 27/9/2004 and on that date PW4 testified before Mr. R. O. Oigara, R.M. The prosecution closed its case on the same date. There was no mention of Section 200 of the Criminal Procedure Code.

I do therefore find that the proceedings before R. O. Oigara, RM was a nullity. The magistrate did not explain to the appellant his rights to recall the witnesses who had already testified. The evidence also is clear that the appellant explained how he came into possession of the cow. He led police to the person who gave him the cow to sell on his behalf.

In the end I do find that this appeal has merit and the same is allowed.

The Appellant shall be set at liberty unless otherwise lawfully held.

***Delivered, dated and Signed at Kakamega this 29<sup>th</sup> day of July, 2009.***

**SAID J. CHITEMBWE**

**J U D G E**