



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 24 OF 2014**

MARTIN MUNENE JEREMIAH .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**From original conviction and sentence in Cr. Case No. 514 of 2013 at the Resident Magistrate's Court at Runyenjes by HON. J.P. NANDI- SRM on 7<sup>TH</sup> JANUARY 2014**

**J U D G M E N T**

1. **MARTIN MUNENE JEREMIAH** the Appellant herein was charged with two offences;

**Count 1**

**Stealing contrary to section 275 of the Penal Code**

The particulars being that the Appellant on the 5<sup>th</sup> day of October 2013 at Kathogo village within Embu County stole one She-goat valued at kshs.7,000/= the property of PATRICK MUTEMBEI.

**Count 2**

**Unnatural offence contrary to section 162(b) of the Penal Code**

The particulars being that the Appellant on the 5<sup>th</sup> day of October 2013 at Kathogo village within Embu county had carnal knowledge of a She-Goat.

2. He pleaded not guilty to both counts and the matter proceeded to full hearing. He was later convicted on both counts and sentenced to two (2) years and five (5) years imprisonment respectively. Sentences are to run concurrently.
3. He was aggrieved with the judgment and has appealed against both conviction and sentence citing the following as the grounds;
- i. The trial Magistrate erred in law and fact when he convicted the Appellant on a prosecution

- case full of contradictions and inconsistencies.
- ii. The trial Magistrate erred in law and fact when he convicted the Appellant on a defective charge sheet which stated that the animal was stolen but it was in its own possession at the trials hence contravention of section 214 of the Criminal Procedure Code.
  - iii. The trial Magistrate erred in law and facts when he shifted the burden of prove to the Appellant.
  - iv. The trial Magistrate erred in law and facts when he failed to observe that prosecution case was not proved beyond reasonable doubt as the law requires.
  - v. That the trial Magistrate erred in law and facts when he rejected the Appellant's defence in contravention of section 169(1) Criminal Procedure Code.
4. A summary of the prosecution case is that PW1 Patrick Mutembei and PW2 - Peterson Kinyua who are brothers were asleep in their respective houses on 5<sup>th</sup> October 2013 at 10.30pm when they heard their mother screaming saying her goat had been stolen. They woke up and went outside. PW1 checked the goat house and found one She-Goat missing. They heard the sound of the goat which they followed. They had bright torches whose light enabled them to identify the Appellant. On seeing the torch light he ran away. They went to his house but did not find him. They arrested him early the following morning. It was PW2's evidence that the clothes the Appellant had on himself had goat furs on them. The Appellant relied on his written submission which he presented to the court;
- i. He has in the submissions expounded on his grounds. He has questioned his identification since it was at night.
  - ii. He submitted that the Judgment was against the weight of the evidence as the clothes alleged to have had fur on them were not produced.
  - iii. He stated that his defence of *alibi* was not considered.
5. PW3 Isaac Gitari a Livestock Health Officer examined the She-goat (EXB1) and was of the opinion that the animal had been recently sexually penetrated. He produced his report EXB2. PW4 - APC Patrick Simiyu Wanyonyi and PW5 - Abdo Abdallah received the Appellant and the She-goat (EXB1) from members of the public on 6<sup>th</sup> October 2013. The Appellant in his sworn defence denied the charge, saying he had gone to a bar with a friend and stayed there upto 11pm taking beer. He went home and slept. At 9am he was woken up by three men who asked him to assist them look for miraa. On the way they arrested him and a goat was brought where he was. He was then told of this offence which he denied committing.
6. When the appeal came up for hearing M/s Ing'ahizu the learned State Counsel conceded the appeal against the conviction and sentence in count 1 on the ground that the Appellant had been charged under the wrong provisions of law. But she opposed the appeal in relation to count 2 for the reason that the Appellant was well identified by PW1 and PW2 who were ten (10) metres from him. And that the evidence placed the Appellant at the scene.
7. As this is a first appeal this court is enjoined to re-evaluate and reconsider the evidence and arrive at its own conclusion. I also bear in mind that unlike the trial court I did not have the benefit of seeing and/or hearing the witnesses. See **OKENO -V- REPUBLIC [1972] EA 32; NJOROGE – V- REPUBLIC [1989] KLR 313.**
8. I have considered the submissions by both the Appellant and the State together with the grounds of appeal. I have equally considered the evidence on record and the findings by the trial court.
9. What is alleged to have been stolen was one She-goat valued at shs.7000/=. The Appellant was charged under section 275 of the Penal Code when he ought to have been charged under section 268 of the Penal Code which deals with theft of livestock. The State has conceded to the appeal against the findings on count 1. The conviction on count 1 is quashed and the sentence set aside.
10. I am now left with the appeal in respect of the 2<sup>nd</sup> count. Upon evaluating the evidence and the grounds of appeal, I find the main issue to be determined to be the issue of identification of the Appellant.
11. It is not disputed that PW1 and PW2 were woken up from their sleep by the screams of their mother. The time was 10.30pm. They say they followed the sound of the goat and shone their torches in that direction. Ten meters away they saw the Appellant having sex with the goat. This is what PW1 said at page 4 lines 16-18;

***“I had a torch which I shone at the direction the sound of the goat was coming from about 10 metres away and saw accused having sex with the goat”.***

This is what PW2 said at page 5 line 20 – 21;

***“We found accused half naked. He had pulled down his trouser having sex with the goat”.***

12. PW1 and PW2 had a duty to explain to the court what they exactly saw and how they were able to identify the Appellant. For example did they identify him by his facial appearance, by his back or by what he was wearing? Were they able to see his face? Given the allegations made against him it was material that the witnesses tell the court exactly what they saw for the court to be convinced that the person they saw was the Appellant.
  13. Whenever the case against the accused person depends wholly or to a great extent (as in the case here) on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.
  14. In the case of ***WAMUNGA –V- REPUBLIC [1989] KLR 424*** the court of appeal had this to say about identification at night;
    1. ***“Where the only evidence against a Defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction”.***
    2. ***Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.***
    3. ***The robbery in the present case was committed at night and the only form of lighting were torches carried and flashed by the robbers, all the victims were woken up from sleep in their respective houses”.***
  15. And in ***WANJOHI & 2 OTHERS –V- REPUBLIC [1989] KLR 415*** the Court of Appeal stressed that ***“the vital question upon which there is special need for caution is the correctness of the identification”.***
- In other words the identification must be proved beyond reasonable doubt.
16. PW1 and PW2 were not able to explain to the court the positioning of the said goat and the Appellant. Had this goat been tied on something or how was it being mounted by the Appellant? Indeed if they saw what the learned trial Magistrate believed them to have seen, then there could have been nothing difficult for them to explain.
  17. PW2 also told the court that when they went to arrest the Appellant the next morning they found him in clothes which had goat furs. He did not explain to the court what kind of clothes the person they saw that night wore. In cross-examination he said the same clothes the Appellant had in court were the ones he had that night. It is nowhere indicated on record that indeed the clothes the Appellant had in court had goat furs, yet the learned trial Magistrate in his judgment believed PW2.
  18. If indeed the clothes the Appellant was wearing on 6/10/2013 morning had goat fur nothing would have stopped PW4 and PW5 from retrieving them from the Appellant and using them as exhibits.
  19. It is clear from the evaluation above that the learned trial Magistrate did not pay special attention to the fact that the incident occurred at night and the star witnesses (PW1 & PW2) needed to explain more about their identification. He over relied on the issue of goat furs which in his judgment at page 14 lines 17-19 he stated;

***“His clothes had goat furs which strengthens the fact that it was the accused who PW1 and PW2 saw having sex with the she goat”.***

There was nothing presented to the court to confirm that indeed the Appellant's clothes had goat furs. I find PW2's evidence on this issue to be of evidential value. The totality of these findings brings me to the final finding that the identification of the Appellant by the two witnesses could not be without error. And for that reason I find the conviction to be unsafe.

I allow the appeal and quash the Appellant's convictions on both count 1 and count 2. The sentences on both counts are also set aside.

The Appellant to be released forthwith unless otherwise lawfully held under a separate warrant.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 31<sup>ST</sup> DAY OF JULY 2014.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Mr. Miiri for State**

**Appellant**

**Njue/Kirong – C/c**