



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc. Crim. Appli. 491 of 2007

MOHAMED ELIAS MOHAMEDAPPELLANT

- AND -

REPUBLIC

RESPONDENT

**(An appeal from the judgment of Senior Resident Magistrate A. *Ingutya* dated 17th November, 2006
in Criminal Case No. 314 of 2006 at Wajir Law Courts)**

JUDGEMENT

The appellant was charged with stealing stock contrary to s. 278 of the Penal Code (Cap. 63, Laws of Kenya). The particulars of the charge were that the appellant, on 3rd September, 2006 at about 08.00 Hrs, at Orahey Wells in Wajir District within North Eastern Province, jointly with others not before the Court, stole one goat valued at Kshs.2,000/= the property of **Ugas Hussein Ahmed**. He faced the alternative charge of handling stolen goods contrary to s. 322 (2) of the Penal Code; the particulars being that he, the appellant, on 3rd September, 2006 at about 0.800 Hrs at Orahey Wells in Wajir District aforesaid and while acting jointly with others not before the Court, otherwise than in the course of stealing, dishonestly received or detained one goat the property of **Ugas Hussein Ahmed** knowing or having reason to believe it to be stolen.

The complainant (PW1) had taken his goats out to pasture in the morning of 3rd September, 2006. When these goats came home at 2.00 pm on the same day, one of them, a white-coloured goat, was missing. On the following day PW1 found his missing goat at a Police camp, tethered to a tree. When PW1 began untying his goat, a person who said he was a Police officer came and demanded he leave the goat as it was his; this Police officer said he had purchased the goat. A dispute followed which necessitated the making of a report at Wajir Police Station; and Police officers took possession of the goat, which PW1 now identified in Court as the goat in question.

Sgt. Benedict Warali (PW2) of Wajir Police Station testified that he is the officer-in-charge of the Police Officers' Mess, and in that capacity he is the one who buys goats for the mess. On 3rd September, 2006, a Sunday, two young men sought to sell a goat to PW2. One of these men was the appellant herein and he had informed PW2 that the goat belonged to his mother. PW2 agreed to buy the goat at the price of Kshs.1,400/= and he paid the money to the appellant. PW1 tethered the goat next to the Officers Mess and did not slaughter it that day. On the following day word reached PW2, that there was a person laying claim to the goat which he (PW2) had purchased the previous day. PW2 then had a meeting with the complainant at the Police Lines. PW2 thereafter asked **Police Constable Mugambi** (PW3) (who the goat -seller had said the previous day, he knew) to trace the seller; and **Constable Mugambi** was able to arrest

the appellant herein that same day. On cross-examination, PW2 testified that **Constable Mugambi** had been present at the time of purchasing the goat, on the material day.

Police Constable Dominic Mugambi (PW3) of Wajir Police Station was in his house on the material date, at 2.00 pm when he was called to the Officers' Mess to identify the persons who were offering to sell a goat to the Officer-in-charge (PW2). PW3 did know the two goat-sellers, and it was his testimony that one of the two was the appellant herein. On cross-examination, PW3 said he had no knowledge that the goat in question had been stolen; and that he is the one who later effected the appellant's arrest, near a place known as Liban.

Ibrahim Aliow Adan (PW4) of the Wajir Police Canteen testified that two young men including the appellant had gone to the canteen on the material date, at 2.00 pm, and asked if the canteen could buy a goat from them. The men had left the goat in the meantime at **Constable Mugambi's** place at the Police Lines; and now they went and brought it to the canteen. It was PW4's testimony that the price was negotiated, and the sum of Kshs.1,400/= paid to the appellant in PW4's presence. Then on the following day, at 9.30 a.m., the complainant came to the canteen and said the goat in question was his property.

Responding to cross-examination. PW4 said it was the appellant himself who was holding the goat on a leash, at the time of negotiating the price; and it was the appellant who received the money; the goat in question was the one now before the Court. PW4 said the appellant had been at the canteen for 20 minutes, and he, the appellant was the one negotiating the price.

Police Constable Stephen Wandera (PW5) of Wajir Police Station had received one **Ugus Hussein**, a brother to the complainant, who reported that his brother's goat had been stolen; and later the appellant was arrested and brought to the Police Station, and the goat was handed over to PW5 to conduct investigations into the theft-claim; he later charged the appellant herein. On cross-examination, PW5 testified that the appellant had informed him he (appellant) received the goat from some two women (who remained unnamed).

The appellant in his defence made a sworn statement which only marginally related to the transactions that constituted the alleged theft of the goat. The only relevant thing the appellant said was: "*I did not steal the goat. That is all*". Even in cross-examination, the short testimony of the appellant did not touch on matter explanatory to the alleged transactions of theft, or handling of dishonestly-obtained property.

On the basis of the evidence, the learned Magistrate thus approached his verdict:

"I have fully considered the evidence herein. The evidence of PW1, the complainant, to the effect that his goat was stolen and that he later recovered it at the Police Lines, remains uncontroverted. The accused was seen at the Police Lines with the goat by no less than three witnesses who corroborated each other on this fact. One of the witnesses, P.C. Mugambi, was in fact a close friend of the accused

"According to the evidence on record, the only reason PW3 was brought into the picture [was that] the accused himself mentioned him [PW3] as a friend. PW2 wanted to be sure that in the event of a query on the purchase, he would be able to access the accused.

"PW3 had no reason at all to lie to the Court. Nor [had] PW2 or PW4. The testimonies of the witnesses herein converge in placing the accused at the scene and indicate without a doubt that he sold the goat to PW2. The accused did not give any explanation at all as to how he came to possess the goat. The fact that he had the goat on the very day it was stolen from the complainant leads me to the finding that he stole it, in fact.

"In the upshot, I find that the prosecution proved its case beyond any reasonable doubt, and I convict the accused as charged, under section 215 of the Criminal Procedure Code".

The learned Magistrate sentenced the appellant herein to serve a jail term of ten years.

In his grounds of appeal, the appellant contends that the trial Court failed to give him the benefit of certain doubts in the proof of the case.

The appellant came before this Court with written submissions, to which was appended a document bearing the heading: "Amended Memo". And in the new grounds, the appellant contended that he had been convicted against the weight of the evidence adduced; and that the trial Court erroneously failed to take the merits of his defence into account.

In his oral submissions which he made in person, before this Court, the appellant said: "I did not steal the goat; it's all a frame-up. It comes from malice and there was a grudge. There's no truth in the matter".

Learned counsel **Mr. Makura**, for the respondent, contested the appeal, and urged that all the evidence showed the appellant to have committed theft. Counsel urged that the evidence had been entirely consistent; it proved the case; and the sentence was in all respects fair.

After considering all the evidence, it has become clear to me that the prosecution witnesses gave water-tight accounts showing how the complainant's goat had disappeared in circumstances consistent with it having been stolen; soon thereafter the appellant was the one offering the said goat for sale; the appellant actively made a case for a sale transaction, for the goat, at the Wajir Police Officers' Mess; the appellant received the price-money which he had negotiated; the appellant was well known to some of the witnesses, and he was unmistakably identified as the man who, with another person, had offered the goat for sale. To this overwhelming case, the appellant's defence was neat *evasion*; he claimed he had obtained the goat from persons he was not ready to identify; he was contented with the bald claim that he was not the thief; he focused his defence on irrelevant situations that avoided the issue of the goat-sale transaction. Such a strategy of defence, to my mind, would cast no doubts at all on the overwhelming cogency of the prosecution case. Besides, in the *total absence of any explanation* at all as to how he came to possess the goat, the alternative charge of handling suspected stolen property is *inapplicable*; and the conclusion is to be drawn that the appellant *was* the thief.

I hereby dismiss the appeal; uphold conviction; and affirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 2nd day of February, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Huka

For the Respondent: Mr. Makura

Appellant in person