

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

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 265 OF 2015

KENNEDY YALED MONKO..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from a decision of the High Court of Dodoma at Dodoma)

(Mohamed, J.)

dated the 19th day of August, 2015

in

DC Criminal Appeal No. 61 of 2012

JUDGMENT OF THE COURT

6th & 11th April, 2016

JUMA, J.A.:

The appellant Kenedy s/o Yared Monko and Paulo s/o Kija were in the District Court of Manyoni charged with a single count of cattle theft contrary to sections 268 (1) and 265 of the Penal Code, Cap 16, R.E. 2002. The prosecution alleged that at about 22.00 hours on 29/9/2011 at Ntumbi village, Manyoni District, Singida Region, they stole nine heads of cattle valued at Tshs. 1,210,000/=, being the property of DONALD S/O NDULALE.

After hearing five prosecution witnesses and the defence offered by the two accused persons, the trial District Magistrate (N.K. Munuo-DM)

acquitted Paulo s/o Kija but found the appellant guilty and convicted him accordingly. The appellant was sentenced to a term of five (5) years in prison. His first appeal, DC Criminal Appeal No. 61 of 2012 was dismissed by Mohamed, J. for lack of merit.

Through his memorandum of appeal, the appellant has come to this Court with six grounds of appeal which may be condensed into three areas of complaints. In the **first** ground the appellant contends that the prosecution's case against him was not proved beyond reasonable doubt because no witnesses from Heka village where he was arrested were called to testify about how he was arrested whilst in possession of the stolen heads of cattle. The **second** ground faulted the two courts below for allowing the complainant to exhibit the photocopied photographs of the stolen heads of cattle instead of identifying in court the livestock he claims to be his. In his **third** ground the appellant complains that despite his objections, the two courts below still admitted the cautioned statement without following the procedure of a trial within trial or at very least, refer him to the justice of the peace.

Before we move any further we must pause and remark that the third ground complaining about the cautioned statement has no basis because the appellant had raised this same ground during his first appeal, and the first appellate Judge had allowed this ground but went ahead to dismiss his appeal because there was still sufficient evidence to sustain his conviction.

The Background to the arrest of the appellant is disclosed in the evidence of the complainant Donald Ndulale (PW5). It was around 10.30 on the material day when his nine (9) heads of cattle were stolen from his household. He raised the alarm, which attracted his fellow villagers. Once assembled at the complainant's household, the villagers organized themselves to trace the stolen heads of cattle the following morning. According to the complainant, his heads of cattle had very distinctive marks/brands on each ear which is cut twice, and a letter "O" is also marked out.

Joseph Samweli Mafunde (PW 1) who described himself as a farmer and as the chairman of the traditional soldiers of Ntumbi village, was amongst the villagers who set out to trace the stolen heads of cattle.

Jumanne Chalho (PW3) who described himself as the commander of the traditional soldiers was also in the search party that early morning of 30/9/2011. They followed hoof-marks left behind by the herd to an area known as Heka where they found six bulls and 3 cows in possession of the appellant inside a kraal specially constructed by the appellant. The appellant was arrested and together with the recovered heads of cattle were taken to the Police Station at Heka. Because he was injured during his arrest by the 'traditional army', the appellant was taken to hospital. The herd of cattle was later returned back to the owner, the complainant.

The appellant and his co-accused testified in their own respective defences. The appellant protested his innocence insisting he had nothing to do with stolen livestock. He questioned why the animals that were allegedly found in his possession were never tendered in court, and instead the complainant tendered photocopied pictures of the animals. If anything, the appellant lamented, his own photographs whilst in possession of the stolen heads of cattle should have been taken and tendered to prove the offence against him.

At the hearing of the appeal, the appellant preferred to have Ms. Beatrice Nsana, learned State Attorney who appeared for the respondent to respond first to his grounds of appeal, and he would make his reply to the State Attorney's submission.

Ms. Nsana supported the appellant's appeal, arguing that the heads of cattle which were allegedly found in the appellant's possession were never identified in court as belonging to the complainant and as having been found in the appellant's possession. The learned State Attorney referred us to **Benard Masumbuko Shio and Charles Widman vs. R.**, Criminal Appeal No. 213 of 2007 (unreported) wherein this Court had interpreted section 39 of the Criminal Procedure Act, Cap. 20 (CPA) and remarked that although the prosecution is not compelled to tender any particular type of evidence, but failure to tender material evidence in its possession will be to its disadvantage and to the advantage of the defence. According to Ms. Nsana, failure of the prosecution to tender the heads of cattle weakened the prosecution's case contending that the appellant was found in possession of the stolen livestock. The learned State Attorney placed reliance in the decision of the Court in **Mulangalukiye Augustino**

Ms Nsana has also submitted that the ten photographs of the heads of cattle have no probative value because they were not accompanied with a certificate regarding their preparation by an officer appointed by order of the Attorney-General under section 202 of the CPA. The relevant section 202 of CPA provides:

202.-(1) In any inquiry, trial or other proceeding under this Act a certificate in the form in the Third Schedule to this Act, given under the hand of an officer appointed by order of the Attorney-General for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film together with any photographic prints, photographic enlargements and any other annexures referred to therein, shall be evidence of all facts stated in the certificate

(2) The court may presume that the signature to any such certificate is genuine.

(3) When any such certificate is used in any trial or proceeding under this Act other than an inquiry the court may, if it thinks fit, summon and examine the person who gave the certificate.

PW11 also proved that the 1st Accused was brought at police with those cattle and later he absconded and was the one who mention (sic) the 2nd Accused. At police he confessed and his caution statement was written by PW IV. The 1st Accused denied that statement by the evidence of PWI to PWII plus the evidence of PW5 was enough to convict the Accused. The 2nd Accused was mentioned by the 1st Accused and that evidence before conviction need corroboration.

In the end the 1st Accused is hereby convicted and the 2nd accused is acquitted under section 235 of the CPA Cap. 20."

Like the trial court, in dismissing the appeal the first appellate Judge similarly invoked the doctrine of recent possession without demanding the proof of ownership by the complainant of the livestock found in the possession of the appellant:

"...I am of a similar view. The appellant was caught red handed with the stolen cattle within a short time from when they were stolen. Had he given an explanation of how he had otherwise come in

possession of the same, it would have exonerated him from the offence. He gave none."

There is clearly no evidence proving that the nine heads of cattle allegedly recovered whilst in possession of the appellant belonged to PW5 so as to invoke the doctrine of recent possession. Nowhere in his evidence does PW5 formally identify the nine heads of cattle as his nor did he give any special identification mark on any of the nine heads of cattle. In **Godfrey Lucas vs. R.**, Criminal Appeal No. 23 of 2013 (unreported) this Court underscored the need to prove that stolen property found in possession of a suspect must be positively identified to belong to the complainant:

*"...The case of **Joseph Mkubwa & Samson Mwakagenda V R** Criminal Appeal No. 94 of 2007 (unreported) cited in **Abdi Julias** (supra), give three conditions which must be satisfied before the doctrine of recent possession can be applied to convict an accused person. The conditions are:*

*'First, that the property was found with the suspect, second, **that the property is positively proved to be the property of the complainant.** and lastly, that the stolen thing constitutes the subject*

matter of the charge against the accused... The fact that the accused does not claim to be the owner of the property does not relieve the prosecution to prove the above elements...' "[Emphasis added]

In the instant appeal PW5 merely stated:

"...The group which went to Heka seized 9 heads of cattle with the accused. After ... seized them we were informed by a Telephone. Later I was informed that the 1st accused was arrested with them and was taken to Heka out post to Sanza Police outpost and was given those cattle.....On 15/3/2011 I was informed by the OCCCID to take photo picture of them. I have brought 9 photos picture of each head of cattle and the tenth photo picture are of all cattle. I pray to tender the 10 photo picture as P11 of this case."

In the circumstances, we cannot say the prosecution has established beyond reasonable doubt the nine heads of cattle stolen from PW5's household were the same as ones which were allegedly found in the possession of the appellant.

Accordingly we allow this appeal. We quash the conviction and set aside the sentence of five years imprisonment which was passed on the appellant. We order the appellant's forthwith release from prison unless he is held for some other lawful cause.

DATED at DODOMA this 08th day of April, 2016.


E.A.KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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




E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL