



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CRIMINAL APPEAL NO.76 OF 2010**

*(Being appeal from the conviction and sentence by the Chief Magistrate Hon. R. Nyakundi at Bungoma in Cr. Case No.489 of 2010)*

**FRANCIS NGALI MULICHI**

.....

**APPELLANT**

**~VRS~**

**REPUBLIC**

.....

**RESPONDENT**

**JUDGMENT**

The Appellant was convicted of theft of cows contrary to section 278 of the Penal Code and sentenced to serve 5 years in jail. The particulars of the charge were that during the night of 10<sup>th</sup>/11<sup>th</sup> March 2010 at Harambee market in Kholera Sub-location of Bungoma south District in Western Province he jointly with others not before the court stole two cows worth Ksh.34,000/= the property of Kennedy Agenga Kuloba (PW1). He was aggrieved by the conviction and sentence and preferred this appeal. The

appeal was conceded by Mrs. Leting for the State.

The evidence called by the prosecution was that PW1 woke up on 11/3/2010 and found the two cows he had left in his compound the previous day were missing. He reported to Bungoma Police Station. On the same day he was called to the police station where he found the cows having been recovered. The police officer who testified was P.C. Martin Kipronoh (PW3) whose evidence was that the animals were brought to the police station by a police officer. They were brought along with the Appellant who was said to have been found with them. The police officer who brought the cows was not called to testify, and the prosecution case was closed without there being evidence of where the cows were found and whether the Appellant had anything to do with them.

When the Appellant was put to his defence, he stated that he was with a clan elder in Bungoma town. There were cattle grazing in the field here. The elder directed him to go and untie the cattle so that they drive them to his (elder's) home. It is at that point that police officers came and arrested him. He did not call a witness.

It was upon the prosecution to prove the guilt of the Appellant beyond all reasonable doubt. No evidence was called by the prosecution to show that the appellant stole the cows or was found with them in a manner that indicated he was the thief or that he had feloniously come by them. The explanation by the Appellant regarding how he came by the animals was not controverted or challenged in any way. It shows he was innocently following the direction of the clan elder when he was arrested with the cows. In all, I find that there was no evidence called to link the Appellant with theft of the cows, and there was no indication he had criminally handled them. The conviction was not merited and is quashed. The sentence of 5 years is set aside. The Appellant is ordered to be set at liberty forthwith unless he is otherwise being lawfully held.

Dated and delivered at Bungoma this 7<sup>th</sup> day of December, 2011 in the presence of the Appellant, Mrs Leting the State Counsel and Lilian Gimose the court clerk.

**A. O. MUCHELULE**

**JUDGE**



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