



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**Criminal Appeal 98 of 2006**

**DAVID NYARANGA BUNYANYA.....APPELLANT**

**VRS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

David Nyaranga Bunyanya hereinafter referred to as the appellant and another were arraigned before the Resident Magistrate's Court in Webuye on 24.2.2006. He was charged with the offence of stealing stock contrary section 278 of the Penal Code.

They both jointly faced an alternative charge of handling suspected stolen property contrary section 322 (2) of the Penal Code. Particulars on both counts are as in the charge sheet. They both denied the charges. His co-accused was acquitted under section 210 Criminal Procedure Code after the trial court found that he had no case to answer. The case against the appellant proceeded to full trial. He was found guilty on the main count, convicted thereon and sentenced to serve 4 years imprisonment. Being dissatisfied with the said conviction and sentence, he filed this appeal citing some 7 grounds of appeal which are rather mixed – up and largely incomprehensible. He has asked the court to quash the conviction and set aside the sentence and set him at liberty. Learned counsel for the state opposes the appeal. He submitted that the appellant was properly convicted on the evidence adduced and the conviction should not therefore be disturbed. He also submitted that the sentence was not excessive but said that the same was illegal as it failed to include ‘*hard labour*’ which is mandatory under section 278 of the Penal Code.

This being a first appeal, it is incumbent upon me to re-evaluate the evidence adduced before the trial court and come to my own conclusion as to whether the conviction was safe or not. In a nutshell therefore, the complainant herein one Edson Wekesa Wakhungu had left his herd of cattle in their boma on the night in question as he retired to bed. His son – PW2 woke up at night and on checking on the cattle, he noticed that 3 of them were missing from their boma. He alerted his father, and also other neighbours. They started looking for the missing cows but they did not find them that night. The matter was reported to the area police station. The very following day, an Ag. Chief in Kiminini area received information that some 3 cows which were suspected to have been stolen had been spotted in her area. She telephoned her assistant chief i.e. PW5 and passed the same information to him as the stolen cattle were said to be in his sub-location. He was even informed that they were in the home of PW6 Charles Simiyu Bunjunju who is the appellant's brother-in-law. He proceeded to PW6's home but found that the cows had already been removed from the homestead. He reported the matter to the police and he was accompanied by some police officers. They went to the slaughter house in Kitale where they suspected that the cows could have been taken for sale. They found 2 of the stolen cows there. They managed to arrest the 2 accused persons and took them to Kitale Police Station. Only 2 of the cows were recovered. They were photographed and returned to PW1. The photographs were produced before the court as exhibit. The appellant was taken to Webuye Police Station where he was later charged with the offence now before the Court.

Some documents, namely a movement permit and a “*no objection*” certificate were recovered from the people in charge of the slaughter house in Kitale and produced as exhibits in this case. Upon

scrutinizing those documents, I note that they had been issued on 6.7.2006 to one Peter Wamalwa. This was 2 days before the complainant's cows were stolen. I can safely conclude therefore that the said documents were not in respect of the said cows. If they were the ones which had been used to couch the movement of the said cows, then they must have obtained from the said Peter Wamalwa who may have obtained them earlier for the movement of cows other than the complainant's. I am not surprised therefore that they did not bear the name of the appellant. The submission by the appellant therefore that they were not in his name is neither here nor there and did not affect the evidence tendered against him at all.

In his defence which was tendered on oath, the appellant told the trial court that he had gone to Kiminini Market on the morning of 9.2.2006. He had found his co-accused and another with the said cows. He said that he was interested in buying the same but he did not have the entire purchase price which was agreed at Ksh.35,000/=. He said that the sellers refused to take a part payment. Since it was late, he decided to get them somewhere to sleep before they could proceed to Kitale town the following day.

He took the cows to the home of PW6 – his brother-in-law. It will be noted that he went there alone with the cows and left the co-accused and another to go and sleep elsewhere. What was not explained is why indeed if the appellant believed that the cows were not stolen he did not take them and the purported owners to spend the night at his home which was also in Kiminini. According to PW6, it was actually the appellant who produced the movement permit to show that the cows were being moved legally. According to the appellant, they decided to drive the cows to Kitale so that he could look for the balance of the purchase price and pay for the cows. They were ambushed at the slaughter house the following morning and he and another were arrested as one person managed to escape. His defence was that the cows did not belong to him but to his co-accused and another and that he was just an innocent intending buyer.

I have considered this evidence in its entirety. Of interest however was the evidence of PW6 – the appellant's brother-in-law who told the court that it was the appellant who had sought shelter for the cows in his homestead. He further told the court that it was the appellant who had produced and presented to him the movement permits in question. He further told the court that it was the appellant who had gone to Kiminini Market to look for buyers for the cows. Indeed the following morning when 2 buyers came, it was the appellant who was negotiating the price with them. Neither accused 2 nor any of his other accomplices were present at PW6's home where the negotiations were going on. Even the other transaction where one of the cows was exchanged was between the appellant and one Jerida who was a relative.

The other question that arises is why the appellant had to accompany the others and the cows to the slaughterhouse in Kitale. They could have left the cows in PW6's home and then he could have gone to look for the money and brought it there and then given it to his co-accused and the others. The truth of the matter is that they were going to sell the cows at the slaughter house. He was not a buyer but one of those selling the cows. I, like the learned Trial Magistrate is satisfied that the defence proffered by the appellant was nothing but a concoction of lies. My finding is that the learned trial Magistrate evaluated all the evidence before him very well and arrived at the right conclusion. I agree with him and wish to add that although the appellant was not seen stealing the cows in question, he was found with them the very following day. The doctrine of recent possession aptly applies in this case. The cows could not have changed hands overnight. He should therefore be deemed to be the thief of the said cows along with others not in court. I have considered the evidence adduced before the trial court along with the grounds of appeal and the submission by the learned counsel for the state. My considered finding is that the evidence against the appellant before the trial court was overwhelming. The conviction was very safe and I have no basis or reason whatsoever to disturb the same.

Accordingly, my finding is that this appeal lacks merit and the same calls for dismissal. The same is hereby dismissed. I uphold the conviction.

I however note that a sentence under section 278 of the Penal Code carries mandatory hard labour. I

therefore order that the 4 years imprisonment be accompanied by hard labour. The sentence should therefore be amended to include hard labour.

W. KARANJA

JUDGE delivered, Dated and Signed this 28<sup>th</sup> day of February, 2007. In presence of Mr. Ndege for state and appellant in person.