



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: CHUNGA, C.J. GICHERU & SHAH, J.J.A.)**

**CRIMINAL APPEAL NO. 40 OF 1997**

**BETWEEN**

**ANTIPHACE HERMAN .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**JUDGMENT OF THE COURT**

The appellant, Antiphace Herman, was convicted on the 16th day of November 1994, of the offence of stock theft contrary to section 278 of the Penal Code and sentenced to a term of eight years imprisonment and was ordered to receive 10 strokes of the cane. His appeal to the superior court was dismissed and the sentence was confirmed on 4th April, 1996. He has now appealed to this Court against both the conviction and sentence.

On 9th November, 1994 the complainant, one Bomani Kiriando locked up his cattle (cows) for the night and retired to go to sleep. He woke up at 5.00 a.m. on 10th November, 1994 and found his cattle missing. The gate to the cattle enclosure (Boma) was open. The complainant in company with others followed the hoof prints of the cattle and found that the cattle had appeared to have moved into Tanzania. Having obtained the permission to enter Tanzania (Rombo area near lake Challa) he found his twelve head of cattle and one person (the appellant) already arrested by the civilians.

None of the witnesses who gave evidence in the Magistrate's court identified the appellant and his co-accused (one Dominic Kiango Mutheu) as the actual thieves. The arrest of the two came to be as a result of the appellant and his co-accused running away when they saw a group of people coming towards them. These people chased the two and arrested them with the help of Tanzanian civilian group known as "Sungu Sungu" traditional guards.

It was one Emmanuel Longoto (P.W.2) who stated that the one of the accused persons (it is not clear whether it was the appellant or his co-accused) offered to free the cattle if he was paid Tanzanian shillings 80,000/=. As pointed out the accused persons were arrested after a chase. In such state of affairs the appellant's defence in the Magistrate's court was that he was at the market in question where he saw some cattle being offered for sale. He saw some people carrying weapons.

He ran away along with others. He was running towards his house. His co-accused followed him and he was arrested along with him and taken to Kenya. He said no one believed his story. The appellant said he

was in the business of selling old clothes. In short his defence was that he had nothing to do with the stock theft and that he was arrested whilst running away along with others from a group of armed persons.

The learned Magistrate in evaluating the defence of the appellant said:

"I do not believe that the accused No.II (the appellant) was arrested for no reason or be (sic) is alleged to have (sic) involved in theft because P.W.III Emmanuel has a grudge against him. The charge against the accused has been proved that he and the accused No.1 did go to the complainant's boma and stole 12 head of cattle from his boma and took them to Tanzania."

What the learned magistrate did not consider was whether the appellant's defence was probably true or whether it raised some doubt as regards him having been actually involved in the theft of the cattle. It is possible that the appellant's version could well be true, more so if looked at in conjunction with the evidence of the co-accused. The appellant had taken the same stand, as regards his arrest, immediately thereafter. He said that no one believed what he told them. He said "that I was not with the accused No.1". His witness (the co-accused) gave evidence to the effect that he had nothing to do with the appellant; that they were arrested in different places at different times; that the appellant did not talk to him; that he did not even talk to the appellant.

It was held in the Tanzanian case of R.V. Wilbald vs. Tibanyendela [1948] E.A.C.A. 111 that the fact that an accused person has made a statement denying his guilt very soon after he has been charged with the offence may often be very relevant as showing the consistency of his conduct at that early date with the version of facts as given by him at his trial and may in some cases be the last ounce which turns the scales in his favour. On first appeal to the superior court, that court failed to evaluate the appellant's version of events although the superior court set down, somewhat sketchily, the appellant's version of events.

The superior court also failed to consider the evidence of the co-accused. That is where in our view the superior court erred. It is incumbent upon the first appellate court to properly evaluate the whole defence of the appellant as brought out in the lower court. Failure to do so, when it is possible that the appellant's version may well be true, is fatal to the conviction.

In those circumstances we allow the appeal, quash the conviction and set aside the sentence as meted out to the appellant and order the appellant's immediate release unless otherwise lawfully held.

**Dated and delivered at Mombasa this 19th day of January, 2000.**

**B.** **CHUNGA**  
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**CHIEF JUSTICE**

**J.** **E.** **GICHERU**  
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**JUDGE OF APPEAL**

**A.** **B.** **SHAH**  
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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR.**