

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: RUTAKANGWA, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 309 OF 2013

1. ALEX NYAMBEHO @FANTA1ST APPELLANT
2. MONDEKO KITASHA MANDIRA2ND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT
**(Appeal from the decision of the High Court of Tanzania
at Mwanza)**

(Mruma, J.)

**dated the 12th day of June, 2012
in
Criminal Appeal No. 10 of 2009**

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JUDGMENT OF THE COURT

26th May & 3rd June 2015
RUTAKANGWA, J.A.:

Bahati Masinta and Karoli Masinta are siblings. They are the sons of Masinta Marisa of Kyandege village in Bunda District. Masinta is a peasant who claimed to own about 650 head of cattle.

On 1st February, 2006, both Bahati and Karoli took out their father's cattle to the grazing fields. According to Bahati they took out **300** head of cattle, but Karoli put the number at **500**. This clear and unexplained contradiction notwithstanding the two were of one accord as to what befell them that afternoon when the cattle were grazing.

At around 4.00 p.m. they were invaded by a gang of eight (8) people who were armed with 'pangas', swords, spears and bows and arrows. The gangsters placed them under arrest and warned them not to raise any alarm at the pain of being killed. The order was heeded to, thus clearing the way for some of the bandits to get away with part of the herd, while four of them remained behind guarding Bahati and Karoli who were eventually released at around 6.00 p.m. After regaining their freedom and the departure of their temporary captors, Bahati and Karoli raised an alarm. A number of people responded to the alarm, including Māsinta Marisa, Julius Matutu and Washington Kashanga.

The alarm people were told by Bahati and Karoli that their invaders and robbers included Alex Nyambeho @Fanta and Mondeko Kitasha@ Mandira. The mentioned persons were allegedly well known to Masinta, Bahati, Karoli and Matutu. The people who had assembled at the scene of the robbery, began the exercise of gathering up the remaining cattle. At the end of the exercise, it was discovered that only 25 head of cattle had been stolen.

The search for the stolen cattle began that evening and eventually led Bahati, Matutu and Kashanga to Nyamongo, Tarime, where they reached on 6th February, 2006. That day was auction day at Nyamongo. It was at that auction where the search party allegedly spotted seven of the 25 stolen head of cattle of Masinta in the possession Alex Nyambeho @ Fanta, Mondeko Kitasha and Marwa Wantahe Chacha. A report was made at Nyamongo Police post and the trio was arrested by No. E8633D/Sgt. Modestus together with P.C. Ally and P.C. Shaban. D/Sgt. Modestus interrogated the three suspects concerning their possession of the 7 head of cattle. The suspects told him that the cattle belonged to them. Apparently, D/Sgt. Modestus did not buy that story and relayed the information to Bunda police station.

Upon getting the report of the arrest of three suspects found in possession of the suspected stolen cattle, one No. F4833 D.C. Athumani was dispatched to Nyamongo police post on 7/2/2006. He subsequently returned to Bunda with the three suspects and the seized seven head of cattle. On 9/2/2006, No. F656 D/Cpl. Vendelinus took the cautioned statements of the three suspects, in which some of them owned up to committing the armed robbery. Thereafter D.C. Athumani handed over the seven head of cattle to Masinta Marisa to take "them to Mugeta police out post for further investigations." The three suspects were formally arraigned in the District Court of Bunda (the trial court) for armed robbery on 10/2/2006. The three suspects were Mondeko s/o Kitashi @ Mandira (1st accused), Alex s/o Nyambeho @ Fanta (2nd accused) and Marwa Wandahe (3rd accused).

The three accused persons denied the charge and a full trial ensued. At the trial, Bahati, Karoli, Mansita, Matutu, Kashanga, D/C. Athumani, D/Cpl. Vendelinus, D/Sgt. Modestus and P.C. Ally, testified as PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, and PW9 respectively. Both PW1 Bahati and PW2 Karoli told the trial court that they managed to recognize the 1st and 2nd accused persons at the scene of the crime because the two were formally their villagemates and/or schoolmates. Furthermore, PW1 Bahati and PW4 Matutu testified that they were enabled by special identification marks on the recovered seven head of cattle to identify them as the stolen cattle of PW3 Masinta. Despite this claim, PW1 Bahati tendered in evidence seven head of cattle as exh. P1 collectively, without showing the said special identification marks to the trial court. As if this omission was not fatal enough, PW2 Karoli, PW3 Masinta, PW4 Matutu, PW5 Kashanga, PW7 D/Cpl. Vendelinus and PW9 P.C. Ally were not shown exhibit P1 at all. On his part, PW6 D.C. Athumani, without being shown the said seven head of cattle, simply asserted thus:-

"They had the marks 'O' ' and 'M' to the body, two maksai and five Mitambas totaling 7 in number. They are the same tendered in court as exhibit P1.

That is all."

Each accused person denied committing the offence. The 1st accused (Mondeko) told the trial court that he was a resident of Nyamongo ward and that the 2nd accused (Alex) was his villagemate. He claimed that he saw the 3rd accused (Marwa) for the first time at Nyamongo police post. He categorically denied being arrested at Nyamongo auction mart on 6/2/2006. He further claimed that he was not at Kyandegge on 1/2/2006 as on that day he was hospitalized at Shirati hospital, where he had been admitted ill on 27/1/2006 and was discharged on 3/2/2006. To support this claim he tendered in evidence, without any objection from the prosecutor, the Shirati hospital admission, discharge and prescription forms as exhibit D1 and D2 respectively. He denied to have been in possession of any incriminating thing at the time of his arrest. He also challenged the credibility of the prosecution witnesses as they contradicted each other on PW3 Masinta's cattle identification marks.

The 2nd accused also claimed to have seen the third accused for the first time at Nyamongo police post on 6/2/2006. He flatly, denied being found in possession of stolen cattle.

In his judgment, the learned trial Senior District Magistrate was of the settled view that PW3 Masinta's 25 head of cattle were robbed while grazing on 1st February, 2006. The only issue he had to contend with, he found, was the identity of the robbers. After considering the evidence of the prosecution witnesses to the effect that:-

"... four bandits remained with them watching including the 2nd accused Alex s/o Nyambeho, other persons including the 1st accused Mandeko s/o Kitasha and 3rd accused Mututa s/o Wandahe, went and robbed them heads (sic) of cattle and went away with them",

the fact that they were found in possession of exhibit P1, as well as their alleged confessional cautioned statements (exh. P5, P6 and P7), he was satisfied beyond any shadow of doubt that the 1st and 2nd accused persons before him were part of the eight robbers. He accordingly found them guilty as charged, convicted them and sentenced them to thirty (30) years imprisonment plus 24 strokes of the cane each. He, however, acquitted the 3rd accused because he had "doubts on the evidence of the prosecution" as he "was not at all seen and identified at the scene and at the public auction in Nyamongo Tarime."

The attempts of the convicted two to challenge the conviction and sentences to the High Court sitting at Mwanza, through the services of Mr. Magongo, learned advocate, proved abortive.

In dismissing the appeal, the learned first appellate judge agreed with the finding of the trial court that the prosecution proved to the required standard the offence of armed robbery contrary to the submission of Mr. Magongo. On the identity of the robbers, he was convinced that the visual identification evidence of PW1 Bahati and PW2 Karoli, coupled with the fact that they were found in possession of seven out of the 25 stolen head of cattle squarely placed the two appellants before him at the scene of the robbery on 1st February, 2006.

Still protesting their innocence, the two appellants have sought to vacate the judgment of the two courts below through this appeal. In this appeal Alex

Nyambeho @ Fanta (Alex) is the 1st appellant and Mandeko Kitasha @ Mandira (Mandeko) is the 2nd appellant.

The two appellants lodged a joint memorandum of appeal containing seven grounds of appeal some of which are interrelated or overlapping. They are, indeed, faulting the two courts below for founding their conviction on the fundamentally contradictory evidence of the prosecution witnesses, wrongly admitted cautioned statements and the doctrine of recent possession. At the hearing of the appeal they elaborated, with precision, on the alleged contradictions in the prosecution case.

Before us, the respondent Republic was represented by Ms. Martha Mwandeya, learned Senior State Attorney. Ms. Mwandeya surported the conviction of the appellants for two reasons. **One**, they were unmistakably identified at the scene of the crime by PW1 Bahati and PW2 Karoli. **Two**, they were found in possession of seven (7) out of the 25 robbed head of cattle five (5) days after the robbery.

In reply, the two appellants locked horns with the learned Senior State Attorney. They argued that if they had been impeccably identified at the scene of the crime and were known to the two identifying prosecution witnesses as alleged, the search for the robbed cattle and robbers would have started at their homes, which was not the case. They further argued that the doctrine of recent possession was wrongly invoked and relied on as none of the prosecution witnesses identified exh. P1 by their special or distinctive identification marks.

In disposing of this appeal, we have found it convenient to start with the issue of the doctrine of recent possession. The law governing the successful invocation of this doctrine is well settled. It has been succinctly stated in a plethora of cases decided by this Court. In the case of **Joseph Mkumbwa &**

Another v. R., Criminal Appeal No. 97 of 2007 (unreported), for instance, we held thus:-

*"For the doctrine to apply as a basis of conviction, it must positively be proved, **first**, that the property was found with the suspect, **Second**, that the property is positively the property of the complainant; **third**, that the property was recently stolen from the complainant; and **lastly**, that the stolen thing in possession of the accused constitutes the subject of a charge against the accused."*

This is the position of the law as of to-day.

In his evidence, PW1 Masinta told the trial court that all of his cattle had the following distinctive marks and we shall quote him:-

"... they had "C" to the right cheek, to the right leg there is "C" and "M" to the body."

This piece of vital evidence is in contrast with that of PW1 Bahati, who said:-

"... they had "O" to the cheek left side, and in the side there are "A" mark and in the right area had "C" marks."

On his part, PW2 Karoli said:-

"... they had "O" or "C" and "M" marks,"

while PW4 Matutu claimed that the marks were, "O" and "M" without mentioning on which part of their bodies they were located.

PW9 PC. Ally who claimed to have arrested the appellants in the company of the acquitted Marwa, alleged that the seized 7 head of cattle which he handed over to PW6 DC. Athumani had these marks:-

"O' to the right cheek of each cow and "=" to the right hip of each."

If then the evidence of PW9 PC. Ally is true and we have no convincing reason to hold otherwise, it will be accepted without much ado that the seven head of cattle which PW6 D.C. Athumani received from PW9 P.C. Ally were not the robbed property of PW1 Masinta. In the light of these patent contradictions, which the two courts below never alluded to at all, we have found ourselves constrained to hold that this evidence might have been contrived to incriminate the appellants and that's why none of the prosecution witnesses identified exh. P1 by the so-called special marks they had testified on. We accordingly accept the appellants' complaint, as indeed Ms. Mwandeya eventually conceded that the doctrine of recent possession was wrongly invoked in this case.

Coming to the issue of identification of the appellants, we have realized that it was based on the credibility of the two identifying witnesses, supported by the now discounted doctrine of recent possession.

It is now trite law that in assessing the credibility of any witness, the trial court does not enjoy exclusive monopoly. Apart from demeanour, even this Court on a second appeal has the jurisdiction to do so in order to advance the interests of justice. In the case of **Shabani Daudi v. R.**, Criminal Appeal No. 28 of 2000 (unreported), this Court held thus:-

"May be we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as

demeanor is concerned. The credibility of a witness can also be determined in two other ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court. Our concern here is the coherence of the evidence of PW1."

Furthermore, "a witness might appear to be perfectly honest but mistaken at the same time. On the other hand it is a fact of life again that even lying witnesses are often impressive and/or convincing witnesses" (**Festo Mawata v. R.**, Criminal Appeal No. 299 of 2007 (unreported)).

It must be obvious to all now, that during our canvassing of the appellants' complaint against the invocation of the doctrine of recent possession, the discrediting falsehoods in both PW1 Bahati's and PW2 Karoli's evidence were exposed. If these witnesses were indeed truthful in their claims they would not have contradicted each other and other witnesses on the special identification marks which were on PW3 Masinta's cattle. Again, if PW1 Bahati was a truthful witness, he could not have told the trial court that the seven head of cattle seized by PW9 P.C. Ally at Nyamongo auction mart on 6/2/2006 belonged to his father while this was not the case. On this, he was indisputably discredited by PW9 P.C. Ally.

In his evidence, PW1 Bahati stated that the four bandits who were guarding them included the 1st appellant (Alex), while the 2nd appellant Mondeko, 3rd accused at the trial and two others left immediately with the robbed cattle.

This piece of evidence is in crying contradiction with that of his brother and self-claimed eyewitness PW2 Karoli. The latter said:-

"... the four bandits remained watching us and the rest four including the 1st, 2nd and 3^d accused persons went to rob the 25 heads (sic) of cattle and went away..."

These, in our considered opinion, are not pieces of doubtful evidence but, obviously very discrediting ones.

On top of the above, the three key prosecution witnesses contradicted each on the number of cattle which had been sent to the fields on 1/2/2006. It was PW3 Masinta's evidence in chief that they were 650 in all, but he belied himself while under cross-examination when he put the number at 600. However, PW1 Bahati claimed that they were 300, not only contradicting his father but also his brother, PW2 Karoli, who confidently asserted that they were 500. In the light of these patent discrepancies, we respectfully differ with the findings of the two courts below, which never considered these blatant lies at all, that PW1 Bahati and PW2 Karoli were witnesses of truth. For these reasons we accept the appellants' complaint to the effect that their conviction was based on palpably false eyewitness identification evidence. Had the two courts below objectively evaluated the entire evidence, they could, in our view, not have rejected the defence of alibi of the 2nd appellant which was supported by undisputed documentary evidence, on the basis, as the learned 1st appellate judge held:-

"How can an ill looking person be discharged from hospital? In my opinion, the medical chits were manufactured to suit the case."

With due respect, the learned judge was being unduly unfair to the appellant. If he doubted the genuineness of exhibits D1 and D2, which were put in evidence

without any objection from the prosecution, he ought to have called for further evidence from their authors. These were Dr. Hendry who discharged him and one Mr. Charles Paul who wrote the prescription form (both on 03/02/2006).

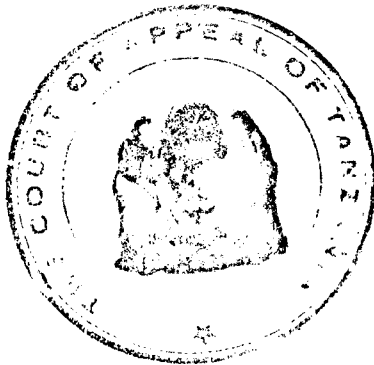
It has also occurred to us that the two courts below engaged double standards in assessing the credibility of the prosecution witnesses. Both PW1 Bahati and PW2 Karoli gave evidence, placing the accused Marwa at the scene of the crime. On top of that, PW1 Bahati, PW2 Karoli, PW4 Matutu, PW5 Kashanga, PW9 P.C. Ally and PW6 D.C. Athumani stated in no uncertain terms that Marwa was arrested at Nyamongo auction mart on 6/2/2006 in the company of the two appellants with 7 head of cattle allegedly belonging to PW3 Masinta. The trial court, for no apparent reason, disbelieved them while in the same breath believed them in relation to the two appellants. The High Court on appeal apparently confirmed this finding. To us, this approach, respectfully smacks of a traversery of justice.

We understand that the trial Senior District Magistrate had also relied on the retracted confessional cautioned statements, which had been recorded in contravention of the provisions of sections 50 and 51 of the Criminal Procedure Act, Cap. 20, R.E. 2002 (the Act). Fortunately, in sustaining the conviction of the appellants, the learned first appellate judge did not rely on them. Since these statements were illegally taken, we shall discount them. At any rate it can be safely assumed that their contents were not true otherwise Marwa would not have been acquitted.

In the light of the above discussion, we are convinced that the prosecution failed to proffer cogent evidence implicating the appellants with the robbery of 25 head of cattle belonging to PW3 Masinta. We accordingly allow this appeal in its entirety by quashing and setting aside their conviction and the sentences

imposed on them. The appellants are to be released forthwith from prison unless they are otherwise lawfully held.

DATED at MWANZA this 2nd day of June, 2015.



E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL