

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 302 OF 2003

**(From Original Conviction and Sentence in Criminal Case No. 339 of 2003
of the Resident Magistrate's Court at Wundanyi A. Ngugi RM)**

JACKAN JUMA APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The appellant in this appeal was charged with and convicted of the offences of stock theft contrary to section 278 of the Penal Code and Creating disturbance in a manner likely to cause a breach of place contrary to section 95(1)(b) of the Penal Code and sentenced to three years and six months imprisonment respectively. He appealed against both conviction and sentence.

The facts of the case were that on the 28th July 2003 the complainant P.W.1 locked her cows in a cowshed. At 6 a.m. apparently on 29th July 2003 she woke up and found the cowshed open. She saw the appellant driving her two cows away. She followed him but he threatened her with a panga and she returned to her house and sat down. It is not clear when she reported the matter to the neighbours but it is after some time. She does not say she did not report immediately because of fear. The report to the police was made after at least one day.

At the hearing of this appeal Mrs. Mwangi, the State Counsel submitted that given the complainant's conduct it was unsafe to support the conviction. I agree with her. The trial magistrate while believing the evidence of the complainant was not bothered by her conduct. It is strange that the complainant could see her cows being driven away and fail to raise an alarm by screaming. One of the cows returned but the other one was never traced. It was never found with the Appellant.

As both the conviction on both offences were based solely on the evidence of the complainant whose credibility has been questioned it is not safe to let them stand. Consequently I allow this appeal, quash the convictions and set aside the sentences. The Appellant is to be released forthwith unless otherwise lawfully held.

DATED this 20th day of January 2004.

D.K. Maraga

Ag. JUDGE