IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 285 OF 2015

DAUSON ATHANAZ ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the conviction and Judgment of the High Court of Tanzania at Bukoba)

(Matogolo, J.)

Dated the 26th day of May, 2015
in
Criminal Appeal No. 5 of 2015
.....

JUDGMENT OF THE COURT

12th & 19th February, 2016

Mmilla, J. A.:

The appellant, Dauson Athanaz is currently in prison serving a sentence of fifteen years following his conviction by the District Court of Ngara at Ngara. Before that court he was charged with cattle theft contrary to section 268 (3) of the Penal Code Cap. 16 of the Revised Edition, 2002. After conviction and sentenced he unsuccessfully appealed to the High Court of Tanzania at Bukoba, hence this second appeal to this Court.

The brief facts of the case were that on 1.8.2012, Anthony Andrea Kyabuka (PW1) was informed by Idd Muturumbe who was keeping his heads of cattle that 27 of them were missing. PW1 and a couple of his fellow villagers conducted an unsuccessful search until 14.8.2012 when he reported the incident to the police at Ngara. However, he continued searching.

On 24.8.2012, he went to an auction mart at Muleba at which he found the appellant in possession of two heads of cattle which he identified because they bore mark "IB" which he allegedly impressed on all his heads of cattle. He called the Executive Officer (sic) and the militia people of that area who arrested the appellant and interrogated him. The appellant is alleged to have admitted that he stole them. He led them to the forest where they recovered 13 heads of cattle. On being asked the whereabouts of the rest, the appellant told them that they were scattered by elephants as he drove them in the forest, but that he sold 2 of them to Mr. Patrick. He led them to the latter wherefrom they recovered 2 heads of cattle, bringing the number to 17 of them. The appellant was taken to Chamyomwa Police Station, and later on transferred to Ngara Police Station.

The appellant's defence consisted of general denials, and in particular he denied to have been found in possession of the alleged heads of cattle, adding that he was unjustifiably implicated in the commission of that offence.

Before us the appellant appeared in person and fended for himself. His memorandum of appeal raised four grounds as follows:-

1. That the learned trial judge (sic) erred in basing his conviction on uncorroborated evidence.
2. That the learned trial judge (sic) erred when he failed to consider that PW2 and PW3 had their own interests to serve.
3. That the learned trial judge (sic) improperly invoked the doctrine of recent possession, and
4. That the case was not proved beyond reasonable doubt.

On the other hand, Mr. Athuman Matuma, learned Senior State Attorney, appeared for the respondent Republic. He informed the Court that he was opposing the appeal. The appellant elected for the Republic to address us first.

To begin with, Mr. Matuma suggested to discuss only two grounds; the first and third, on the ground that they encompass the remaining two.

He submitted that the evidence of PW1 Anthony Andrea, PW2 Buberwa Michael and PW3 Meriness Anthony established that the appellant was found in possession of 17 heads of cattle which were positively identified by PW1 as his. He contended that the evidence of those witnesses was very strong because after being apprehended with two heads of cattle in his possession at the auction mart, the appellant led them to the forest where they recovered 13 of them, and that he similarly led them to Mr. Patrick from whom they recovered two more of them, bringing the number to 17 of them. He contended that the trial court properly held that the appellant committed the charged offence because such evidence was very strong, therefore was correctly believed and relied upon.

Mr. Matuma pointed out however, that the prosecution case suffered one problem in that the 17 heads of cattle were not tendered in court as evidence. He was quick to add however, that the omission was not fatal because all through, the appellant knew that he was charged of cattle theft. In the circumstances, he submitted, the error was curable under section 388 of the Criminal Procedure Act Cap, 20 of the Revised Edition, 2002 (the CPA). He also requested the Court to seek inspiration from the case of **A. S. Sajan v. Cooperative and Rural Development Bank** [1991] T. L. R. 44 in which the Court relied on the letters because they

were documentary evidence of what had been given orally. He added that the complainant in the present case described the heads of cattle, therefore that it should be regarded that he was referring to the heads of cattle which the appellant knew of, and that the decision of both lower courts was based on the credibility of the witnesses. He pressed the Court to uphold his submission on the point so that justice may be done in the case. He referred us to the case of **Marko Patrick Nzumila and another v. Republic,** Criminal Appeal No. 141 of 2010 in which among other things, the Court emphasized the importance of vouching the interests of justice of both sides of the scale of justice in any given case.

At another stage, Mr. Matuma submitted that the sentence which was meted on the appellant was not excessive in the circumstances of this case, He requested the Court to uphold it.

On his part, the appellant submitted that he was falsely accused of stealing the alleged heads of cattle because none of them were produced in court as exhibits as it ought to have been. Also, he wondered why, Mr. Patrick, a crucial witness, was not called to testify. He prayed the Court to allow the appeal.

After carefully going through the proceedings of the case, the judgments of both courts below, the grounds of appeal and the rival submissions of the parties in this appeal, we wish to address first the complaint that the trial court improperly based its decision on the uncorroborated evidence of the prosecution witnesses, and that the first appellate court wrongly upheld that decision.

The prosecution's case was essentially built on the evidence of PW1, PW2 and PW3. It is essential to point out at this stage that The evidence of PW1 was that the appellant was found with a total of 17 heads of cattle all of which bore mark "IB" which was his creation. Two of those heads of cattle were seized from the appellant at Muleba auction mart, after which the appellant allegedly led them to the forest where he showed them 13 others, and finally they recovered two more heads of cattle from Mr. Patrick. The evidence of PW1 was corroborated by that of PW2 and PW3. Like PW1, PW2 and PW3 testified in common that after recovering two heads of cattle from the appellant at Muleba auction mart, he led them to the forest where they recovered 13 of them, and 2 others were recovered from Mr. Patrick. To an extent, we agree with Mr. Matuma that PW2 and PW3 corroborated the evidence of PW1. However, there are two challenges which taint that evidence; one that Mr. Patrick from who the last two heads

of cattle were recovered was not called as a witness, and secondly that the 17 heads of cattle were not tendered in court as evidence. We begin with the aspect of prosecution's failure to call Mr. Patrick as a witness.

There is no dispute that the last two heads of cattle were recovered from Mr. Patrick who was not called to testify. The issue is whether it was proper to have not called him as a witness in the circumstances of this case. We hasten to agree with the appellant that Mr. Patrick ought to have been called to testify because he was a crucial witness unless there were reasons to the contrary. We are relying on what the Court expressed in the case of **Aziz Abdallah v. Republic** [1991] T.L.R. 71 (CA), among others.

In **Aziz Abdallah v. Republic** (supra) the appellant was convicted by the High Court exercising its economic crimes jurisdiction on four counts charging attempted unlawful exportation of certain valuables. On appeal to the Court, among other grounds, the appellant invited the court to draw an adverse inference against the prosecution for failure to call KLM witnesses. It was held that:-

> *"The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts.*

If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

In the present case, the prosecution did not assign any reasons why they did not call Mr. Patrick to testify in this case. We believe that had they called Mr. Patrick, the trial court would have been placed in a better position to confirm the assertion of the complainant that they collected the last two heads of cattle from that person. Given that pit fall, the lower courts ought to have drawn an adverse inference against the prosecution as contended by the appellant. It is important to point out however, that in a proper case, that could have only affected the prosecution case in so far as the two heads of cattle which were allegedly collected from that witness were concerned.

The appellant's other strong point is that the allegedly stolen heads of cattle were not tendered in court as evidence. While conceding that they were not tendered as ought to have been, Mr. Matuma has submitted, as already pointed out that it was a minor omission which is curable under section 388 of the CPA. The begging issue is whether failure to tender the

heads of cattle which were allegedly recovered was a minor omission in the circumstances of this case.

In our settled minds, it was crucial for the prosecution to tender the allegedly recovered heads of cattle as evidence in the circumstances of this case because they were a crucial link to the oral evidence that was given and could afford a strong impact in the case. As Ray Moses, an American jurist once said, *"Seeing is believing. We believe things when we see them with our own eyes, or rather one picture is worth a thousand words."* - See **Impact of Exhibits in Criminal Cases, 2000, Ray Moses, E – Group; CCJ Books.** We do not hesitate to say that we agree with him.

At any rate however, we underscore that in theft cases identification of the allegedly stolen property is a crucial requirement – See the case of **David Chacha and 8 others v. Republic,** Criminal Appeal No 12 of 1997, CAT (unreported).

In that case, the subject matter of theft was, among other things, an electric press iron which was tendered as exhibit P12. While approving the decision of the High Court that the complainant in that case correctly identified the object by describing its marks namely a black handle with a broken light indicator spot, the Court emphasized that:-

". . . it is a trite principle of law that properties suspected to have been found in the possession of accused persons should be identified by the complainants conclusively. In a criminal charge it is not enough to give generalized description of property."

See also the case of **Nikandaeli Federiko v. Republic**, Criminal Appeal No. 35 of 1995, CAT (unreported).

In the circumstances of the present case, how was the trial court able to appreciate that the subject heads of cattle were properly identified and described without having seen them and authenticate the mark ("IB") which was pointed out by the complainant? Certainly, such a situation baffles every one. In our firm stand, the fact that PW1 said the heads of cattle were at his home and was ready to bring them to court if required to do so cannot bail out the Republic. The reason is that the police ought to have sent the heads of cattle to the trial court on the day the appellant was arraigned before it, for which the public prosecutor would have been able to tender them as exhibits. That could have given him (the prosecutor) opportunity to request the court to make an order regarding their disposal and/or custody pending trial. As we are aware, this is the usual practice, say in perishable goods or any other objects including heads

of cattle which may pose challenges to keep or handle. Nobody knows why this was not done.

We have considered the case of **A. S. Sajan v. Cooperative and Rural Development Bank** (supra) referred to us by Mr. Matuma in support of his argument that omission to tender the subject heads of cattle was a minor irregularity. It is certain that in that case the Court stated that it was proper to rely on the letters because they were documentary evidence of what had been given orally. In our decision however, that case is distinguishable to the present one for two reasons; **one** that the circumstances under which the Court allowed those exhibits to be used were different from the circumstances in the present case; and **two** that it was a civil case whose burden of proof thereof is lower than that which is required in criminal cases, which is proof beyond reasonable doubt. On the same magnitude, the case of **Marko Patrick Nzumila and another v. Republic** (supra) on the basis of which Mr. Matuma sought us to deem that the interests of justice of both sides of the scale of justice has to be considered is not helpful to them because as aforesaid, the evidence in the present case was unsatisfactory on account that the alleged heads of cattle were not tendered in court.

For the reasons we have given, the first ground of appeal has merit and we allow it.

The second ground of appeal is that the doctrine of recent possession was wrongly invoked by the trial court, therefore wrongly upheld by the first appellate court. Once again, we agree that there is substance in this complaint.

It is notorious that the essential ingredients of the doctrine of recent possession are that it must be proved beyond reasonable doubt that the accused person was truly found in possession of the allegedly stolen properties and that those properties should be positively identified by the owner. See the case of **Director of Public Prosecutions v. Joachim Komba** [1984] TLR 213 in which it was held that:-

> "The doctrine of recent possession provides that if a person is found in possession of recently stolen property and gives no explanation depending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or a guilty receiver."

In our present case we have found that the subject heads of cattle were not conclusively identified because they were not tendered in evidence. As such, the appellant cannot be faulted that the doctrine of

recent possession was wrongly invoked because there was no proof that he was found in possession of any heads of cattle. In the circumstances, this ground too has merit and we allow it.

Before we may conclude, we find it indispensable to consider one legal point concerning the suitability or otherwise of the sentence of 15 years which was imposed against the appellant. Upon being asked to comment on this aspect, Mr. Matuma responded that the sentence was not excessive in the circumstances because it was the minimum provided by section 268 (1) of the Penal Code. On his part the appellant left the matter in the hands of the court.

We wish to express our view that we do not agree with the learned Senior State Attorney for reasons we will soon assign.

Our starting point is section 170 (1) (a) of the CPA which imposes limitations on the sentencing powers of the subordinate courts. That section provides that:-

> *"170(1) A subordinate Court may, in cases in which such sentences are authorized by law, pas the following sentences:*

(a) imprisonment for a term not exceeding five years; save that where a Court convicts a person for a scheduled offence it may if such sentence is authorized for such offence for a term not exceeding eight years."

According subsection (5) thereof, "scheduled offence" has the meaning assigned to that expression by the Minimum Sentences Act. Under the Minimum Sentence Act Cap 90 of the Revised Edition, 2002 the offence of cattle theft is a scheduled offence. Thus, the learned magistrate illegally imposed a sentence of imprisonment of more than five (5) years.

Again, subsection (2) of section 170 of the CPA provides as follows:-

"(2) Notwithstanding the provisions of subsection (1):

(a) A sentence of imprisonment:

(i) for a scheduled offence (as defined in subsection (5), which exceeds the minimum term of imprisonment prescribed in respect of it by the Minimum Sentences Act;

(ii) for any other offence, which exceeds twelve months;

(b) a sentence of corporal punishment which exceeds twelve strokes;

(c) a sentence of a fine or for the payment of money (other than payment of compensation under the Minimum Sentences Act, which exceeds six thousand shillings,

Shall not be carried into effect, executed or levied until the record of the case or a certified copy of it, has been transmitted to the High Court and the sentence or order has been confirmed by a judge.

Provided that this section shall not apply in respect of any sentence passed by a Senior Resident Magistrate of any grade or rank."

In our present case, there are two things which we want to point out. The first aspect is that the sentence was based on section 268 (1) of the Penal Code which creates the punishment in this. It states that if the thing stolen is any of the animals to which this section applies the offender **shall be liable to imprisonment for fifteen years**. In our firm view, this provision does not create the minimum sentence as submitted by Mr. Matuma. To the contrary, in our reading of that provision, it is certain that the legislature gave the trial court discretion to determine the befitting sentence **as the circumstances may demand**. That is why the

legislature used the words **"... shall be liable ..."** These circumstances include the limitation imposed by section 170(1) (a) of the CPA.

The second aspect relates to the provisions of section 5 (b) of Minimum Sentences Act Cap. 90 of the Revised Edition, 2002 (the MSA). Under that section, the minimum sentence for the offence of cattle theft is five years. That is one of the reasons why we said the sentence under section 268 (1) of the CPA is not the minimum. Equally important however, is the fact that the learned magistrate was not a senior resident magistrate, therefore that the proviso to section 170 (2) (c) of the CPA precluded him from imposing a sentence beyond 5 years. Thus, by any standards the sentence of 15 years imposed by him against the appellant was illegal. In a proper case, he ought to have forwarded the record to the High Court for confirmation as required by subsection (2) of section 170 thereof - See the case of **Abdi Massoud @ Iboma & Others v. Republic**, Criminal Appeal No.116 of 2015 CAT (unreported). In view of that, we find and hold that **were we to dismiss the appeal**, we would have definitely been justified to intervene and vary the sentence.

Over all, for reasons we have given, we allow the appeal, quash conviction and set aside the sentence. We direct that the appellant should

forthwith be released from prison unless he is being continually held for some other lawful cause.

Dated at **Bukoba** this 18th Day of February, 2016.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL