

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT**

CASE NO: CA 107/2013

In the matter between:

**GODWIN KAUZUU
AUGUST KAMBOBO
vs**

**1st APPELLANT
2nd APPELLANT**

THE STATE

RESPONDENT

Neutral citation: *Kauzuu v State* (CA 107/2013) [2014] NAHCMD 68 (28 February 2014)

Coram: HOFF J and SIBOLEKA J

Heard on: 31 January 2014

Delivered on: 28 February 2014

Flynote: Criminal Law: Where the prosecution has proved its case against a suspect beyond reasonable doubt on the basis of clear and credible evidence the Appeal Court would find no reason to set aside such a conviction.

Summary: The complainant missed two goats, which were later said to have been found dead by the first appellant who claimed one goat was his and the other belonged to a family member, Meando. However, the first appellant nonetheless proceeded and gave the whole carcass of the second goat to the second appellant who helped in skinning and taking the meat home.

Held: No police officer in his rightful mind can refuse to be shown valuable evidence related to the very matter he is investigating, for example the skin and head of the alleged stolen stock.

Held: The prosecution has proved its case beyond reasonable doubt.

Held: The appeal is dismissed.

ORDER

The appeal is dismissed.

JUDGMENT

SIBOLEKA J (HOFF J concurring):

[1] This is an appeal against conviction and sentence.

[2] The appellants appeared in the Magistrate's Court, Omaruru for theft of two goats valued at N\$900. They pleaded not guilty and after trial they were convicted and sentenced to three (3) years' imprisonment for the first appellant and two (2) years' for the second appellant.

[3] At the hearing of the appeal Mr Nduna appeared for the respondent, and Ms Campbell for the appellants. The court appreciates both counsel's valuable arguments in this regard.

[4] The grounds as written by the appellants themselves and amplified by their counsel are as follows:

“2.6.1 The Magistrate erred in not taking into account that this was a first conviction for both accused persons; and

2.6.2 The Magistrate erred in not attaching enough weight to the personal circumstances (i.e. that they were the breadwinners and had various minor children to support).

2.7 In a nutshell, the appellants appeal against their conviction and sentence.”

[5] I will now look at the evidence of the prosecution.

Engelhardine Nangolo, the complainant testified that on 24 August 2010 her goats totaling nine went for grazing. When they came back two nanny goats, one pregnant were missing. They both were white and brown colour around the neck, and had ear tags as well. She received the full carcass of one goat and half of the other. She did not receive the skin and head but as she was the only person who reported missing big goats to the police she took it they were hers. The two goats were valued at N\$900. During cross-examination the complainant stated that her goats had a mark on one ear and ear tags on the other.

[6] Kaveto Dausab testified he resides at Ombara Reserve close to Omatjete in the Omaruru district. On 24 August 2010 while playing soccer at Ombara he was alerted about people who were slaughtering goats. He and a friend went there and found accused 1 and 2 removing the skin from the carcasses. Accused 1 told this witness he had seen for himself that the animals were not his. The two goats had white skins and brown heads which the first appellant confirmed during cross-examination but added that the two animals were not of the same color. This witness did not identify the owner of the animals. The following day he and the small boy Paulus escorted the police to the scene, the two appellants were in

their company as well. One full carcass and half were recovered. The witness testified that although he knows that accused 1 farms with goats and cattle, he believes that if the goats were his he would not have slaughtered them in the veld.

[7] In cross-examination he said at the scene accused 1 said to Paulus "... you have seen that the goat is not yours?" He reaffirmed what he said in his evidence in chief, that he did not agree the slaughtered goats belonged to accused 1. Although the witness testified that he saw the skin and head of the goats, in cross-examination he denied he saw them and conceded that as a result thereof the goats might have belonged to accused 1.

In re-examination he testified that the only reason why he says the animals did not belong to accused 1 is because they were slaughtered in the veld.

[8] Sergeant Alexander Ochurub testified that he went with Sgt. Kaisuma to attend to a stock theft complaint at Ombora. They rounded up the appellants and according to this officer, they were taken to the scene. The appellants told the officers that after they slaughtered the goats, they threw the skins in the pit. The pit was shown to them, and there was nothing they could do to retrieve the skins because the pit was very deep. They realized that if they tried to dig one would easily fall in. At some place in the riverbed the appellants showed the officers one full and a half carcass of goats. The officers located the complainant and asked her whether she was the one that lost two goats, which she confirmed, and the carcasses were handed to her in the presence of the appellants. This officer testified that the appellants were linked to the theft of the goats by the witness Kaveto Dausab who found them slaughtering the goats in the veld.

During cross-examination the officer denied the appellants allegations that they refused to be taken to the scene to see the skins of the goats.

In reply to a question during re-examination how apart from what the appellants informed him on what grounds or reasons did he link the carcasses to the two

stolen goats, the officer said the appellants were found in the veld busy slaughtering the goats.

[9] Godwin Kauzuu, the appellant, testified that he is a livestock herder, residing at Ombora. He takes care of cattle and goats of his parents (family); as well as those of Adam Muhea (his nephew) and Winfried Maendo. They share one kraal as a family. In 2010 he lost all goats, one belongs to him and the rest to Winfried Maendo. Only some of them returned that day. The next morning more or less fifteen goats returned and more than twenty were still missing. This appellant had eight nanny goats. He tracked the footprints of the goats that returned home and \pm five kilometers from his residence he came across two carcasses of goats. One had a bite or mark on its forelegs, while the other had saliva on the neck. One had a red color in the head, the other had redish, brownish color in the head. One belonged to him and the other belonged to his nephew Maendo, but he never called the latter to come and confirm this in court.

[10] The family uses earmark tags and the same were on the two goats found dead. However, this aspect was not put to Kaveto Dausab and the complainant to enable them to react to it. The appellant testified that he continued tracking the goats till he got all of them and brought them home. He went to look for donkeys in the riverbed in order to harness them to the donkey cart, loaded the meat thereon, and took it home. He went to call the second appellant to help him skin the goats. They each took a goat. This appellant did not explain why he gave the other carcass to the second appellant because his evidence is that one of the dead goats belonged to him and the other one to Maendo. I would have understood and accepted the logic if he shared his own carcass with the second appellant, but to give away another family member's carcass just like that without explaining whether he would compensate his family member or he called Maendo and was given a go ahead. This state of affairs poses serious doubt on the evidence of this appellant as regards the ownership of the two goats.

[11] If it could have happened that the police officers and Kaveto Dausab in fact saw the skin and head, but left these parts at the scene and in court they delibe-

rately avoided to talk about it, the appellant would easily have reminded them during cross-examination which he didn't.

[12] According to the first appellant after they had shared the two goats they left the skin and head on the scene to be collected at a later stage. They separated and were later arrested. The appellants took the police officers to the tree where the meat was hanged. From there, the officers took the appellants to the neighboring farm from where the two goats were allegedly stolen. According to this appellant, he offered to show the police officers the skin and the head but was told they will attend to that the next day which they never did. The appellant further testified that the officers later refused to be shown the skin and the head. This aspect was however never put to the officers during cross-examination to afford them an opportunity to react to it. The skin and head of the alleged stolen animals is valuable evidence. In my view no police officer would be so naïve or neglect his duty to such a degree that he refuses to be shown what goes to the core of what he is investigating. It is further strange that if indeed the skin and head were left at the scene for collection the next day, it is obvious that the police officers would have found the parts there when the appellants showed them the scene. This makes the evidence of police officers reasonable when they testified that the appellants told them they threw the skin and head in a pit which was so deep that it could not be retrieved.

[13] Kaveto Dausab the witness who found the two appellants slaughtering and removing the skin of the two carcass testified that was the only time he saw the skins and heads of the goats. Although Dausab was in the company of the police the time the scene was visited, he did not testify having seen those parts again. During cross-examination the appellant did not dispute Kaveto Dausab's evidence that when he found them at the scene busy slaughtering, the skin was whitish with brownish heads, a description which accords with the one given by the complainant.

[14] August Kambobo testified that on the day of the incident the first appellant

found him in the riverbed waiting for donkies. He asked him to help skin two goats which he did. While they were busy skinning a person unknown to him (he is referring to Kaveto Dausab) was observing them. According to this witness they put the skin and head on top of a bush for collection the next day. They cooked and ate some meat and took the carcass to the first appellant's place. In cross-examination he said it appeared to him that the goats were bitten by wild animals.

[15] According to the Magistrate although the complainant did not identify her slaughtered goats due to the absence of the skin and head, Kaveto Dausab, the eye witness who found the two appellants removing the skin from the carcass gave the description which accords with the complainant's evidence.

[16] In their evaluation of evidence both the prosecutor and the magistrate were satisfied that the two appellants stole the two goats, and were accordingly convicted them.

[17] In terms of the provisions of section 11(2) of Act 12 of 1990 any person charged with theft of stock belonging to a particular person may be found guilty *inter alia* of theft of stock notwithstanding the fact that the prosecution has failed to prove that such stock actually did belong to such particular person.

[18] In the present instance even if it can be argued that the goats slaughtered by the appellants were not proved beyond reasonable doubt to be the goats of the complainant, it should be apparent, in view of the circumstances of this case and in particular the conduct of the appellants, that the only reasonable inference may be drawn is that they stole the two goats and consequently cannot escape a conviction of theft of stock.

[19] From the above I am of the view that the appeal cannot be allowed to succeed.

[20] In the result the appeal is dismissed.

A M SIBOLEKA
Judge

E P B HOFF
Judge

APPEARANCES

APPELLANTS:

Ms Campbell
Amicus Curiae, Namlex Chambers

RESPONDENT:

Mr S Nduna
Office of the Prosecutor-General, Windhoek