

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: Nyalali, C.J., Makame, J.A. and Kisanga, J.A.)

CRIMINAL APPEAL NO. 2 OF 1986

B E T W E E N

PAULO s/o MALYANYA APPELLANT

A N D

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

(Appeal from the decision of the High Court
of Tanzania at Mwanza) (Mwalusanya, J.)
in

Criminal Appeal No. 252 of 1982

JUDGMENT OF THE COURT

NYALALI, C.J.:

The appellant was charged in the District Court of Bunda District at Bunda with the offence of cattle theft - contrary to sections 268 and 265 of the Penal Code, and was acquitted. The Director of Public Prosecutions was aggrieved by the acquittal and he w appealed to the High Court at Mwanza. The High Court, Mwalusanya, J., allowed the appeal, convicted the appellant and sentenced him to five years' imprisonment under the Minimum Sentences Act, 1972. The appellant was also ordered under the same Act to compensate the complainant in respect of his 28 head of cattle. The appellant was aggrieved by the decision of the High Court and hence this appeal to this court.

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From the proceedings both in the two courts below and in this Court, the following primary and secondary facts appear not to be in dispute between the prosecution and the defence: Some time in the morning of 3rd September, 1981, the appellant, who is a resident of Buzimbwe Village, was travelling when he approached the village of Kinyambwiga where he was confronted and roughed up by ^{some} Kinyambwiga Villagers. Thereafter, he was taken to the Village Branch of CCM, where he met P.W.1, namely, Edward Msangya, the CCM Branch Secretary. Thence he was taken from Kinyambwiga Village to the Police Station. Sometime later P.W.3, namely, Jumanne Maleju, who is ~~the~~ a fellow villager of the appellant, arrived with other people in the village of Kinyambwiga. He and his companions were searching for cattle stolen from P.W.3 and they had a document which bore the description of the cattle they were searching for. The cattle described in the document seemed to tally with some 12 head of cattle which had been found in Kinyambwiga village and were taken to the Police Station prior to the arrival of the search party. P.W.3 and his companions went to the particular Police Station where they recovered the twelve head of cattle.

From the ^{same} proceedings, it appears that the following primary and secondary matters are in dispute between the parties. It is the prosecution case that the twelve head of cattle which were found in Kinyambwiga Village were part of the sixty-three head of cattle which had been stolen in Buzingwa Village on the 30th August, 1981.

It is part of the prosecution case that the twelve head of cattle were being driven by the appellant when he was confronted and roughed up by the villagers as he approached Kinyambuiga Village.

On the other hand, it is the appellant's defence that he was not found in possession of any cattle, but was a victim of robbery by three youths, including F.W.2, namely, Taabu Luhekula. In essence, it is the defence case that the appellant did not steal any cattle.

Since this Court is not dealing with concurrent findings of fact by the two courts below, we are entitled to review the evidence and come to our own conclusion. The first point for consideration and decision in this case is whether the appellant was found in possession of the twelve head of cattle. The trial court, Kagali, D.M., appears to have rejected the evidence adduced by the prosecution on the point, apparently on the basis that the number of cattle stated in the charge sheet, that is forty head of cattle, did not tally with the number of head of cattle mentioned in the evidence of F.W.3, that is sixty-three.

The learned High Court judge, in his judgment, criticizes this approach of the learned trial magistrate. We agree with the criticisms of the learned appellate judge, since it was quite wrong to reject the evidence ~~adduced~~ ^{on the basis of} by the prosecution / a discrepancy between such evidence and the particulars contained in the charge sheet. It was open

for the learned trial magistrate to direct the amendment of the charge under the provisions of section 209 of the Criminal Procedure Code, which applied at the time of the trial.

The learned appellate judge, on the other hand, accepted the evidence of P.W.1, P.W.2 and P.W.4 and found as a fact that the appellant was found in possession of the twelve head of cattle. In rejecting the story given by the appellant, the learned appellate judge stated:-

"... , one cannot fail to see that the respondent's account about the robbery incident was nothing but a ghost story. P.W.1 and P.W.4 were not (a) party to the alleged robbery, then how come they testified against the respondent? They had nothing against respondent to trump up the serious charge of cattle theft. In any case by then they did not know that respondent had stolen cattle as they were merely investigating. Is it not preposterous to suggest that P.W.1 and P.W.2 and P.W.4 trumped up the charges and in doing so they had to steal or part with their 12 head of cattle merely to hook the respondent(?). Nobody can believe that fantastic story. While I agree that respondent was assaulted and harmed while being arrested because he tried to flee yet I don't agree that the assault was in furtherance of a robbery."

We agree with the learned appellate judge. Moreover, if the appellant had really been a victim of a robbery, he would have mentioned that fact to P.W.1. The record shows that he did not do so.

The next point for consideration and decision in this case is whether the twelve head of cattle were among the head of cattle which had been stolen from P.W.3. This, obviously, is a point of identification. The learned appellate judge considered this point and stated:-

"There could be a point that the evidence of identification of stolen cattle by the complainant was rather perfunctory. However, I think the point could have merit if there was a competing claim to the said cattle. In the circumstances of this case the identification of the stolen cattle by general features sufficed so long as the identification was not challenged by anybody. ".

In his memorandum of appeal, the appellant complains about this finding of the learned appellate judge. He states, in effect, that the absence of disputed ownership concerning the twelve head of cattle did not lessen the burden of the prosecution to prove the identity of the stolen cattle beyond doubt. We are, of course, aware of the approach adopted by the courts in this country which tends to require stringent proof of the identity of stolen cattle. Perhaps, in an appropriate case this Court may have to review that stringent approach to underscore the point that there is only one standard of proof in criminal cases, and that is proof beyond reasonable doubt, regardless of whether the stolen property is cattle or otherwise.

We are satisfied in the present case that there is evidence which establishes the identity of the stolen cattle beyond reasonable doubt. The evidence was to the effect that the search party carried a document which described the cattle in general terms, and the cattle which the appellant was found in possession answered that description to the satisfaction of the village CCM Branch Secretary and the other villagers of Kinyambwiga village. This fact, taken together with the absence of dispute concerning the ownership of the cattle, establishes sufficiently

in our /6

view
in our / that the twelve head of cattle found in the
possession of the appellant were among those stolen
from P.W.3, and we so find.

The next point for consideration and decision
is whether the appellant was the thief of P.W.3's cattle.
The learned appellate judge considered this point and stated:-

"I note that the respondent was found with
the stolen cattle only four days after the
same were stolen. In such short period
the cattle could not have exchanged hands.
Therefore this was an appropriate case in
which to invoke the doctrine of recent possession
whereby the respondent should have been convicted
as charged."

We agree with the finding of the learned appellate judge.
It follows, therefore, that this appeal cannot succeed
and we hereby dismiss it in its entirety.

DATED at MWANZA this 3rd day of December, 1986.

CHIEF JUSTICE

JUSTICE OF APPEAL

JUSTICE OF APPEAL