

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 241 of 2007

MAINA MBUTHIA APPELLANT

Versus

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence by V. W. NDURURU, Ag Senior

Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 696 of 2006

at MUKURWEINI)

JUDGMENT

The appellant was charged with *stealing stock contrary to section 278 of the Penal Code*. The particulars of that charge indicate that the appellant stole the complainant's cow valued at kshs. 20,000. He was convicted as charged by the lower court and was sentenced to 10 years by the lower court. PW 1 said that on 26th January 2007 at 4.30 am he got out of the house in response to his mother's screams. His mother raised an alarm and stated that the cow had been stolen. PW 1 on coming out of the house flashed light on the cattle shed and found that the cow was missing. He began to run after the people who had stolen it. As he did so he was following the plants that had been flattened by the thieves. He soon found the appellant who was hiding in the coffee bushes. PW 1 hit him with a stick and he fell down. He pleaded not to be killed. It was then that PW 1 discovered that it was their neighbour the appellant. Soon another neighbour arrived and found that he had subdued the appellant. Many villagers came to the scene but on seeing it was their neighbour and particularly the appellant's family, they returned home. The cow was recovered. PW 2 was the mother of PW 1. She was awoken on 26th January 2007 at 4.30 a.m. by sound of many footsteps outside the homestead. As she listened she heard the cow shed being opened. She went out, flashed her light and saw three men. She raised an alarm and PW 1 came out immediately and pursued them. She was able to identify the cow that was before the court. PW 3 was the neighbour who came to assist PW 1. On hearing the alarm he came out with a torch and rungu. He followed PW 1 and soon came to where the appellant lay in the coffee bushes. The matter was reported to the police. The appellant in unsworn statement in his defence stated that on 26th January 2007 he had woken up to milk his cow. Whilst in the process he heard an alarm from PW 1's homestead. He proceeded there only to be attacked on the head with a rungu. He called one witness his wife. In her testimony she stated that on 16th January 2007 and not 26th January 2007 at about 4 am the appellant woke up and heat water for milking the cow. When she heard the alarm raised she went out and found the husband was not there, but had left the milk behind. She then went towards PW 1's home and found the appellant lying down having been beaten. This witness on being cross examined insisted that her testimony related to 16th January rather than 26th January 2007. She confirmed in cross examination that her husband the appellant had prior conviction and had served three years jail term for having purchased a stolen cow. He was also having a pending robbery case. As it is clear from the evidence, the cow the subject of this charge was recovered. The appellant therefore ought not to have been charged with theft. That as it may be, there is clear evidence that the appellant was in a group of people who went to PW 1's homestead and attempted to steal his cow. On our part we are in agreement with the lower courts rejection of the appellant's defence. In any case that defence is not supported by the witness the appellant called. I am satisfied that the appellant did attempt with others to steal that cow. Since I am of the view that the

appellant should have been charged with attempted theft I hereby set aside the conviction of the lower court and instead convict the appellant for *attempted stealing of stock contrary to section 278 as read with Section 389 of the Penal Code*. The maximum sentence for attempted theft is seven years. I therefore set aside the lower court sentence and substitute with a sentence of five years which sentence will begin to run from the date of conviction.

MARY KASANGO

JUDGE

DATED AND DELIVERED THIS 28TH DAY OF OCTOBER 2008.

M. S. A. MAKHANDIA

JUDGE