



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**Criminal Appeal 2005**

**PATRICK KABENGI MUKONO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged and tried on a charge of stealing a cow valued at 9000/- the property of Magu Mbogo. He was found guilty convicted and sentenced to 5 years imprisonment. He has filed 3 grounds of appeal saying that:-

1. the trial Magistrate erred in failing to observe that the prosecution did not prove the case beyond reasonable doubt
2. that the Trial Magistrate failed to consider that any body could be a victim of buying stolen stoke and
3. that the Trial Magistrate erred in rejecting the defence without considering the alibi put forward.

The prosecution case is that on the night of 30/7/2004 and first day August 2004 the complainant tied his fresian bull in his compound at 10 p.m. He went to sleep. He woke up at 5.00 p.m. on 1.8.2004 and found the animal missing. He reported the matter to the police. He commenced searching for his animal. After about a period of 2 weeks he heard there was a bull recovered at another place Karumandi. He traveled there and on the way he met Assistant Chief who told him that the animal had been taken to Kianyaga Police Station. At Kianyaga Police Station he found the animal and identified it as his. The Police told him that the animal was found with the appellant. The story as to how the appellant was found with the animal is told by PW2, PW3, and PW4. PW2 a housewife and a farmer said her bull had been stolen on 4/8/2004. Another bull was stolen the night before the 11/8/2004. People came and asked her to accompany them to look for the two animals as there was information that a bull had been seen in the area. They went to the home of appellant and in the compound found a bull.

PW2 noticed that the bull was not hers. The other person who had lost a cow was an administration officer corporal Njogu who was among the members of public who were searching for the lost animals. He was involved. He took the agreement which the appellant showed as evidence of a purchase transaction of cow. This agreement was not exhibited but it is said to have been fake because the I.D members did not add up to the digits usually found in an I.D card. This officer did not give evidence in court neither was the document produced as exhibit. PW3 is the councilor for the area and a lady she received information from a vigilant group. She said there were 2 cows stolen one of A.P. Corporal and

another of Mr. Munene Kangi. She accompanied the mob to Kathungune where she was informed that a cow was being sold. She found the appellant with a black bull of fresian breed. Appellant said she would sell the cow for Shs.7000/= money he had paid for it. Appellant also offered to show the mob where he had purchased the animal. He had an agreement for purchase which he showed her. The same mentioned by PW2.

PW4 was the police officer on duty when the appellant was taken to Kianyaga Police Station by the members of public and A.P. Officer. A bull was also with the people. He received both the appellant and the bull suspected to have been stolen. He was there later when a person came who identified the cow as his. This was complainant. Among the exhibits were photographs of the cow taken by the scenes of crime personnel. The cow does not show any special marks to distinguish it from any other cow of the breed of fresian. The appellant admits that he had the bull after purchasing it from one James Kamu Kamotho and he had the agreement of sale which he surrendered to the people questioning him, the one mentioned by PW2 and PW3. There is no direct evidence that the appellant shot the cow of the complainant. The cow was said to have been stolen on the nights of 30/7/2004 and 1/8/2004 according to the charge sheet. The month of July consists of 31 days the prosecution has not notice this. It is not clear what happened on 31/7/2004. Therefore there are thefts of the same cow on the night of 30/7/2004 and 1/8/2004.

The offence of stealing is defined under section 268 of the Penal Code thus:- **“268 (1) A person who fraudulently and without a claim of right takes anything capable of being stolen..... is said to steal that thing”**. In this case the evidence shows that the appellant was arrested by mob on suspicion of having a stolen animal on his compound several days after it was lost. He told the people that it was his cow, he had purchased it from a named person. He took the people to the home where he purchased the animal. He showed them a written document evidencing the purchase agreement. This evidence was not taken to court. However the appellant did not dispute the identification of the cow by PW1. When Appellant cross examined the complainant PW1, he was told **“you were arrested with my bull.”**

The trial Magistrate analyzed the unsworn statement of the appellant and found it not sufficient to create a doubt on the prosecution case. It is to be noticed that the appellant stated that he purchased the cow from an individual. It was not in a market place. Also there is the well known principle that a person who is caught with a stolen thing soon after its theft is presumed to be the thief. In this case the cow was found in the compound 11 days after it went missing from the complainant's compound.

I therefore find that:-

- The ground number one cannot be sustained.

-The Ground number 2 a Trial Magistrate may be expected to consider that a purchaser of an animal may be a victim of buying stolen stock but only if the transaction was in an open market not otherwise. This ground is not with merit.

- On ground number 3 it is not true that the Trial Magistrate rejected the Appellant's defence. The record shows that he did consider it and found it not acceptable

In the circumstances, I find no merit in this appeal and I do not see any reason to interfere with the conviction. On the same issue of sentence the maximum prescribed is fourteen years. Five years imprisonment is not excessive or harsh in the circumstances.

The upshot is that the appeal is dismissed.

Dated this 18<sup>th</sup> January, 2007.

**J. N.KHAMINWA**

**JUDGE**

**18/1/2007**

**Khaminwa – Judge**

**Njue – Court Clerk**

**Appellant – present**

**Mr. Kimathi –Present**

**Judgment read in open court.**

**J. N .KHAMINWA**

**JUDGE**