



**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**Criminal Appeals 138 & 139 of 204**

**JAMES GEMO**

**WYCLIFF AGIRA ::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANTS**

**V E R S U S**

**REPUBLIC ::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

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

James Gemo, the 1<sup>st</sup> Appellant, and Wickliffe Agira, the 2<sup>nd</sup> Appellant, were two of the four accused persons charged in Hamisi RM Criminal Case No.531 of 2004 with the offence of Stock Theft Contrary to section 278 of the Penal Code. The trial court on 18-11-04 acquitted the appellant's co-accused in the case and convicted the 1<sup>st</sup> and 2<sup>nd</sup> appellants of the said offence whose particulars were that the four accused had in the night of 22<sup>nd</sup> August, 2004 at Kanyamosi village, Gavundunyi Sub-location in Vihiga District within Western Province jointly with others not before the court stolen one cow valued at Shs.30,000/=, the property of Lucas Dalisu.

Five witnesses gave evidence for the prosecution at the end of which the prosecution closed its case and the trial court put the appellants and their co-accused on their defence. The record shows that in his defence the 1<sup>st</sup> appellant told the court – not on oath that he had committed the offence. The second appellant also stated in his unsworn statement that he had committed the offence and that he was sick when the charge was read to him. He did not say anything else in defence. During the plea on 7/9/04, both appellants had pleaded not guilty. When they were put on their defence each of the appellants told the trial court that he would make un-sworn statement and would not call witnesses.

The first appellant lodged appeal in which he challenged the evidence of PW4 and contended that the evidence of PW1, PW2, PW3 and PW5 exonerated him of the charge. It was his contention that the charge had not been proved beyond any reasonable doubt. The 2<sup>nd</sup> appellant had identical grounds of appeal.

When the appeal came for hearing before me, each appellant relied on the grounds of appeal.

The learned State Counsel, Mr. Karuri, who appeared for the Respondent opposed the appeals and submitted that the conviction was sound as it was based on evidence which proved the guilt of the appellants beyond any reasonable doubt. He however expressed doubts about the severity of the sentence and opined that it was somewhat harsh having regard to the fact that the stolen cow had been recovered and the appellants had admitted their guilt in their un-sworn statements. That the appellants denied the charge during the plea and maintained that position during the prosecution case makes the stance they took when they admitted the offence upon being called upon to defend quite baffling! Both the handwritten and the typed record of the proceedings show that the trial court recorded the appellants as having admitted their guilt. Why did they waste valuable judicial time by denying the offence only to turn round, after the prosecution had closed its case, and admit their culpability. Were they waiting to see if there was evidence against them? The trial court did not ask the appellants, which it could have done, whether they were changing their plea of not guilty to a guilty plea. The court proceeded to hear the defence of the appellants' and thereafter reserved judgment. Did the evidence before the trial court establish the guilt of the appellants?

The complainant, Lucas Dalisu (PW1) was asleep in his house between 1 a.m. and 2 a.m. on 22/8/2004. He had a cow and 2 calves in the homestead. His cow was stolen when he was asleep and he

woke up when he heard commotion outside the house. When he went out to check, he found the cow and calves missing. With his daughter Emma he went in their pursuit. He found the calves and recovered them. On 27.8.04 the OCS at Serem Police Station called him and showed him his stolen cow and four suspects who were found in possession of the cow. He did not know any of them. The cow was later released to him. Elizabeth Rotich, PW2, was the Assistant Chief who interviewed the four suspects. She testified that they claimed to own the cow. They had a panga, 2 knives, 2 torches and a pair of pliers.

The village elder, John Kirui (PW3) saw the appellants and their co-accused after their arrest being in possession of the stolen cow. PW4, Samuel Bitok, a farmer, met the four suspects with the cow on 23.8.2004 at 9.30 a.m. and accosted them. He suspected the cow to have been stolen and informed the village elder who came. Upon being searched, the appellants and their co-accused were found to have 2 knives, a panga and a pair of pliers.

The 5<sup>th</sup> witness was PC Mohammed Farah from Serem Police Station. He received PW1's complaint that his cow had been stolen. The theft had been reported earlier. After PW1 identified the cow as his, PW5 charged the appellants and the latter's co-accused with theft of cow.

Although in his judgment the trial magistrate (MR. J. N. MUKUT) stated that the 1<sup>st</sup> appellant had denied the charge, he had recorded the 1<sup>st</sup> appellant as having stated that he had committed the offence. The trial magistrate also states in the judgment that the 2<sup>nd</sup> appellant said he committed the (offence) but claimed he was sick when the charge was read to him. The true position is that the 2<sup>nd</sup> appellant stated: *"I committed the offence. I was sick when the charge was read over to me."* What can reasonably be inferred from that record is that the 2<sup>nd</sup> appellant was lamenting having denied the offence and he was attributing the denial to sickness at the time of the plea by implying that he did not understand it. When he was put on his defence, he admitted the offence.

The burden of proving the charge reposed on the prosecution. The appellants were found in possession of a stolen cow in the morning following the night it was stolen on 22.8.2004. They claimed to own it. They did not deny possession. They admitted it. Although they were not seen stealing, the fact that they were found in possession of the cow so soon after it was stolen gave rise to the application of the doctrine of recent possession enunciated by Lord Chief Justice of England in R v. LOUGHIN 35 Cr. App R 69 when he said that *"if it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop-breaker."* Applying this principle, there is no doubt that the appellants were the thieves who had stolen the cow as they were found in its possession and asserted owning it which was a lie. They were rightly convicted of stock theft c/s 278 of the Penal Code. Their appeal against conviction was devoid of merit. As regards sentence, the maximum sentence for stock theft under s. 278 is 14 years with hard labour. The appellants were given half that sentence. It cannot be said to excessive.

I find no merit in the appeals and I accordingly dismiss them.

*Delivered, dated and signed at Kakamega this 28<sup>th</sup> day of September, 2006.*

G. B. M. KARIUKI

J U D G E