

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KIMARO, J.A., MANDIA, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 455 OF 2007

KIJA NESTORY @ JINYAMU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Tabora)

(Kihio, J.)

Dated 21st September, 2007

in

Criminal Case Session No. 42 of 2001

JUDGMENT OF THE COURT

15th & 19th April, 2013

KIMARO, J.A.

The 20th of August, 1999 was not a fortunate day for Masigana Nundu, Nsamaka Jilala and Ngwalu Chela. The first two were husband and wife respectively while the latter was their daughter in law. On that day their lives were miserably terminated in a violent way. The prosecution evidence shows that on the fateful day, the trio were asleep in their house, when they were invaded and ruthlessly cut with a lethal weapon, namely a "panga". According to the doctor who conducted the autopsy on the

bodies of the trio, Dr. Abbas Haji Ram (PW1), the cause of death for all the three persons was brain damage and excessive bleeding. They all sustained injuries of head fracture. That is also what is reflected in the reports on the post-mortem examination which were admitted in court as exhibits P1, P2 and P3 respectively for the respective deceased persons. All three bodies had big head cut wounds. The appellant was charged with three counts of murder contrary to section 196 of the Penal Code for each respective deceased shown above.

The evidence showing how the appellant was arrested and charged came from Lucas Kampuni, (PW2) a village mate of the deceased persons, Luchoronga Makalwe, (PW3) the brother of the first deceased Eliota Muri(PW4), who investigated the case, Wilson Nkune(PW5) a Mgambo militiaman attached at Bunambiyu ward where Mwangili village in which the crime was committed is located, and Ex-B 7285 Detective Station Sergeant Reuben (PW6) who recovered herds of cattle allegedly stolen in the commission of the murder of the deceased persons.

The testimony of PW2 was that, on the fateful day, at night, an alarm was raised from the house of the first deceased. When he went there he

found the three persons dead and more than 50 herds of cattle belonging to the first deceased stolen. The witness said all the cattle were marked "14" on one of the thighs. The evidence on the identification marks of the stolen cattle is corroborated by the evidence of PW3, PW4, and PW5. PW4 told the trial court that, apart from collecting the doctor who did the post-mortem examination at the scene of crime, (PW1), in the process of his investigation he communicated with all police stations about the theft of the stolen cattle. He was later informed that the cattle were recovered at Mwanza. Upon receiving that information PW2, PW3, PW4 and PW5 went to Mwanza on 23rd August 1999 to Nyakato Police Station. The four witnesses saw 22 herds of cattle with mark "14" on their thighs. The 22 cattle were handed over to PW4, who subsequently handed them over to PW3, the brother of the deceased. PW3 informed the court that there was no other villager, apart from the first deceased who had cattle with same marks.

The appellant was arrested by PW6. His testimony was that on 23rd August, 1999 he was instructed by Inspector Athuman to make a follow up of cattle which were allegedly being sold at very low price at Igoma Market. He went there and saw the 22 herds of cattle which had marks

"14" on their right hand thighs and were in possession of the appellant and another suspect who died. The appellant and the other suspect were taken to the police station for purposes of being charged with property suspected to have been stolen. According to the witness, the explanation given by the appellant that he was sent by his parents to sell the cattle because of hunger was not satisfactory. He arrested the appellant and remanded him in custody, pending investigation. Fortunately, on 24th August, 1999 a group of persons arrived from Shinyanga and reported theft of cattle from Binambiyu Ward and the commission of murder in the process of the theft. The witness said that the cattle were identified by their mark "14" on their thighs by PW3 and PW5. PW6 corroborated the evidence of PW3 that the cattle were handed over to him.

In substance that is the evidence which led to the appellant being charged with the three counts of murder as indicated before.

The defence of the appellant before the trial court was that he was dealing with goat business and he was not involved in the commission of murder of the deceased persons, nor the theft of the cattle. He denied even being found in possession of the cattle with marks "14". However, he

admitted being arrested at Igoma market and also selling cattle in that market on that day. His explanation was that the cattle he sold belonged to his grandfather and they had mark "11"

The learned trial judge was satisfied that the prosecution had satisfactorily proved the charges against the appellant on the standard required on the principle of recent possession and the appellant failed to give a reasonable explanation of his possession of the 22 herds of cattle with marks "14". He relied on the cases of **Ally Bakari Vs R** CAT Criminal Appeal No.47 of 1991(Unreported), **Bakari Abdallah** (1949)16 E.A.C.A.84 which was quoted with approval in the case of **D.P.P.V Jachim Komba** (1984) T.L.R.216 and convicted the appellant and sentenced him to suffer death by hanging.

The appellant was aggrieved by the conviction and sentence and has filed a memorandum of appeal with four grounds. The first ground faults the learned trial judge for his finding that the cattle were properly identified. The second ground faults the learned judge for wrongly applying the doctrine of recent possession. The learned trial judge is faulted in the third ground for his finding that there was sufficient

circumstantial evidence which irresistibly led to an inference of accused guilty. Lastly the learned trial judge is faulted for his finding that the prosecution case was proved beyond reasonable doubt.

At the hearing of the appeal the appellant was represented by Mr. Mgaya Mtaki, learned advocate and Ms Juliana Moka learned State Attorney represented the respondent/Republic and supported the conviction and sentence.

Submitting for the appellant on the first ground, the learned advocate challenged the prosecution case on the inconsistency in the prosecution witnesses on the identification of the stolen cattle. His main concern was in respect of the evidence of PW2. The learned advocate said the evidence tendered by PW2, PW3 and PW4 was that they all went to Mwanza to make a follow of the cattle that was stolen. He wondered why PW2 did not say in his examination in chief that the stolen cattle had mark "14". He only mentioned about the identification marks in cross examination. The learned advocate said all the witnesses were from the same village. Then why did PW2 fail to give the identifying marks of the stolen cattle in his examination in chief. His considered opinion was that the omission creates

doubt in the prosecution evidence. The learned advocate further challenged the evidence of PW4 that he did not give identification marks of the stolen cattle. He said such shortcoming in the prosecution case shows that the appellant was not found with the stolen cattle. He prayed that this ground be allowed.

In response to this ground of appeal the learned State Attorney said the stolen cattle were sufficiently identified. She said PW2 gave the identifying marks at the scene of crime. The rest of the prosecution witnesses, said the learned State Attorney, namely PW3, PW4 and PW5 also ably identified the stolen cattle at Mwanza. She said all witnesses said the stolen cattle bore mark "14". She referred the Court to the case of **Nikandael Frederiko Vs R** Criminal Appeal No. 35 of 1995 CAT (Unreported). She also mentioned that the failure by the prosecution to tender the recovered cattle as exhibit was not fatal, nor did it water down the weight of the evidence of the prosecution case against the appellant that the cattle were found at Mwanza and handed over to PW4.

For this ground of appeal we are of a settled view that we need not waste time in determining it because the prosecution evidence is straight

forward. There is consistence in the prosecution witnesses, namely PW2, PW3 and PW5 that the cattle that were stolen had mark "14". PW2 who responded to the alarm raised during the commission of the offence gave the identification marks at the scene of crime. PW3 was the brother of the first deceased. He said the stolen cattle of his brother had mark "14" and that was an exclusive identification mark for his brother's cattle in their village. PW4 who said he went to the scene of crime said he was told that the stolen cattle had identification mark "14" on their thighs. This evidence was corroborated by PW6 who told the court that at the time he arrested the appellant at Igoma market he was selling cattle with mark "14" on their thighs at a very low price and that is why he arrested the appellant. In resolving the issue of identification of stolen property found with the appellant during the commission of the offence of murder, the Court in the case of **Nikandael Frederiko** (supra) after being satisfied that the witness gave prior description of the stolen property, before its recovery held:-

"We are fortified in this view by the fact that PW1 was not cross-examined at all on her identification of the stolen property. Nor did the

appellant or any other person claim ownership of the item.”

As already indicated, the identification marks of the recovered cattle were given before they were recovered. The appellant or any other person did not claim ownership of the recovered cattle. The evidence of the prosecution on this ground does not create any doubt at all. This ground of appeal has no merit.

On the second ground of appeal, the learned advocate for the appellant said it was wrong for the trial judge to invoke the doctrine of recent possession because the appellant reasonably accounted for the possession of the cattle he was selling. He said the appellant said the cattle which he was selling at the time of his arrest which belonged to his grandfather, had mark “11”. He referred the Court to the case of **Bakari Abdallah** (1949) 16 E.A.C.A.84.

On her side the learned State Attorney supported the conviction of the appellant based on the doctrine of recent possession and said it was properly applied. Referring to the cases of **Joseph Mkumbo and Another V R** CAT Criminal Appeal No. 94 of 2007 and **Zuberi Abdallah**

and Another V R CAT Criminal Appeal No. 131 of 2007(both unreported), the learned State Attorney said the time lapse between the commission of the offence and the recovery of the stolen property was short and so the trial court properly applied the doctrine of recent possession.

The prosecution evidence in this case was that the offence of murder was committed on 20th August, 1999. PW6 who recovered the stolen cattle with identification mark "14" on their thighs said he recovered the same from the appellant at Igoma market on 23rd August, 1999. The appellant did not claim ownership of the cattle. His defence was that the cattle he was selling had mark "11". But they are not the subject of the charge in this case.

In grounding the conviction of the appellant on the doctrine of recent possession, the learned trial judge relied on the case of **Ally Bakari V R** (supra) where the Court held that:-

"If upon a charge of murder it is proved that the deceased person was murdered in a house and that the murderer stole goods from the house, and that the accused was a few days afterwards

found in possession of the stolen goods, that raises a presumption that the accused was the murderer and unless he can give a reasonable account of the manner in which he became possessed of the goods, he would be convicted of the offence.”

The murder of the three deceased persons occurred on 20th August, 1999. Three days later, on 23rd August, 1999 the appellant was found with the cattle which were stolen from the scene of crime. The cattle were satisfactorily identified to be the property of the first deceased, Masigana Nundu. The appellant did not claim ownership of the cattle. Nor did anybody else do so. The appellant failed to explain how he came to be in possession of the said cattle with mark “14”. In this respect we are satisfied that the appellant was properly convicted, basing on the doctrine of recent possession and we cannot fault the learned trial judge on his finding.

In the case of **D.P.P. V Joachim Komba** (supra), the Court held that:-

“Cases often arise which possession by an accused person of property proved to have been stolen has been held not only to support a presumption of burglary or breaking and entering but of murder as well, and if all circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal.

The circumstances of this case fall squarely within the ambit of the doctrine of recent possession. The brutal death of the deceased persons occurred on 20th August, 1999. More than 50 heads of cattle bearing marks “14” were stolen from the house in which the murder was committed. Since the appellant failed to account for his possession of the 22 herds of cattle, he was the killer.

Regarding ground three of the appeal where the learned trial judge is faulted for finding that the appellant’s guilty was proved on circumstantial evidence, we agree with both the learned State Attorney and the learned advocate that the prosecution case was not based on circumstantial

evidence. As already indicated, the prosecution case was proved beyond doubt on evidence of recent possession.

The appellant's appeal has no merit. It is dismissed in its entirety.

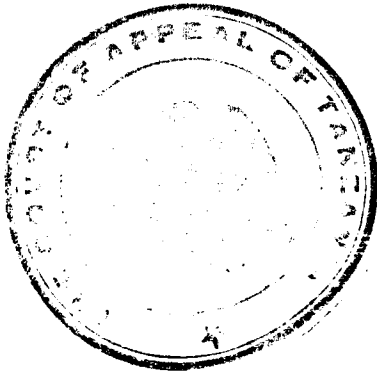
DATED at **TABORA** this 18th day of April, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL