



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 9 OF 2014

MAHAT HASSAN SAAL APPELLANT

V E R S U S

REPUBLIC PROSECUTOR

(From original conviction and sentence of Criminal Case No. 223 of 2013 – Wajir – L. Kassan – SPM)

JUDGMENT

The appellant was charged in the subordinate court at Wajir with stealing of stock contrary to Section 278 of the Penal Code. The particulars of the offence were that on 16th October 2011 at Hadado village Wajir West District within Wajir County stole 7 camels valued at Kshs 420,000/- the property of Ugas Adan Ahmed. He was also charged with an alternative count of handling stolen property contrary to section 322(2) of the Penal Code. The particulars of the offence were that on 30th May 2012 at Modogashe area Modogashe District within Garissa County otherwise than in the cause of stealing dishonestly received/handled 3 camels knowing or having reasons to believe them having been dishonestly obtained.

He denied both charges. After a full trial he was convicted of stealing of stock and sentenced to serve 5 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has now come to this court on appeal. He filed initial grounds of appeal but later filed amended grounds of appeal as well as written submissions. His grounds of appeal are as follows:-

1. The learned trial magistrate erred in both law and fact in convicting him on evidence from the prosecution which did not prove the offence.
2. The learned trial magistrate erred in law and fact in convicting him on inconclusive prosecution evidence.
3. His defence was not given adequate consideration as required by the law.
4. The language used falsified his evidence.
5. That as he denied the offence he was entitled to an acquittal.

As I have said above, the appellant filed written submissions which I have perused and considered. In addition, the appellant orally submitted in court that he was injured by the police and not taken for treatment. He said that he wanted to be given a chance to go and record a statement and to be taken to hospital.

Learned Prosecuting Counsel Mr. Okemwa did not oppose the appeal. Counsel submitted that there were many inconsistencies in the evidence and as such the State was not opposing the appeal, but left it to the

court to make its own decision.

At the trial the prosecution called 5 witnesses. PW1 was the owner of the camels. He was named Ugas Adan Ahmed. He testified that his camels had disappeared or got lost in 2011. Some of the camels had also died. Later the said camels were seen at Habasweni. He went to Modogashe, met a chief called Issa who promised to take him to see the camels at 200.pm. He stated that the appellant and his family were suspects but that they refused to take them to where the camels were.

They went to the OCS at Modogashe who refused to take action and had to report the matter to the DO. He was then given Administration Police to assist. When he met the appellant's two brothers, they threatened to kill him with a panga and a club. He said that he saw his 3 camels but was told that the camels had been taken to Somalia. Elders were then involved who tried to settle the matter, but he was later told that 5 camels had been bought. The appellant was arrested he was later charged.

In cross examination he said that he could not call all the witnesses who saw the camels. He maintained that he saw the camels in the appellant's homestead but was chased away. He stated that the appellant sold the camels to a person whom they could not trace. He said that the appellant was initially arrested and then released before being arrested again.

PW2 was Issack Salan Fatule an Assistant Chief. It was his evidence that in June 2012 he was called by the chief of Hadado who said that camels had been stolen from his location and driven to the location of Issack Fatule. He was also told that the appellant, who was his relative had stolen the camels. When he talked with the appellant's father he confirmed that five camels had been bought and that 3 camels were still in the location. Though they asked the OCS to investigate the matter, he refused and did not know whether the OCS was bribed.

They traced the appellant and told him to show him the camels and he refused and said that he would kill the complainant if they went to the boma. They then arrested the father of the appellant and there was a clan fight when they put him into the bus. The police were over whelmed but the police eventually arrested the appellant.

In cross examination he stated that the appellant took advantage of clan differences to take away the camels. He stated that the appellant and his brothers were thieves. He stated that he did not have any exhibits. He said that the police were almost killed by the public when the father of the appellant was arrested.

PW3 was Hillow Abdi Adan a Chief of Hadado Location. He stated that on 12th May 2011 at 10.00 am, Adan Ibrahim sent him a report that a man had sold him stolen camels. He told him to go and report the incident at Hadado Police Station. He was told by the chief of Lagbogol that a man had stolen camels and had been arrested and the matter was settled through Maslaha. He informed the Chief of Modogashe about the incident, and after a while Chief Issa told him that he had arrested a suspect with 3 camels. However when they went out, they were unable to come with the camels but were able to come with the appellant.

In cross examination, he stated that he saw the appellant after the arrest. He said that he did not see any exhibit. He said that the person who bought a camel from the appellant was forced to release it but to date he had not released the camel.

PW4 was Ibrahim Aden Hussein a businessman at Hadado. He stated that on 12th May 2012 while at Hadado market he saw a man with a camel and brokers came to him whereby he bought the camel. The seller of the camel wrote his name as Mahat Hassan Saal on a piece of paper as he did not have an ID card but swore that he was a Muslim and would not lie. He stated that he bought the female camel for Kshs 44,000/-. After 2 days, a man came and claimed that the camel was his. They went to the police and he let go the camel and had not been paid to date. He said that elders sat down and tried to get him refunded his money but he had not been paid to date.

In cross examination he maintained that the appellant wrote his name on a paper which he left at home. He stated that the appellant sold him the camel during the daytime and that there were eye witnesses to the sale.

PW5 was CI Dismus Eregai of Hadado Police Station. It was his evidence that on 10th May 2012, a report was made at Logbogol Administration Police Camp that a man had lost 7 camels. He talked to fellow chiefs and the camels were traced in Modogashe. He was later told that the camels were found and the complainant identified them. However the family of the suspect prevented the complainant from getting his camels and the OCS Modogashe did not cooperate. He sent three police men and the complainant to see the OCS Modogashe and also wrote a signal. The appellant was also arrested and brought to him. According to him the owner of the camel was able to identify it. However he was forced to release the camel. He stated that the elders agreed that the complainant be paid for five camels.

In cross examination he stated that no exhibit was recovered. The witness also said that he relied on what he was told by witnesses. That was the end of the prosecution case.

When put on his defence, the appellant gave sworn testimony. He stated that the chief who was a relative called Issa Salat, had his Kshs 270,000/- which he gave him to take his daughter Aday Mahat to University in Uganda. That he left the chief with Kshs 270,000/- and also sold a plot and brought the chief an additional Kshs 70,000/-. When he however asked for the Kshs 270,000/= the chief told him that he had used the money and would instead give him relief food, which he declined. He called elders and demanded for his money and the police then came and arrested him and he was taken to Wajir where he heard that he had stolen camels which initially were 10, later they were said to be 3 and later still they were said to be 7 camels. He stated that no exhibit was found on him. He said also that the complainant had lost his camels 9 months before. He said the area chief was using his powers to harass him.

In cross examination he maintained that Issa Salat was his cousin. He said he did not know Ulgas Adan Mohammed. He stated that he never met Ibrahim Adan nor sold him a camel.

This being a first appeal, I have to remind myself that I am required to re evaluate the evidence on record and come to my own conclusions and inferences. I have to take in mind that I did not see witness testify to determine their demeanor and give due allowance to that fact. See the case of ***Okeno -vs- Republic (1972) EA 32.***

I have re evaluated the evidence on record. The appellant was charged with one main count and one alternative count. In the judgment, the learned magistrate seemed to have assumed that the appellant was charged with only the main count whose date was in October 2011, while the alternative count of handling was for a date in May 2012, a difference of about 8 or so months.

The burden is always on the prosecution to prove a case against an accused person beyond reasonable doubt. The accused has no burden to prove his innocence. He can merely raise doubts in the prosecution case. See the case of ***Woolington -vs- Director of Public Prosecution (1932) AC 462.***

In our present case the Learned Prosecuting Counsel Mr. Okemwa has conceded to the appeal and said that there are various inconsistencies in the prosecution evidence.

I have already given a summary of the prosecution evidence in this judgment. The theft of the camels occurred in October 2011. All the information about the report on the theft and the sale of the camels is for May or June 2012, about 9 months later. There is no indication at all that a report was made to the authorities in 2011 October when the camels were stolen. The number of the camels in question also changes from witness to witness.

Indeed the appellant in his sworn testimony stated that the number of the camels started from 10, they went down to 3 then they went up to 7. The alleged camels which was sold is a single female camel, and was nowhere to be seen at time of trial.

With all these contradictions, it cannot be said that the prosecution established the number of camels stolen. And since there was no report made to the police, it is also guess work to say that any camels had been stolen. Those camels could as well have been lost rather than stolen.

In addition to the above, none of the camels was either specifically described nor exhibited in court even the camel that was alleged to have been sold to a person who testified in evidence. These gaps in the prosecution case, meant that the prosecution did not prove that camels were stolen or lost.

The evidence of the prosecution, connecting or associating the appellant with the theft of the camels was hearsay evidence. There was no direct evidence that the appellant had stolen camels. It appears that the appellant and his brothers or family were tagged or suspected of being thieves, and thus the appellant was implicated. Otherwise, nobody testified that he saw the appellant in control of any camel that was identified as belonging to the complainant. The person who said that the appellant sold him a camel at the market gave a sketchy story that was not believable. He said that there were eye witnesses to the sale, but did not attempt to identify or describe any of those eye witnesses. In addition the camel itself was nowhere to be seen nor was it described in a way that could be said to prove that it was one of the camels which belonged to the complainant.

In my view, the conviction of the appellant herein was based on suspicion which is not adequate in a criminal case to found a conviction. In any case the appellant himself gave sworn testimony in which he gave the reasons why his cousin Issa, who was a chief was unfairly implicating him. With the facts and circumstances of this case, the defence of the appellant is believable.

The learned Prosecuting Counsel has conceded to this appeal and in my view correctly so. On my part, I find that the prosecution did not prove its case against the appellant beyond any reasonable doubt. As such both the conviction and the sentence cannot be sustained.

To conclude, I find that the appeal herein has merits. I allow the appeal, quash the convictions and set aside the sentence. I order that the appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered Garissa this 4th day of February 2016.

GEORGE DULU

JUDGE