**IN THE COURT OF APPEAL FOR EAST AFRICA**

**AT NAIROBI**

**( Coram: Law, Miller & Potter JJA )**

**CRIMINAL APPEAL NO. 24 OF 1979**

**BETWEEN**

**MAY.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**Law JA** This is a second appeal by a lady who was convicted in a Resident Magistrate's court at Nairobi on four counts charging offences under the Prevention of Cruelty to Animals Act (Cap 360). She appealed unsuccessfully to the High Court (Todd J) and now brings this second appeal to this court.

The facts are not in dispute. The appellant at all material times ran a business known as "Amber May Safaris", and in connection with that business she owned some fifty horses, twelve mules and six zebroids which she kept on land owned or occupied by her at Nanyuki. She also kept four dogs there. Apparently the appellant left Kenya early in July, 1978, for a holiday in Europe, and returned later in the year. It is common ground that during her absence, these animals were neglected and suffered greatly. This was reported to the Kenya Society for the Protection and Care of Animals, who caused the animals to be inspected by their Nanyuki representative Colonel Harris and by the District Veterinary Officer for Laikipia, Dr Kimaru. As a result of what they reported, the Society obtained a custody order under Section 26 of the Act. It was found that the grazing on the appellant's land was almost non-existent. In pursuance of the custody order, all the equine animals were removed to the Nanyuki Sports Centre, where there was some grazing, except for five horses and one mule which were in such an under-nourished and generally poor condition that they had to be destroyed on the spot. Two of these animals appeared to have been slashed with pangas. Of the remaining horses, twenty were in a very poor condition due to underfeeding. The dogs were also in a deplorable condition. Two were taken to Nairobi for veterinary treatment. One, described by the veterinary surgeon Mrs Godfrey as an elderly bitch, was suffering inter-alia from a wound consistent with a panga slash, which was causing it a lot of distress. She destroyed the bitch, as it could not usefully be treated. Another veterinary surgeon examined a faecal sample from the appellant's horses and found it heavily infested with worms. None of these facts are disputed.

The offences with which the appellant was charged were as follows:

**Count 1**, doing an act which amounts to cruelty contrary to Section 3(1) of the Act, in that being the owner of twenty horses, without sufficient cause she underfed the said horses.

**Count 2**, abandoning animals contrary to Section 3(1) (e) of the Act, in that being the owner of the

animals already referred to, without reasonable cause or excuse, she abandoned the said animals in circumstances likely to cause them unnecessary suffering.

**Count 3**, failing to procure veterinary treatment, contrary to Section 3(1) (f) of the Act. This charge related to "the elderly female dog, "without reasonable cause or excuse."

**Count 4**, keeping animals in a verminous condition, contrary to Section 3(1) (f) of the Act. Charging the appellant with keeping a horse in a grossly verminous condition, without reasonable cause or excuse.

The appellant did not give evidence on oath in her defence or call any witnesses. She contented herself with making a short unsworn statement to which reference will be made later. No adverse inference can be drawn against the appellant for electing to make an unsworn statement. She was exercising a right conferred upon her by statute (Section 211(1) of the Criminal Procedure Code); see also *Wiston s/o Mbaza v Republic* [1961] EA 274. No such adverse inference was in fact drawn by either court below.

The appellant has been represented throughout by Mr Mervyn Morgan, in the Resident Magistrate's Court, in the High Court, and in this court. His case throughout has been that although somebody must have been at fault for the animals' sufferings, it was not the appellant. She had left a headman and two syces in charge of her establishment, and in a letter written by her to the Society, which was in evidence, she had said inter-alia "I asked my brother in law Mr. Derek Holmes to keep an eye on things while I was away."

This she amplified in her unsworn statement at the trial, which read as follows:

"before I went away on holiday to Austria, for the first time overseas in twenty years, of course I asked my twin sister's husband Derek Holmes to look after my animals. He answered me that he would do so, and I believed him. Apart from being an animal lover myself, these animals are my livelihood."

Mr Morgan submitted that an unsworn statement was evidence, but could cite no authority for this proposition. Our researches have revealed two persuasive authorities from English cases, in which this point was considered. In *Hale* (48 Cr App R 284), referring to an unsworn statement, Parker LCJ said:

"In the opinion of this court, it is quite unnecessary to consider what is really an academic question, whether it is called evidence or not. It is clearly not evidence in the sense of sworn evidence that can be cross-examined to; on the other hand it is evidence in the sense that the jury can give to it such weight as they think fit … and should take into consideration in deciding whether the prosecution have made out their case so that they feel sure that the prisoner is guilty."

In *Coughlan's* case (64 Cr App R 11), the headnote reads:

Held:

"When a person charged with an offence chooses to make an unsworn statement from the dock, although such statement might throw light on the sworn evidence and thus influence the jury's decision, its potential effect was persuasive rather than evidential, for such a person was not a witness, and thus his statement could not prove facts that were not otherwise proved by evidence."

With reference to Section 1(h) of the Criminal Evidence Act, 1898, which preserved the right of an accused person in England to make a statement without being sworn, Shaw LJ said:

"The section makes a clear distinction between the position where an accused person elects to assume the role of a witness in his defence and the situation where he makes an unsworn statement. In the latter case, he is not a witness, and he does not give evidence … what is said in such a statement is not to be altogether brushed aside; but its potential value is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence before the jury, but it may make the jury see the proved facts and the inferences from them in a different light. In as much as it may thus influence the jury's decision, they

should be invited to consider the content of the statement in relation to the whole of the evidence. It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case. It is right, however, that the jury should be told that a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence."

From all this, we are satisfied that an unsworn statement is not evidence as that expression is generally understood. It has no probative value, but should be taken into consideration in relation to the whole of the evidence.

Mr Morgan then submitted that the learned judge on first appeal erred in holding that the words "he answered me that he would do so" in the appellant's unsworn statement represented hearsay and should be excluded from consideration. We do not find it necessary to decide whether or not these words were hearsay, because an unsworn statement is not strictly speaking evidence, and the rules of evidence cannot strictly be applied to an unsworn statement. We note that no cross-examination was directed to two prosecution witnesses who had spoken to Mr Holmes and might have been able to say whether or not he had agreed to look after the animals. The appellant's contention that he had so was raised at the last possible moment, in an unsworn statement which had no probative value and could not be tested by cross-examination. Even if that contention is taken into consideration, it is not supported by the evidence recorded in the case, and its effect in our view was so lacking in weight and cogency as to be of little if any value so far as raising any doubt in favour of the appellant is concerned. Mr Morgan's next submission was that it was the duty of the prosecution to have called Mr Holmes as a witness, as his name had been mentioned to the Society in the letter to which we referred earlier in this judgment, as having been asked by the appellant "to keep an eye on things" while she was away. We find this submission most surprising; Whether Mr Holmes had been asked to keep an eye on things, or had agreed to do so, was no part of the prosecution case. It is not the prosecution's duty to investigate possible defences, except in the case of a disclosed alibi. We see no merit in this submission. Mr Morgan's final submission was that sufficient facts arose from the evidence as a whole to rebut the allegations that the offences charged had been committed "without sufficient cause" or "without reasonable cause or excuse." In Mr Morgan's submission, the appellant had done all that was reasonable and sufficient to ensure the welfare of her animals. She had left her three employees in charge of them, and she had asked her neighbour Mr Holmes to keep an eye on them. Both courts below found that these steps were not sufficient or reasonable, and we entirely agree with them. As regards the employees, the facts speak for themselves. They were obviously completely untrustworthy and irresponsible persons. They allowed the animals to starve, to suffer wounds, to become vermin and pest ridden, and did nothing about it. We do not know what instructions, if any, they were given as to what action to take if there was insufficient fodder or grazing for the animals or if veterinary attention was required. As to Mr Holmes, the only admissible evidence on record is that he was asked to keep an eye on things. In our view, the prosecution fully discharged the onus of proving that the undisputed sufferings of the appellant's animals arose without sufficient cause, or without reasonable cause or excuse, on the part of the appellant, which cause or excuse would be necessary to exonerate her from her primary responsibility as owner.

It may be that the appellant has been let down by her employees and friends, from whom she may have expected better things, but no sufficient or reasonable cause or excuse for the commission of the offences charged against her emerged from the evidence on record, and we are of the opinion that she was rightly convicted on all counts.

We order that this appeal be dismissed.

As **Miller** and **Potter JJA** agree, it is so ordered.

**Dated and Delivered in Nairobi this 17th day of December 1979.**

**E.J.E.LAW**

**.....**

**JUDGE OF APPEAL**

**C.H.E.MILLER**

**.....**

**JUDGE OF APPEAL**

**K.D.POTTER**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the

original.

**DEPUTY REGISTRAR**