



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CRIMINAL APPEAL NO 161 OF 1988**

**ELKATA..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(From original conviction and sentence of the Resident Magistrate's Court, MM Muya, Esq, RM in Criminal Case No 16 of 1988)

**JUDGMENT**

The appellant who was the first accused in this trial was charged with two counts of stock theft contrary to section 278 of the Penal Code. The record does not show whether he was convicted for both counts or not. One sentence of 3 years' imprisonment with hard labour together with two strokes of the cane was however passed which seems to indicate that he was convicted in respect of one count.

The appellant was employed by complainant in count I as a herdsboy. Complainant testified that he lost three bulls one in the month of February 1987, second in the month of April 1987 and the third in September, 1987.

He suspected that appellant stole the bulls and reported to police. The complainant in count II who had also engaged the appellant as a herdsboy lost three heads of cattle – one in the month of September 1987, second in the month of October 1987 and the third in the month of December 1987. In all those occasions the appellant used to say that the missing cow must have been left behind.

It seems that the first complainant's herd of 54 heads of cattle and the second complainant's herd of 47 heads of cattle were being grazed together. In addition to the evidence of two complainants, the prosecution relied on the confession made to IP Wafula (PW 2). According to IP Wafule, the appellant made the statement in Kiswahili language which IP Wafula says is understood by appellant very well. The statement is however recorded in English language and not in Kiswahili language. The practice that the statement made by accused person must be recorded in the language he speaks has been overemphasized by the court on many occasions.

The fact that the statement was not recorded in Kiswahili is compounded by the evidence of appellant in cross-examination – In trial – within – trial that he was not able to understand Swahili and that though the statement was read to him, he understood very few words as he could not comprehend anything.

The courts do not take lightly the complaint by an accused person that he did not understand the language used. In this case, it seems that the appellant did not understand Kiswahili at least very well.

The record of 8/1/88 shows that before plea was taken, he informed the learned magistrate that he does not understand Kiswahili and the court had to provide an interpreter to translate Orma language which appears to be the mother tongue of the appellant into Kiswahili. The appellant had the use of the interpreter in the course of the whole proceedings. The record bears witness to the inability of the appellant to speak in Kiswahili fluently.

In all the circumstances, one cannot say with any certainty that the statement of the appellant is true. The statement was incurably defective and should not have been admitted as evidence.

That leaves the evidence of two complainants as the only evidence to support the charge. The missing cattle were not recovered. There is only suspicion that the appellant disposed of the cattle. Nobody was caught in possession of any of the missing cattle. As each complainant did not report to police as each head of cattle was found missing, the evidence of the two complainants that the cattle were in fact missing has not been verified by any other evidence.

It is possible that in a large herd, some heads of cattle can go missing without the herdsboy realizing.

In all the circumstances, the conviction was not safe.

I allow the appeal, quash the conviction / convictions, and set aside the sentence.

Appellant to be released forthwith unless lawfully held for another offence.

Dated and Delivered at Mombasa this 6<sup>th</sup> Day of October, 1989

**E.M.GITHINJI**

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**JUDGE**