Case Number:	Criminal Appeal 1 of 1979
Date Delivered:	14 Nov 1979
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Edward Trevelyan, Alan Robin Winston Hancox
Citation:	Khalif Haret v Republic [1979] eKLR
Advocates:	CN Omondi for the Appellant. Capt Mbewa for the Republic.
Case Summary:	**Khalif Haret v Republic** **High Court, Appellate Side, Nairobi 14th November 1979** **Trevelyan & Hancox JJ** **Criminal Appeal No 1 of 1979** ***Theft*** *- handling stolen goods - stolen goods - belief by defendant that goods stolen – Penal Code (cap 63), section 322.* ***Court martial*** *– evidence - abstract of evidence - certificate accompanying–failure to supply certificate to defendant with abstract.* ***Evidence*** *- hearsay – meaning of "hearsay".* On a charge of handling stolen property (contrary to section 322 of the Penal Code), the prosecution must prove that the goods in question had been stolen and it is not sufficient to establish merely that the defendant believed that the goods had been stolen. *Dictum* of Lord Reid in *Haughton v Smith* [1974] 2 WLR 1, 11, applied.

A certificate in prescribed form should accompany an abstract of evidence which is served on an accused person under the Armed Forces Rules of Procedure; if it does not accompany the abstract, however, its absence may be treated as a mere technical breach of the rules, provided that it does not have a prejudicial effect on the accused or the conduct of his defence.

Hearsay evidence is evidence of a fact spoken to by someone who did not himself perceive it of his own senses, but proved by him to have been said by someone else. Hence, what a person not called as a witness has said cannot be received in evidence to prove the truth of the facts stated; although if it is not the truth of what was said that is sought to be proved but only that it was said, the evidence would be admissible.

Appeal

Khalif Haret appealed to the High Court (Court–martial Criminal Appeal No 1 of 1979) against his conviction and sentence by a Court–martial held at 3 KR, Nakuru Barracks, on charges of committing two civil offences, contrary to section 69 (1) of the Armed Forces Act. The facts are set out in the judgment of the court delivered by Hancox J.

Cases referred to in judgment:

1. *Davies v Director of Public Prosecutions* [1954] AC 378, [1954] 2 WLR 343, [1954]: 1 ALL 507, ER HL.
2. *Haughton v Smith* [1975] AC 476, [1974] 2 WLR 1, [1973] 3 All ER 1109, HL.
3. *Mahon v Osborne* [1939] 2 KB 14, [1939] 1 All ER 535, CA.
4. *Okethi Okali v The Republic* [1965] EA 555, EACA.
5. *Pyaralal Melaram Bassan v R* [1961] EA 521, EACA.
6. *R v Asumani Logoni s/o Muza* (1943) 10 EACA 92.
7. *R v Gokaldas Kanji Karia* (1949) 16 EACA 116.
8. *R v Kilbourne* [1973] 2 WLR 254, [1973] 1 All ER 440, HL.
9. *R v Kipkering arap Koske* (1949) 16 EACA

	135. 10. *R v Thakar Singh s/o Kahir Singh* (1934) 1 EACA 110. 11. *Tuwamoi v Uganda* (1967) EA 84, EACA. 12. *Uganda v Kimchand Kalidas Shah* [1966] EA 30, EACA. 13. *Wanja Kanyoro Kamau v The Republic* [1965] EA 501, EACA. *CN Omondi* for the Appellant. *Capt Mbewa* for the Republic.
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal dismissed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT APPELLATE SIDE NAIROBI

CRIMINAL APPEAL NO 1 OF 1979

KHALIF HARET .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Private 4524 Khalif Haret of 66 Artillery Regiment, Kenya Army, appeals by leave of this Court from his conviction by Court-martial on 31st July 1977, on charges of committing two civil offences, *contra* section 69(1) of the Armed Forces Act namely handling 620 rounds of 7.62 mm ammunition knowing or having reason to believe it to be stolen under section 322(1) of the Penal Code, and being in possession of that ammunition without a firearm certificate under section 4(1) of the Firearms Act. He was sentenced to the statutory custodial minimum of seven years' imprisonment with hard labour on the second (handling) charge, and four and a half years' imprisonment on the third (firearms) charge to run concurrently. He was, in addition, sentenced to be dismissed from the armed forces on each charge under section 103(4) of the Act. The appellant was acquitted of the remaining two charges, the first being stealing public property (to which charge 2 was an alternative), and the fourth of storing the ammunition in disobedience to standing orders.

On 11th January 1977, at 23.00 hours I/P Kabiru in company with two Army officers raided a house in the Army quarters at Gilgil in which there were two civilians, two women and some children, and recovered a carton containing 620 rounds of 7.62 mm ammunition bearing serial numbers which showed clearly that they had originated from the armoury of the mechanised battalion, of which Senior Private Ngatia was in charge.

They were said to have been part of a quantity issued by him for use on the range at Rumuruti sometime in 1976. One of the civilians present was named Hussein Abdi (also referred to as "Mohamed"). Despite strenuous and repeated objections by counsel then representing the appellant, the judge-advocate permitted I/P Kabiru to tell the Court what Hussein Abdi had said to the police inspector, evidence which was not only hearsay but clearly prejudicial to the appellant.

The evidence connecting the appellant with this ammunition was, as the judge-advocate said in the course of his summing-up, confined almost entirely to the evidence of Senior Private Ngatia (who, there can be no shadow of doubt, was an accomplice) and a confession of the appellant recorded by Capt Munene on 27th January 1977, after a caution had been administered on handing him the abstract of evidence under rule 9(2) of the Armed Forces Rules of Procedure. That confession was (as we are not satisfied after seeking Mr Omondi's clarification on the matter) wholly repudiated by the appellant's then advocate, but was admitted after a trial within a trial by the judge-advocate sitting in the Court's absence.

The circumstances in which it was admitted and those in which it was said to have been taken have been the subject of a strong attack by Mr Omondi (who did not appear at the Court-martial) on behalf of the appellant on this appeal, forming the second of the amended grounds of appeal.

The first ground of appeal was, however, purely on a point of law. Mr Omondi submitted that it is an essential ingredient in any charge of handling stolen property that the property has in fact been stolen. It is not enough for the accused person to be shown to have had reason to believe the property was stolen (under the second branch of the ingredient requiring guilty knowledge) if there is no evidence (or, as in this case, no admissible evidence: the contention being that such evidence as there was constituted hearsay) that it was stolen. He cited a passage from Lord Reid's judgment in the English case *Haughton v Smith* (1974) 2 WLR 1, 11, as follows:

It is clear from the terms of that section and of section 24(3), that the goods must be goods which have been stolen but have not been restored to lawful custody before the commission of the offence. It has been admitted, though perhaps wrongly, that the goods to which the charge relates had been restored to lawful custody before the alleged offence was committed. So there could be no offence under section 22 with regard to them. There is a reference in the section to the accused believing the goods to be stolen goods. But that does not widen the ambit or scope of the section: it merely makes the E section apply to a case where the goods are, in fact, stolen goods but the accused does not know that but only believes them to be so ....

with which we respectfully agree. Mr Omondi said that, at best, the evidence that the ammunition had been stolen was hearsay; that there was confusion in Senior Private Ngatia's evidence, not only as to which serial markings appeared on the ammunition which had earlier been issued from his store, but also as to that which he observed on the single round taken from the carton removed by Sgt Kimeli from the drainage ditch on the evening of 29th December; that the gap in the evidence was never filled and that the direction of the judge-advocate to the Court that it was enough if they "believed" the ammunition to be stolen property, was wrong.

We return to the second ground of appeal. Mr Omondi took several points in support of his contention that the statement (exhibit 3) was never made. In particular he said that the judge-advocate had relied in his ruling on its admissibility on the appellant's earlier statement at Bahati police station (which was apparently not under caution and which the prosecuting officer refrained from putting in evidence as he said that he was only interested in the signature, not its contents) as supportive of his finding that the appellant had lied as to his knowledge of English. In this connection Mr Omondi further complained that, when subsequently giving a direction to the Court regarding the issue (which was still very much a live issue) of whether the appellant had signed the statement (exhibit 3), the judgeadvocate referred to the appellant's signatures in his pay-book, and to his English proficiency certificate, neither of which were ever satisfactorily produced.

Moreover, Mr Omondi said, the certificate which the officer serving the abstract of evidence on an accused person has to complete under rule 9(4), was neither written by the same person nor on the same day; the statement itself was not made until 5.00 pm, which, we are told, was three hours after the appellant had been served with the abstract, during which time he was under close arrest with no chance of communication, so as to ascertain what the abstract contained; it was recorded in English, whereas the Court of Appeal have said that it should be recorded in the language in which it is spoken, and the date was missing on the typed copies, leading to the conclusion that it was not (at the time it was copied) in the original. Finally, the statement, which is supposed to form part of the abstract, was not served on the defence at least twenty-four hours before the trial under rule 24(4). We note in this last connection that the judge-advocate dealt specifically with the delay in providing the defence with a copy of the statement at the end of his ruling, and must have taken it into account.

All these factors, Mr Omondi submitted, were pointers showing that there was at the least a reasonable doubt that the appellant had made the confession, and that had the judge-advocate's ruling and

subsequent summing-up given due weight to them an acquittal would have resulted, because it was really the only evidence capable of corroborating Senior Private Ngatia. Before leaving this ground we would refer to what was called the “other certificate”, about which Capt Munene was asked by defending counsel (Mr Waweru) when he resumed his evidence in open Court. (This certificate is the form accompanying the abstract which is shown in Part II of the First Schedule to the Armed Forces Rules of Procedure). It is clear from the pattern of Mr Waweru’s question at this point that the form was not attached to the abstract of evidence when it was served on the appellant, as it should have been. However, as Capt Munene was perfectly clear that he had served the abstract (complete save for his own statement) on the appellant, who was given time to consider it and who is said to have made the statement (Exhibit 3A) as a result, we cannot see that the absence of this form, although it is a technical breach of the rules, had any prejudicial effect on the appellant or the conduct of his defence.

Mr Omondi referred us to four separate instances of hearsay evidence being admitted during the course of the trial, despite (on one occasion at least) vigorous protest by defending counsel, which were quite wrongly and inexcusably overridden by the judge-advocate, whose role it was to guide the Court, to give a decision on admissibility, and to protect the interests of the appellant where this was necessary. The first instance of hearsay evidence being let in was when I/P Kabiru was permitted to state what was said by Hussein Abdi during the search of the quarters at Gilgil on 11th January; the second as to what was said to the witness Dahir by his colleague regarding the proposed purchase of ammunition; the third as to what Senior Private Ngatia was told about the finding of the ammunition at Rumuruti; and the fourth as to what the sentry at the gate told Private Njoroge on 29th December (as distinct, of course from that which Private Njoroge himse1f observed), which, in turn, was relevant to the question of whether the appellant had told a lie to Private Njoroge (as the prosecution had sought to establish).

We are grateful to Mr Omondi for drawing our attention to these matters and to the judge-advocate’s express direction that the questions eliciting the first piece of hearsay evidence were in order. As some of the submissions to the Court-martial were directed to this aspect, we venture to clarify the position. Hearsay evidence is evidence of a fact spoken to by someone who did not himself perceive it with one of his own senses, but proved by him to have been said by someone else. In other words, what a person not called as a witness has said cannot be received to prove the truth of the facts stated. Of course if it is not the truth of what was said that is sought to be proved but only that it was said, the evidence would be admissible. The rule has its exceptions and we instance dying declarations.

Mr Omondi continued his submissions by saying the direction by the judge-advocate (to which we have just referred) was but one example of his attitude of obstruction and hostility to the defence throughout the trial. This was further evidenced by the long periods of questioning of witnesses by himself and by the Court, in which he appeared virtually to assume the mantle of prosecutor. We have carefully inspected the record with this in mind; and we agree that there certainly appears to be an inordinate number of interruptions, particularly when defending counsel was on his feet, which moved him to complain at one stage that the judge-advocate was blocking his questions. There was also very lengthy questioning by the judge-advocate and by the Court, in particular of the appellant and his two witnesses, Hussein Abdi and Sgt Chepkwony (he was the “Sgt Kimeli” referred to earlier in the case who was charged with the same offence and convicted, although his appeal was later (as we understand) allowed). We note also that Sgt Chepkwony was warned that he need not incriminate himself, and that in the course of that exchange the prosecuting officer made the amazing suggestion that Mr Waweru had instructed the witness what to say.

We therefore think there is force in Mr Omondi’s criticisms and we would comment that it is in the highest degree unfortunate that in a Court-martial (or, for that matter, in any other case) the judge-advocate should by his conduct and interjection even give the impression that he is favouring the one

side or the other; whether it be the fact or not.

Mr Omondi did not address us at length on ground 6, which was that the judge-advocate had, in his summing-up, not dealt with the evidence as a whole, but had taken the cases for the prosecution and defence in isolation (contrary to the direction of the Court of Appeal in *Okethi Okale v The Republic* [1965] EA 555) and then invited the Court to say which they believed, rather than stressing that they had to be satisfied of the truth of the former beyond reasonable doubt. While there undoubtedly are shortcomings in the manner of conducting the trial, and certain passages in the summing-up which are open to criticism, we do not consider that the summing-up, taken as a whole, treats each case in isolation as was suggested. It is inevitable in any judgment or summing-up that certain parts of the case are referred to separately, but the judge-advocate, both at the outset and towards the end of the summing-up (with references on occasion in between), gave a very clear direction on the burden of proof, and that the Court had to be satisfied of the guilt of the appellant beyond reasonable doubt on each of the charges before they could convict. As was said by Goddard LJ in *Mahon v Osborne* [1939] 1 All ER 535, 566:

The most that can be required is that the judge, in addition to stating the law correctly, shall give a fair summary of the evidence and of the contentions of either side.

Coming to ground 7, which is concerned in its three aspects wholly with Senior Private Ngatia, in support of this ground Mr Omondi submitted that the fact of his being an accomplice did not appear sufficiently clearly from the summing-up. But whilst there are passages in the summing-up which we cannot endorse it seems to us that the judge-advocate directed the Court in fairly clear terms on the law as to accomplices, citing *Davies v Director of Public Prosecutions* [1954] AC 378.

On that basis he left it to the Court to decide whether Senior Private Ngatia was an accomplice; while the judge-advocate did not in terms tell them that he was, we think that his summing-up as a whole really could have left no doubt of it in the minds of the members of the Court. This being so, then, what is the correct approach" It is, we are satisfied, that stated by Lord Hailsham of St Marylebone L C in *R v Kilbourne* [1973] 2 WLR 254, 267 :

Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness’s testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroborated in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed.

(See also *Uganda v Khimchand Kalidas Shah* [1966] EA 30, 31 per Spry JA and *R v Kipkering arap Koske* (1949) 16 EACA 135,136 “ .... corroboration can only remove the taint of suspicion as to his credibility from an otherwise reliable witness”.)

What then, is corroboration" As was put succinctly in *R v Kilbourne* (at page 263) it means “no more than evidence tending to confirm other evidence”. It is not, as the judge-advocate correctly stated, confirmation of everything, so that it amounts to a duplication of the evidence needing corroboration.

Now what did the judge-advocate say here" After saying to the Court that they had to decide if Senior Private Ngatia was an accomplice (and, incidentally, at one point putting it round the wrong way) and then dealing with corroboration, he said “But you must be satisfied that the witness [referring to Senior Private Ngatia] has spoken the truth”. In this respect, therefore, we think that the judge-advocate directed the Court in accordance with the principles we have just cited.

Mr Omondi also drew our attention to the fact that Senior Private Ngatia undeniably did not report what had happened (as Mr Waweru had established in cross-examination) and gave most unsatisfactory replies on this aspect, giving as one reason that if the ammunition was not found, a report would “spoil the names” of Sgt Kimeli and the appellant. We observe that in *Wanja Kanyoro Kamau v The Republic* [1965] EA 501, which was one of the authorities to which Mr Omondi also drew our attention, the same complaint was made, although it was there relevant to whether a witness Wambui was to be regarded as an accomplice. In the instant case, as we have said, it is clear that Senior Private Ngatia was an accomplice and the judge-advocate specifically dealt with the fact that he did not report to Col Ayub. We think that this, coupled with the earlier direction that the Court had to be satisfied Senior Private Ngatia told the truth, constituted a sufficient direction on this part of the case.

In the course of his submissions on this ground of appeal Mr Omondi asked us to say that the appellant’s statement, even if it be regarded, as admissible, nevertheless differed in important respects from the story of Senior Private Ngatia. He instanced that portion of the statement in which the appellant allegedly says that he and Senior Private Ngatia left the other ranks’ canteen together and that they parted at the BIA building, when Senior Private Ngatia went towards Sgt Kimeli’s quarter. Senior Private Ngatia, in giving his version of what happened at this point in time, said he knew the appellant and Sgt Kimeli were looking for him and that he came upon them together near the BIA premises.

While the judge-advocate was in error in directing the Court, as he did (an error into which he was probably led by the prosecuting officer), that a repudiated statement needs no corroboration (see *Tuwamoi v Uganda* [1967] EA 84, 90, 91, in which the Court of Appeal stated that there was no real distinction in principle between a repudiated and a retracted confession) there is nevertheless ample authority, in particular *Pyaralal Melaram Bassan v R* [1961] EA 521, 530, to the effect that an impugned statement, although itself needing corroboration, is itself capable of providing corroboration of an accomplice’s evidence.

Finally, Mr Omondi dealt with ground 3 of the appellant’s original petition of appeal, as ground 8. It is perfectly true that the appellant was not found in possession of ammunition by the authorities. It was suggested that (on the authority of *R v Gokaldas Kanji Karia* (1949) 16 EACA 116) it was not sufficient for proof of possession (in that case of uncut diamonds) to be established by one witness; but the point in issue there was whether the stones seen by De Souza were in fact diamonds; and in dealing with that portion of that case the Court of Appeal upheld the trial judge’s acceptance of De Souza’s testimony. In the instant case, as we have said (and the judge-advocate said), the evidence of Senior Private Ngatia (who was the only witness on the point) would (before acceptance) require corroboration, since this was not a case where an accomplice’s evidence could be accepted without it: see *R v Thakar Singh s/o Kahir Singh* (1934) 1 EACA 110, 112, and *R v Asumani Logoni s/o Muza* (1943) 10 EACA 92. It is only the statement (exhibit 3) which is capable of providing corroboration in this case.

In his address to the Court Capt Mbewa, for the Republic, confined himself to supporting the convictions on the basis that that Court was adequately directed that they were entitled to accept Senior Private Ngatia’s evidence, and then to find corroboration of it in the confession which the judgeadvocate had admitted. He said that the judge-advocate had the opportunity of seeing and hearing the appellant, Capt Munene and the other witnesses, and came to the conclusion that the prosecution had proved that the statement was made.

Having carefully examined the judge-advocate’s summing-up on the issue of Senior Private Ngatia, we considered that his direction was sufficient to warn the Court as to the quality of his evidence; that they should first approach it from the standpoint of whether the witness was credible and then ascertain whether there was corroboration in the confession (exhibit 3). The judge-advocate followed the

established procedure in holding a trial within a trial to determine the admissibility of this confession. He heard all the witnesses which the prosecution and defence wished to call and full addresses by both sides; he then came to a decision after he had delivered a full ruling, in which he recognised that the burden of proof remained on the prosecution. As was emphasised in *R v Gokaldas Kanji Karia* (1949) 16 EACA 116 (in which two English authorities were cited), an appellate court should be slow to interfere with the findings of a trial court when the issue is one of fact to be decided on the credibility of witnesses, all of whom the Court saw, heard and, indeed, questioned, when it has not had those advantages; see also *Uganda v Khimchand Kalidas Shah* [1966] EA 30,33. The judge-advocate again dealt with the issue of the disputed confession in his summing-up and the Court, having also seen and heard the witness, by their verdict, accepted Senior Private Ngatia's evidence as creditworthy. Having made our own assessment, we are satisfied beyond reasonable doubt of the appellant's guilt, for Senior Private Ngatia's evidence was corroborated by the confession. Moreover, applying the principles we have just stated, we are quite unable, on the evidence on record, to say that the judge-advocate's decision to admit it was otherwise than correct. It follows that the Court was entitled, on the material before it, to accept the prosecution case as having been proved beyond reasonable doubt and to reject the appellant's defence containing his denials that he was concerned in these two offences.

We therefore dismiss the appellant's appeal against his conviction. As we understand it there was no separate appeal against the sentence, which, on the handling charge, could not be refused by us even if we were so minded. The sentence on the firearms charge was certainly not excessive and was in any event concurrent to the other. The orders of dismissal from the service were proper.

Appeal dismissed.

Dated and delivered at Nairobi this 14th day of November 1979.

E. TREVELYAN

JUDGE

A.R.W HANCOX

JUDGE