



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEALS NOS 525, 571 & 572 OF 1988 (CONSOLIDATED)**

**BETWEEN**

**KAMWENGA MWACHUPA.....1<sup>ST</sup> APPELLANT**

**MWAJAMBO OMAR..... 2<sup>ND</sup> APPELLANT**

**UHURU WARYO..... 3<sup>RD</sup> APPELLANT**

**V**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*(Appeal from Original Conviction and Sentence in Criminal Case No 1530 of 1986 of the*

*Resident Magistrate's Court at Kwale, J O Magolo, Esq, Ag RM)*

July 21, 1989, **Githinji J** delivered the following judgment.

Criminal Appeals No 571/88 and 572/88 have been consolidated with this appeal.

Kamwenga Mwachupa (First Appellant); Mwajambo Omar (Second Appellant) and Uhuru Waryo (Third Appellant) were convicted for the offence of stock theft contrary to Section 278 of the Penal Code and each sentenced to 2 years' imprisonment and 3 strokes of the cane.

Each appeals against conviction and sentence.

They were charged with stealing 17 goats belonging to Ndurya Jumbi Nyange (PW 1) on 24/9/86.

Upon finding his goats stolen PW 1 was informed by Mwahanje Ndegwa (PW 3) that he met the three appellants driving 17 goats towards Mazeras.

Malachu Tsuma (PW 4) a village elder was also informed. Both PW 2, PW 3, and PW 4 visited the house of the First Appellant. He was questioned and denied stealing the goats and offered to take traditional oath to prove his innocence.

The First Appellant took the traditional oath which proved him guilty. He then offered to pay the complainant shs 1010/- and one goat being the costs incurred for the oath which he paid. He also agreed to pay balance of shs 290/- later and to pay the 17 goats. The First Appellant later refused to pay saying that he had not stolen the goats. He was handed over to the chief. The 2nd and 3rd Appellants were also arrested and all handed over to police. The shs 1010/- paid by the First Appellant was handed over to the police. Each appellant then made a cautionary statement to a police inspector confessing the theft.

During the trial each appellant denied stealing the goats and repudiated the confession.

In convicting the appellants the learned magistrate relied on the evidence that the appellants were met driving the goats, the positive result of the oath, and the confessions.

As against the first appellant the evidence against him was that he was met driving the goats, that result of the oath was positive and that he confessed the offence to a police Inspector.

As against the 2nd and 3rd Appellants, the only evidence against them is that they were met driving the goats and that each confessed the offence. There was no direct evidence to connect each appellant with the theft of the goats. The strongest evidence against each is that the three were met by PW 3 driving the goats. That evidence is circumstantial evidence which before it can found a conviction must be strong and irresistibly point at the appellants as the thieves and be incapable of explanation by any other reasonable hypothesis than that of guilt of the appellants.

Further, there must be no other co-existing circumstances which destroy that inference of guilt. As it has been aptly put, the circumstantial evidence must be watertight. Let us scrutinize the circumstantial evidence.

Firstly, there is grave doubt as to whether the goats the appellants were seen driving, if at all, belong to the complainant (PW1) who is named in the charge sheet. I say so because PW 1 the complainant claimed that his 17 goats were stolen on 29/9/86. At the same time Tundo Kumbula Malachu (PW 2) claims that his 17 goats were stolen on 24/9/86. The evidence does not show that goats which complainant says were stolen are the same goats that PW 2 claims were his and which were stolen. The names of PW 1 and PW 2 have no resemblance and is no evidence that both PW1 and PW 2 are related and come from the same house. It was the prosecution to explain by evidence the anomaly but there was no evidence from which it can be reasonably inferred that PW 1 and PW 2 were talking about the same goats and if so to which of the two they belonged.

The complainant's goats were stolen on 29/9/86. According to PW 3, he met the appellants driving the goats on 24/9/86. As admitted by PW 3 each appellant has his own goats at his home. If the appellants were seen driving the goats on 24/9/86, then those goats do not belong to the complainant as complainant's goats had not been stolen by 24/9/86. These perhaps could be the goats of PW 2 who says that his goats were stolen on 24/9/86.

Secondly, if the evidence of PW 3 is credible that he met the appellants driving the goats, then the question is: have those goats been identified as that of the complainant? The goats were not recovered and were not therefore identified in court.

The complainant (PW1) did not describe the goats in his evidence. He did not also refer to any identifying marks on his goats. It cannot therefore be said that the goats that PW 3 saw matches with the description of the complainant's goats. Indeed, PW 3 did not say that he knew the complainant's goats

before.

The upshot is that if appellants were seen driving the goats they have not been identified as those of the complainant.

The evidence of PW 3 who is a brother-in-law of the first appellant is suspicious. His conduct of counting the goats on the way for no reason is un-natural.

There is no evidence that the goats were being driven from the direction of the complainant's home. Indeed, no evidence was offered to show the relative positions of the homes of appellants and that of the complainant.

We do not know how far the appellants were found by PW 3 from the complainant's home.

All in all, the circumstantial evidence is weak and does not irresistibly point at the appellants as the people who stole the complainant's goats to the exclusion of anybody else.

The traditional oath was taken extra judicially. The oath was not administered in the presence or under supervision of the court and the learned magistrate could not know if the traditional oath has mechanism for proving guilt beyond any reasonable doubt. The evidence of how it was administered was not given in court. The evidence of PW 1 and PW 2 that the oath was positive is hearsay as they were not present. PW4 does not specifically say that he was present when the oath was administered. The taking of traditional oath smacks of trial by ordeal. It is not recognised evidence in criminal trials and the much I can say is that the fact that a traditional oath affected the first appellant is no evidence at all in a criminal trial. The learned magistrate erred in taking the positive effect of the traditional oath as evidence against the first appellant.

That leaves the confessions as the only evidence against appellants. The confessions were denied (repudiated). The court can convict on uncorroborated repudiated confession if the court is satisfied that the confession is voluntary and true but as a matter of practice, the court always looks for corroboration of repudiated or retracted confessions before basing a confession on them.

In this case, the circumstantial evidence as I have shown above cannot amount to corroboration of the confessions. The result of the traditional oath cannot also be taken as corroboration.

The three confessions were taken by one police officer. The one of the 3rd appellant was taken at 2 pm. The second appellant's confession was taken at 2.30 pm and the first appellant's confession was taken at 2.45 pm. All the three confessions were taken on the same day. The confessions are short and similar.

In the circumstances, there is a strong possibility as the appellants stated that they were merely asked to sign. If indeed the first appellant had stolen the goats and had been given a chance to repay, why would he refuse to pay knowing very well that he would be prosecuted.

PW1, PW2, PW3 and PW4 testified that the Shs 1010/- was paid by first appellant as costs of the oath. Yet as Cpl Thomas Ndege (PW 6) testified, he was given the shs 1010/- and told that the money was proceeds of sale of the goats that the appellants had stolen.

All considered, the convictions were unsafe. I allow the appeal of each appellant against both conviction and sentence.

The convictions against each of the three appellants is quashed and the respective sentence set aside.

Each appellant to be released forthwith unless lawfully held for any other offence. The shs 1010/- produced in the lower court as exhibit to be refunded to the first appellant.

**Dated and delivered at Mombasa this 21st day of July , 1989.**

**E.M. GITHINJI**

**JUDGE**



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