REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 229 OF 1986

MBITI ……. APPELLANTS

VERSUS

REPUBLIC…….…… RESPONDENT

JUDGMENT

August 8, 1987 **Abdullah J** delivered the following Judgment.

The appellant was convicted of stock theft contrary to section 278 of the penal code and was sentenced to statutory minimum of seven years imprisonment together with 4 strokes of the corporal punishment.

The complainant's 3 heads of cattle were stolen on May 11, 1984. On the following day, May 12, 1984 the appellant approached a stock dealer (PW 5) and said that he and other two had some cattle for sale. The stock dealer went to the appellant's home following day and from there, to another house where he found the appellant and two others as well as the three stolen heads of cattle. The dealer, bargained with the appellant, bought the cattle for a price, paid some deposit and arranged for PW 4 to drive the cattle from there to the slaughter house.

PW 4 who drove these cattle from that home to the slaughter house on payment, saw the appellant talking to the dealer. Following day, namely May 14, 1984 the cattle were traced, the dealer questioned and the appellant arrested. According to the dealer, the appellant when questioned by police said that he was present but did not sell the cows to the dealer. Under cross examination, the dealer said that the people who discussed the price were the appellant and 2 others who were with the appellant.

The defence of the appellant was that he was merely a witness to the deal between the dealer and the other two men, whom he found when he was returning from the shamba of his father in law. The appellant contents that as the stock dealer, Kiarie knew him for a long time, and as Kiarie was suspicious of the two men, and as he (the appellant) knew the two men, Kiarie wanted the appellant and appellant's father in law to be witnesses. However, because the two men who had sold the cattle to Kiarie could not be found. Kiarie decided to complicate the appellant.

The appellant's version of what transpired could be true or may be false. If it is true, apparently Kiarie must be considered to be an accomplice who is passing the back to readily available scapegoat. Although, as Mr Mugu the learned Principal State Counsel argues that PW 4 has corroborated the evidence of Kiarie, a closer look at such evidence may show that it is not so. PW 4 was not present when the bargain was struck at the person to whom Kiarie paid the deposit. He only went to certain home, at the instance of Kiarie, to collect and drive cattle, where he found appellant and 2 others. Of course the other two persons cannot be traced, but the father in law of the appellant was there. The prosecution would have called him to corroborate the evidence of Kiarie as to who bargained with him and to whom he (Kiare) paid the deposit. They did not do so. It was not for the appellant to adduce any evidence to establish that he was merely witness to sale of cattle by the other two persons. The manner in which Kiarie, a stock dealer proceeded to buy the three heads of cattle does suggest that he was altogether honest and had suspicion about the acquisition of cattle by others. His evidence did require proper corroboration. In my view it was not forthcoming in this case.

I am not satisfied that it may be safe to sustain the conviction. It is quashed and so is sentence thereon.

The appellant be released forthwith unless otherwise lawfully held.

August 8, 1987

ABDULLAH

JUDGE