

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MBAROUK, J.A, MKUYE, J.A AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 539 OF 2016

JUMA ANDREA @ MCHICHI APPELLANT

VERSUS

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

(Mohamed, J.)

dated the 11th day of May, 2016
in
Criminal Appeal No 37 of 2015

JUDGMENT OF THE COURT

5th & 12th March, 2018

MBAROUK, J. A.:

In the District Court of Manyoni at Manyoni, the appellant Juma Andrea @ Mchichi together with two others (Lazaro Hamisi Mgonaa, 2nd accused and Matonya Madinda Anatory, 3rd accused, who are not subject to this appeal) were convicted of the offence of cattle theft contrary to

sections 265 and 268(1) of the Penal Code, Cap. 16 R.E. 2002. The appellant and Lazaro (the 2nd accused) were sentenced to seven (7) years imprisonment each, whereas Matonya (the 3rd accused) was sentenced to three (3) years imprisonment. Aggrieved with that decision, the appellant with his co - accused persons preferred an appeal to the High Court of Tanzania at Dodoma. The High Court (Mohamed, J.) dismissed the appeal preferred by the appellant and that of Mantonya (3rd accused) and allowed the appeal of Lazaro (2nd accused). Undaunted, the appellant alone has preferred this second appeal.

Briefly stated, the facts of the case as they appeared at the trial court were that, Msemne Masasi (PW.1) testified that on 17-4-2014 he was told by militia group Chairman, one Mhila Msoko that Tarange Magadula's (PW.9) twenty five (25) head of cattle were stolen. PW.1 said, they suspected Mosi George (PW.4) to have stolen them, but Mosi told them that he saw the appellant driving the cattle in the morning

going to Chibumagwa auction. PW.1 added that, PW.4 further told them that he knew the appellant since they are living in the neighbouring villages and they are relatives. PW.1 added that, they sent PW.4 to the appellant to pretend to be a buyer of cattle. PW.4 further testified that they agreed with the appellant to sell to him six cattle which he kept them at Matonya's (3rd accused) "boma." PW.1 further said that, PW.9 (the owner) identified his cattle and thereafter were sent to the police station.

Moreover, PW.4 testified that, on 16-4-2014 when he was on his firm, he saw the appellant passing there with cattle and that he knew the appellant before. Later on, he said, he saw people looking for cattle. According to PW4, he and Mwaila Chinzumi (PW.5) went to Chikuyu village and PW.5 pretended to be a buyer of cattle, they bargained and agreed with the appellant. PW.4 and PW.5 reported the matter to the police station and found the appellant who kept the stolen cattle at Matonya's (3rd accused) "boma." PW.4

added that, PW.9 (the owner) identified his cattle and thereafter those cattle were taken to the police station.

On his part, PW.5 testified that, on 16-4-2014 when he was going to the firm he heard an alarm for help as there were cattle stolen from Bida Mwandu (PW.2). When PW.5 and other villagers approached PW.4, he told them that he saw the appellant driving cattle which he said he was going to sell them at the auction. PW.5 further testified that, when he approached the appellant, he pretended to be a buyer of cattle and the appellant showed to him the cattle kept at Matonya's (3rd accused) place. PW. 5, therefore informed his fellow villagers and "sungu sungu" who thereafter reported him to the police station who then went to arrest the appellant.

Furthermore, PW.9 who was the owner of the alleged stolen cattle testified that, on 16-4-2014, he was told that the cattle he had kept at PW.2's place were stolen. PW.9 further testified that, they made a follow up and were told by

PW.1 that the "sungu sungu" have found some stolen cattle at Chikuyu village. They therefore went to surround the appellant's house and arrested him. PW. 9 further added that, they were told by the appellant that he kept the stolen cattle at Matonya's (3rd accused) "boma". PW. 9 said, at Matonya's "boma", he indentified his cattle by his peculiar mark on the thighs having a V-shape and at the trial court 25 stolen cattle were admitted as evidence and marked as Exhibit P.1.

In his defence, the appellant categorically denied the offence charged against him and said that, on 16-4-2014 he went to Chibumagwa auction for his daughter's shopping. He added that, at 23:00 hrs. many people including his brother Muhila Msupo (PW.6) went to his house and broke into it and beat him. He was then sent to the police station.

In this appeal, the appellant has preferred eight (8) grounds of appeal, but in essence the eighth ground is a prayer that he wishes to be present when his appeal is set to

be heard. The remaining seven grounds of appeal which we have paraphrased them are as follows:-

1. *THAT, no search warrant was tendered before the court.*
2. *THAT, no certificate of seizure was tendered before the court indicating that after the search had been conducted, certificate of seizure was issued as per section 38(3) of the Criminal Procedure Act Cap. 20 R.E. 2002.*
3. *THAT, no inquiry was conducted when the appellant objected the said 6 head of cattle to be tendered as exhibit at the trial court.*
4. *THAT, no description of specific marks to the alleged stolen head of cattle was given before tendered as exhibit.*
5. *THAT, no chain of custody was shown by the prosecution when they tendered the alleged stolen 6 head of cattle as exhibit.*

6. THAT, the appellant was not arrested with any exhibit in connection with the alleged offense.

7. THAT, the case was not proved beyond reasonable doubt.

At the hearing, the appellant appeared in person unrepresented, whereas Ms. Judith Mwakyusa, learned State Attorney appeared for the respondent/Republic. Being a lay person not knowledgeable of legal issues, the appellant adopted the grounds of appeal and opted to allow the learned State Attorney to respond to his grounds first and thereafter if the need arose, he would give his rejoinder submissions.

On her part, the learned State Attorney from the outset indicated to support the appeal, because the charge against the appellant was not proved beyond reasonable doubt. Having supported the appeal, the learned State Attorney gave the following reasons:-

One, that all the prosecution witnesses did not see the appellant stealing those cattle.

Two, that no certificate of seizure of the cattle which were seized at Matonya's "boma" was issued or tendered at the trial court which is contrary to section 38(3) of the Criminal Procedure Act Cap. 20 R.E. 2002.

Three, that PW. 9 who was the owner of alleged stolen cattle has failed to give description of special marks before they were tendered as exhibit. She cited to us the case of **Selemani Hassani Vs. Republic**, Criminal Appeal No. 364 of 2008 (unreported) to support her argument.

Four, that after the alleged stolen cattle which were seized at Matonya's "boma", the prosecution failed to show that a chain of custody was not broken after they were sent at the police station and thereafter at Maweni village. She said there were no documents which were tendered to show how a handingover exercise was done before they were tendered in court. The learned State Attorney added that, in

the absence of the evidence concerning the handingover as the cattle were many, hence it creates doubts as to whether they were the same cattle or not. She was of the view that, the issue of tempering cannot be avoided and that leads the prosecution side not to have proved their case beyond reasonable doubt. She said, such doubts have to be resolved in favour of the appellant. In support of her argument she cited to us the case of **Paulo Maduka and Four Others Vs. Republic**, Criminal Appeal No. 119 of 2006 (unreported).

For those reasons, the learned State Attorney urged us to find the appeal with merit. She further urged us to quash the conviction and set aside the sentence, thereafter set the appellant free.

On his part, being a lay person, the appellant had nothing useful to submit in his re-joinder submissions, he simply agreed to what was submitted by the State Attorney and prayed to be set free.

On our part, we fully agree with the grounds of complaint lodged by the appellant which were supported by the learned State Attorney. This is for the reason that, none of the prosecution witnesses testified to have seen the appellant stealing those cattle allegedly owned by PW.9. It seems that, the evidence relied upon by the prosecution to prove their case was circumstantial by nature, but as we shall see later, there are other factors which have shaken the validity of such evidence. For example the contravention of section 38(3) of the CPA, as there was no certificate of seizure of the alleged stolen cattle which was issued. Section 38(3) of CPA states as follows:-

"(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for

the time being in possession or control of the premises, and the signature of witnesses to the search, if any."

The record shows that, when the alleged stolen cattle were seized at Matonya's "boma" no certificate of seizure was issued in compliance with section 38(3) of the CPA. We, just like the learned State Attorney are of the opinion that, the anomaly has effected the seizure of the alleged stolen cattle seized at Matonya's "boma", because they might not be the same cattle which were allegedly stolen

Furthermore, we also agree with the appellant and the learned State Attorney that the chain of custody was broken for the reason that there was no written evidence as to the handingover exercise of the alleged stolen cattle who were seized at Matonya's "boma," then sent at the police station and thereafter at Maweni village.

It is now trite law that, in criminal cases where it is found that there are doubts, then those doubts are to be

resolved in favour of the accused person. Hence, as in the instant matter the chain of custody of the alleged stolen cattle was broken, that create doubts as to whether they were the same cattle stolen. We, therefore, resolve the doubt in favour of the appellant. Showing how the chain of custody should be, this Court in the case of **Paulo Maduka** (supra) stated as follows:-

*"By "**chain of custody**" we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime – rather than, for instance, having been planted fraudulently to make someone appear guilty. Indeed, that was the contention of the appellants in this appeal. The chain of custody requires that from the moment the evidence is*

collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it."

On the issue that no description was given to the alleged stolen cattle, we too again agree with the appellant and the learned State Attorney that PW.9 who was the owner has failed to give sufficient description of the special marks of his alleged stolen cattle. It was not enough for the owner to state that those cattle had V shaped marks on their thighs or others have double marks. We agree with the learned State Attorney that most of the cattle do possess such marks, they are general marks and not special marks. PW. 9 had to go further and describe marks such as how many were oxen and how many were cow, or even their colours etc. In the absence of such special marks which were supposed to be given even before they were tendered in court, we are inclined to believe that PW.9 failed to identify the alleged stolen cattle beyond reasonable doubt.

Showing the importance of giving description of special marks, this Court in several occasions has emphasized such a thing. For instance see our decision in **Mustapha Darajani Vs. Republic**, Criminal Appeal No. 242 of 2015 (unreported), where this Court stated that:-

*"In such cases, **description of special mark to any property alleged stolen should always be given first by the alleged owner before being shown and allowed to tender them as exhibits.**"*
(Emphasis added).

Also see **Selemani Hassani** (supra) and **Hassan Said Vs. Republic**, Criminal Appeal No. 264 of 2015 (unreported) to name a few.

For the foregoing reasons, we are settled in our minds that, if the two courts below had taken into account those points we have considered, they might have arrived at a different conclusion that the case against the appellant was not proved beyond reasonable doubt.

All said and done, we find merit in this appeal. We therefore allow it, quash the conviction and set aside the sentence. We further order the appellant to be released from prison forthwith unless he is held for some other lawful cause. It is so ordered.

DATED at DODOMA this 9th day of March, 2018.

M.S. MBAROUK
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is true copy of the original.



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL