



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL 228 OF 2003**

**(From Original Conviction(s) and Sentence(s) in Criminal Case No 48 of 2003 of the Senior Resident Magistrate's Court at Kangundo N. N. Njagi on 12/2/03)**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**LUKA PATRICK MUTEMBEI ..... ACCUSED**

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

The appellant, Luka Patrick Mutembei, was charged with the offence of Stealing Stock Contrary to Section 278 of the Penal Code. It was alleged that on 3/1/03, at Kisukioni area of Kalandini location, Matungulu Division, Machakos District, stole one cow worth 10,000/= the property of Syombua Mutembei.

In the alternative, he was charged with Handling stolen property Contrary to Section 322 (2) of the Penal code. The appellant denied the offence. The case was heard; accused was found guilty of stock theft and was sentenced to 10 years imprisonment with 10 strokes of the cane. He is dissatisfied with both the conviction and sentence and preferred this appeal.

He cited 6 grounds of appeal which can be summarized as follows: That the court erred in relying on the evidence of his mother; that he had a grudge with his brother; that the bows and arrows belonging to his brother was introduced in evidence as an afterthought; that the cow was never produced in court as evidence but that a calf was produced instead.

The appeal was opposed on grounds that the evidence on record is overwhelming that appellant stole the cow since the appellant was seen driving away the cow, was intercepted and ran off but was arrested by his brother PW4. The state conceded to the sentence to the extent of the strokes because the law was amended doing away with corporal punishment. But otherwise, the offence is rampant and the sentence of 10 years imprisonment is not excessive.

This being the 1st appellate court, this court has the power to evaluate the evidence a fresh and make its own findings.

PW1, Telesia Syombua, recalled that on 3/1/03 at about mid day the cows were taken to the river by a child who she did not name. On the child's return, the child reported that Luka, the appellant drove off one cow. She was unable to trace the accused and the cow. She identified the cow in court. Though she agreed that she had promised to give the appellant a cow, she denied having given it to the appellant at the time. PW4, appellant's brother recalled that on 6/1/02 he went home and was informed that the appellant had stolen a cow. He followed the appellant up to Kasyula Ngombe market, and that appellant was on the way to Mitaboni. He did not manage to arrest appellant but got the cow. He went back home and found

appellant there at 1.00 a.m. and the appellant shot at him with arrows. He then went on to say that he arrested the appellant at the market place.

PW 5 recalled that the appellant was taken to their office on 11/1/03 and he handed him over to Anti Stock Theft Unit. PW2 recalled that he rearrested the appellant from Administration Police Officers who reported that appellant stole a cow on 3/1/02. PW3 testified that he received a report of the appellant having stolen the complainant's cow on 6/1/03 and he gathered youth to look for the appellant and they arrested him. I have reviewed this evidence on record and I find that it is not clear where the cow was recovered and where and when the appellant was arrested.

PW1 told the court that a child who was taking care of the cows told her that the appellant took the cow. The child was not named or called as a witness. The court never seemed to have enquired or required this 'child' to come and give evidence. Then we have the evidence of PW4, the brother to the appellant. He claims to have followed the appellant to Kasyula Ngobe market as appellant was allegedly on the way to Mitaboni. PW4 states "I did not arrest the accused but managed to get the cow. I went home at 1.00 a.m. I found accused at home." From his evidence it is not clear whether he found the appellant with the cow or not. Though the magistrate found in his judgment that the appellant 'ran' off when PW4 found him, that is not contained in PW4's evidence. He did not state exactly where he found this cow. The evidence is very disjointed. It is in cross examination of PW4 that he says that he arrested the appellant but does not state when and the exact place. He only says that he arrested the appellant at the market place. PW3 said he received the report of the theft on 6/1/03 and gathered youth to have appellant arrested. He did not indicate whether the arrest was on the same day or not.

From the evidence before the court which I find to be very scanty and disjointed, there is no evidence from the person who saw the appellant take the cow ; it is not clear whether appellant was found in possession of the cow or not or why they acted on the evidence of the child who was not called as a witness. There is no direct evidence linking the appellant with the theft of the cow. The appellant's defence was a mere denial but he did not have the burden of proving the case. The prosecution had to do it beyond any reasonable doubt.

I have seen the judgment of the trial magistrate which summed up the evidence of the witnesses but did not analyse the evidence on record. Had the magistrate done so, he would have found that the evidence on record was wanting and would not have convicted the appellant. Accordingly, I find the conviction to be unsafe, it is quashed and sentence is hereby set aside. Appellant is set at liberty forthwith unless otherwise lawfully held.

**R.V. WENDOH**

**JUDGE**

**Dated at Machakos this 11th day of October 2005**

**Read and delivered in the presence of**

**R.V. WENDOH**

**JUDGE**