



**IN THE COURT OF APPEAL OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL 298 OF 2008**

**BETWEEN**

**MAINA MBUTHIA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nyeri ( Kasango, J) dated 28<sup>th</sup> October, 2008**

**in**

**H.C.CR.APP. NO 248 of 2007**

**JUDGMENT OF THE COURT**

**MAINA MBUTHIA**, the appellant, was charged before the Senior Resident Magistrate, at Mukurweini with stealing stock contrary to **section 278** of the Penal Code. He was found guilty as charged and sentenced to ten (10) years imprisonment.

The appellant being aggrieved by the decision of that court, preferred an appeal to the superior court against both conviction and sentence. On 28<sup>th</sup> October 2008, Kasango, J after hearing the appeal, dismissed it but substituted the conviction for stealing stock with that of attempted stealing of stock contrary to **section 278** as read with **section 389** of the Penal Code and sentenced the appellant to five (5) years imprisonment. This is therefore a second appeal.

During the wee hours of 26<sup>th</sup> January 2007 at about 4.30a.m. Elizabeth Wagithi (PW2) heard footsteps outside her homestead. She flashed her torch towards the cow shed and saw three people running away. Her only cow was missing. She raised an alarm and her son Benson Kagandi (PW1) who lived in the same homestead woke up and gave chase down the terraces. As he did so he followed the marks of plants and vegetation that had been flattened by the thieves. PW1 stumbled upon a person who was hiding in the coffee bushes. PW1 hit him with a stick and he fell down. On flashing his torch on him, PW1 discovered that the person whom he had subdued was the appellant, who was their neighbour. Soon many villagers were drawn into the coffee bushes by the appellant's screams who was begging for mercy not to be killed. The cow was recovered in the bushes nearby and it had a rope tied on the leg.

In his defence, the appellant averred that he was an innocent neighbour who was only answering a plea for assistance from PW1 and his mother who were his neighbours. He asserted that he was wrongly mistaken for a thief.

The appellant who was unrepresented before us, raised four grounds of appeal, the only substantial point of law being on

identification. Both the trial and the first appellate courts were satisfied that the appellant was properly identified as the man who was found hiding in PW2's farm with the stolen cow nearby during the ungodly hours of the material night. The appellant appeared to raise issues relating to the facts of the case in the trial court but we must reiterate that a second appeal (like the present one) must be confined to points of law and this Court would not interfere with concurrent findings of fact of the two courts below unless they are shown to have been based on no evidence.

See **KAINGO V REPUBLIC [1982] KLR 213**.

Having considered the points of law raised in this appeal and the submissions by the appellant, we are satisfied that the appellant was convicted on very sound evidence. His conviction was indeed inevitable and the superior court was entitled to uphold it.

The only matter that invites our intervention is the substitution of the stealing stock charge with that of attempted stealing stock. In this case, the commission of the offence had been completed by the time the appellant was arrested. The cow had been driven out of the shed and taken some distance away into the bushes. The intention of the appellant had been manifested by this overt act which had been fulfilled. See **section 388** of the Penal Code. However, the substitution had not occasioned the appellant a miscarriage of justice. In fact he has greatly benefited from the substitution. We will say no more.

In the result, this appeal is rejected and is hereby ordered dismissed.

**Dated and delivered at Nyeri this 21<sup>st</sup> day of May, 2010**

**P.K. TUNOI**

.....  
**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**