IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 110 OF 2020

ISSA S/O JAMES..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Judgment of Court of the Resident Magistrate of Musoma (with Extended Jurisdiction) at Musoma]

(Ngaile, RM EXT.JUR)

Dated the 3rd day of December, 2019
in
Criminal Appeal No. 41 of 2019

JUDGMENT OF THE COURT

27th October & 5th November, 2021

WAMBALI, J.A.:

The appellant, Issa James was arrested on 27th April, 2018 at Nyanchabakenye village and was found with ten (10) herds of cattle while in the company of one Lucas Chacha who according to the record of appeal appeared to be deceased. The ten herds of cattle were alleged to be the property of one Rhobi Makaranga who testified in Criminal Case No.35 of 2018 before the Resident Magistrate's Court of Mara (the trial court) as PW2. It is depicted from the record of appeal that after their arrest, the appellant mentioned one Chacha Kishere who turned to

be the second accused person at the trial, to have collaborated with him and the deceased in stealing the cattle.

Consequent to their arrest, the appellant and the second accused were arraigned before the trial court on two counts. The first count involved cattle theft in which they were jointly charged contrary to section 258(1), 268(1) and (3) of the Penal Code Cap 16 R. E. 2002 (now R. E. 2019) (The Penal Code). On the second count, the appellant was charged alone for being found in possession of goods suspected to have been stolen contrary to section 312(1) (b) of the Penal Code. Both pleaded not guilty to their respective counts.

As it were, in a bid to prove the case against the appellant and the second accused (not a party to this appeal) the prosecution brought the following witnesses; Makaranga Makaranga (PW1), Rhobi Makaranga (PW2), A/ Insp Matiku Shadrack Sondobi (PW3), SP Joshuan Rian (PW4), Juma Rhobi Wambura (PW5), H492 D/C Basil (PW6) and G5254 D/C Rashid (PW7). Moreover, four exhibits namely, seizure certificate (exhibit. P1), 8 herds of cattle (exhibit. P2), cautioned statements of the appellant and the other accused (exhibit. P3 and exhibit. P4) were tendered and admitted in evidence.

The appellant defended himself while the second accused person entered his defence with two witnesses. They categorically denied involvement in the alleged offences. At the end of the trial, the prosecution case was considered sufficient to ground conviction against the appellant in respect of the first count and acquittal for the second accused person on the same count. Ultimately, the appellant was sentenced to ten years imprisonment and was ordered to compensate the complainant to the tune of TZS.900,000. His attempt to appeal against the trial court's findings and sentence to High Court through Criminal Appeal No.125 of 2019 which was transferred to be tried by a Resident Magistrate with Extended Jurisdiction and registered as Criminal Appeal No.41 of 2019 at the court of Resident Magistrate of Musoma was unsuccessful; hence the instant second appeal.

It is noteworthy that, the appellant has filed a memorandum of appeal comprising seven grounds of appeal. For reasons that will be revealed shortly, we think it is appropriate to reproduce the appellant's grounds of appeal in full thus:-

1. *That the learned Resident Magistrate with extended jurisdiction erred in law and in fact to convict and sentence the appellant in the absence of credible and sufficient evidence to prove beyond reasonable*

doubt an offence of being found in possession of goods suspected to have been stolen against the appellant.

2. *That PW3's witnesses that the appellant was not the real culprit and that he was just hired to drive such herds of cattle from Nyabange to Ochuna village by Chacha Kishere (who was discharged by prosecution side) and one Maria Maharage (who was totally not arrested) was not totally worked on by the trial RM either mistakenly or properly just to favour the prosecution side by convicting the appellant.*
3. *That the appellant during his defence managed to meet the required standard of the law i. e section 312(1) (b) by satisfying the trial court that he was not caught at the scene of event and when found with ten herds of cattle handed to him by one Chacha Kishere and Mariam Maharage on the way to Ochuna village, he was found with supporting documents such as cattle transport permit washing cattle receipt as narrated by PW4 before the trial court.*
4. *That the Resident Magistrate erred in law and fact to admit the caution (sic) statement as recorded by PW6 since the appellant was not given his right such as calling any relative or any legal personnel who could witness the interrogations as the CPA*

requires. The appellant's deeply rooted defence was not considered during trial.

5. *That the Resident Magistrate misdirected himself by relying on prosecution side by admitting all exhibits tendered thinking they were credible but they were not, for example the cautioned statement tendered and admitted shows the appellant was facing an offence of unyang'anyi wa kutumia silaha without mentioning the section of law contradicting with the charge sheet in record which talks of appellant being found in possession of goods suspected to have been stolen c/s 312(1) (b) of the Penal Code (Cap 16 R.E 2002).*
6. *That the doctrine of recent possession cannot stand as a basis for conviction towards the appellant since he managed to satisfy the trial court by giving explanation depending on the circumstances of the case. For the case on hand, appellant fulfilled that requirement of the law by providing valid supporting documents such as cattle transfer permit, washing cattle receipt etc. (Refer the case of Director of Public Prosecutions v. Joachim Komba 1984 TLR 213).*
7. *That since the appeal is against both conviction and sentence the appellant's sentence of 10 years jail term is too excessive as per section 312(1) (b) of the Penal Code which provides that the imprisonment if at all the offence the appellant is*

charged with is proved beyond reasonable doubt would not exceed three years taking into consideration he is the first offender with no previous criminality record at hand.

From the appellant's grounds of appeal, we note that in grounds 1, 2, 3, 6 and 7, his complaint seems to indicate that he was convicted in respect of the second count while his conviction was premised on the first count. However, it seems to us that the centre of his complaint is that both the trial and first appellate courts wrongly relied on the doctrine of recent possession to ground his conviction on the allegation that he was found in possession of goods suspected to be stolen contrary to section 312 (1) (b) of the Penal Code. Therefore, as there is no dispute that the appellant was convicted on the first count, his complaints in the reproduced grounds of appeal boil down to four major compressed grounds of appeal:-

1. *That the first appellate court erred in law and fact to confirm the trial court's findings that the doctrine of recent possession was properly invoked in grounding the appellant's conviction in respect of cattle theft.*
2. *That the first appellate court erred in law and fact to rely on the cautioned statement (exhibit. P3) to*

confirm the appellant's conviction on the first count while it was illegally procured and improperly relied in evidence.

3. *That the first appellate court erred in law and fact in holding that the case against the appellant was proved beyond reasonable doubt.*
4. *That the first appellate court erred in law to confirm the sentence of ten years imprisonment which is excessive.*

At the hearing of the appeal, the appellant appeared remotely through video conference link from Musoma Prison to the court room and was unrepresented. The respondent Republic enjoyed the services of Mr. Kainunura Anesius learned Senior State Attorney, assisted by Mr. Mafuru Moses and Mr. Frank Nchanila, learned State Attorneys. The appellant adopted his grounds of appeal and prayed to the Court to allow the respondent Republic's counsel to submit and reserved his right of rejoinder if need to do so would arise.

Submitting on the first ground of appeal, Mr. Nchanila stated that the doctrine of recent possession was properly invoked by the trial court because the appellant was found in possession of the cattle which were

stolen from the residence of the complainant (PW2). He submitted further that the persons, who knew the identity of the stolen cattle as having a mark ABED which was the name of the owner's eldest son, identified them at the trial court. He added that the said witnesses testified how the cattle were stolen and later found in possession of the appellant within eleven (11) hours after the theft. Indeed, he submitted that the ten cattle which were found in possession of the appellant belonged to the complainant (PW2). On the other hand, he stated that PW3 testified that though the appellant had a permit of transporting five herds of cattle, he had ten cattle when he was arrested. To this end, Mr. Nchanila submitted that the trial court properly disbelieved the appellant's story that he was only tasked to take the cattle to another place and that he was not responsible for the theft.

Moreover, the learned State Attorney argued that during cross-examination, the appellant agreed that the permit was to transport five cattle and that though the permit was written Lucas Chacha, the appellant mentioned Chacha Kishere as the responsible person. In his submission, the appellant's story created more doubts on the authenticity of the permit and the truthfulness of his statement that he was only tasked to drive the cattle. To support his submission, the learned State Attorney made reference to the decision of this Court in

Mohamed Hassan @ Saidi v. The Republic, Criminal Appeal No.410 of 2015 (unreported). Ultimately, he implored us to find that both the trial and first appellate courts properly invoked the doctrine of recent possession to convict the appellant with the offence of cattle theft and legally convicted him.

At this juncture, to appreciate the deliberation which will follow, we think it is important to set the position of the law clear on the doctrine of recent possession. It is worth making reference to the decision of the Court in **Joseph Mkumbwa and Another v. The Republic**, Criminal Appeal No.94 of 2007 (unreported) in which it was stated that:-

> *"The position of the law on recent possession can be stated thus. Where a person is found in possession of property recently stolen or unlawfully obtained he is presumed to have committed the offence connected with person or place wherefrom the property was obtained. 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 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. It must be the one that was stolen/ obtained during the commission of the*

offence charged. ***The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements****. (See* ***ALLY BAKARI AND PILI BAKARI v. R*** *[1992] T. L. R. 10 which was followed in* ***SALEHE MWEYA AND 3 OTHERS v. R****, Criminal Appeal No.66 of 2006 and* ***ACHAJ AYUB @ MSUMARI & OTHERS v. R****, Criminal Appeal No.136 of 2009 (both unreported)."* [Emphasis added]

Moreover, in **Twaha Elias Mwandungu v. The Republic**, Criminal Appeal No.8 of 1995 (unreported), the Court stated as follows on presumption on section 122 of Evidence Act Cap. 6. (now R. E. 2019):

> *"The presumption under this section embodies, inter alia, the well known doctrine of recent possession which is to the effect that a man who is in possession of stolen goods soon after the theft is either a thief or has received the goods knowing them to be stolen, unless he can account for his possession by at least giving an explanation which may reasonably be true".*

We note from the record of appeal that the trial and first appellate courts came to the firm finding that the doctrine of recent possession was properly applicable in the circumstances of the case in grounding

the appellant's conviction. On the other hand, the appellant contends that he gave reasonable application on how the ten herds of cattle came into his possession. The question for our determination thus is whether that was a proper finding as contested by the appellant.

Admittedly, during his defence at the trial the appellant testified as follows:-

> *"I remember on 24th July, 2018 at 05:00 hours I was followed by Chacha Kichere who is the second accused from my home, he told me that he is doing business together with Lucas Chacha, he told me that he has cattle which he need me to drive to him to the market. The first thing I required from him is permit, he gave me permit which is written the name of Lucas Chacha, after reading the permits and satisfying myself that it is correct, I started to drive the cattle together with Lucas Chacha but the second accused went back to his home. When we arrived at Nyancha Bakenye village we were arrested and I explained what happened until my arrest".*

On the other hand, we gather from the record of appeal that the appellant's defence on how he came into possession of the said herds of cattle was not shaken by both his co-accused and the public prosecutor. In short, his story was consistent. We better let the record of

proceedings of the trial court tell the story. When cross-examined by second accused, he responded as follows:-

> *"You are working as bodaboda operator, I know you before the date of incident. For the first time you employed me to drive the herd of cattle at Nyamakungu market before this incident that's why I trusted you when you employed me for the second time. You came to my house that night and told me that you have herd of cattle which you asked me to help you to drive them to the market (mnadani). You handed cattle to me at 05:00 hours morning. You took me on your motorcycle at Daraja sita area along Musoma – Tarime Highway. We have no quarrels with you. You took me with motorcycle to Daraja sita area. My home is at Songea area".*

When he was cross-examined by the public prosecutor, the appellant maintained his version of story thus:-

> *"I live at Songe area in rented house. The second accused lives at Nyabange, accused used to carry me on his motorcycle because he is working as a bodaboda operator he told me to take the cattle to Ochuma (mnadani) market. The permit was written five herd of cattle, I asked them the reason they told me that my duty is to drive the cattle and to be paid,*

they paid me Tshs 150,000/=. I trusted the permit they gave me, Daraja sita is within Butiama District".

There is no dispute that the appellant was found in possession of cattle which were recently stolen and that he was not the owner, but they belonged to the complainant (PW2). It is also clear that the appellant offered an explanation on how the cattle were handed over to him by the second accused to drive them to the market place. In the circumstances, while we agree with the learned State Attorney that the prosecution proved the elements of the doctrine of recent possession as propounded in the case of **Joseph Mkumbwa** (supra), we are of the settled opinion that the appellant sufficiently gave an account on how he came into the possession of the cattle which might have been reasonably true as it was not greatly challenged by the second accused. It was thus the duty of the prosecution to counter the doubts which the appellant raised in connection of how he came into possession of the stolen cattle. We therefore, find merit in the first ground of appeal and we allow it.

With regard to the second ground of appeal, Mr. Nchanila submitted that the appellant recorded a cautioned statement which was tendered by PW6 and admitted as exhibit. P3. The admission, he added, was not objected to by the appellant as it is vividly reflected in the record of

appeal. He therefore contended that the appellant cannot object the admission of the cautioned statement at this stage while the procedure was followed in tendering and admitting it at the trial court. To support his stance he placed reliance on the decision of the Court in **Nyerere Nyague v. The Republic,** Criminal Appeal No.67 of 2010 (unreported).

On the validity of the cautioned statement, the learned State Attorney submitted that in his testimony, PW6 stated that the appellant was given the right to call his relatives or a lawyer but did not utilize it. Besides, he stated, the appellant did not complain at the trial court before the cautioned statement was admitted in evidence. He added that the contents of exhibit P3 makes it clear on what he stated concerning what happened on the issue involving cattle theft. He therefore urged the Court to follow what is stated in **Mukami w/o Wankyo v. The Republic** [1990] T.L.R. 46.

The learned State Attorney concluded his submission on this ground of appeal by contending that failure to indicate the section of the law and cautioning the appellant on a different offence is not fatal as it is curable under section 388 of the CPA. In the premises, he requested us to dismiss the appellant's complaint.

On our part, we note that the complaint on the second ground of appeal is two limbed. First, that the appellant was cautioned on a different offence of armed robbery (unyangányi wa kutumia silaha) from that he was charged with. Second, that the cautioned statement was recorded without the presence of his relatives or lawyer in contravention of his rights provided under the CPA.

Admittedly, as per exhibit P3 we agree that the appellant was cautioned on the offence of "unyangányi wa kutumia silaha" and that no section of the law was indicated as required under section 53 (1) (c) of the CPA. However, having scrutinized the contents of the cautioned statement, we are convinced that it was a mere slip of the pen. We are of the considered opinion that the contents reflected the offences of cattle theft which was stated in the charge sheet. Therefore, the omission of not cautioning the appellant on a specific offence and failure to indicate the offence section in the cautioned statement cannot vitiate the entire exhibit P3. We think that the omission is not fatal as no serious miscarriage of justice was occasioned in view of the substance of the cautioned statement which reflects the role of the appellant in the offence of cattle theft.

Indeed, the omission of PW6 to caution the appellant on a specific offence charged and to cite the provision of the law cannot in the circumstances of this case lead to the exclusion of the entire evidence in respect of the cautioned statement (exhibit. P3) as contemplated in section 169 (1) of the CPA. We are of the view that this is not a serious contravention. We also find that the requested exclusion of exhibit P3 is not necessary for the fairness of the proceedings as contemplated under section 169(4) of the CPA.

It is in this regard that in **Nyerere Nyague** (supra) the Court observed, among others that:-

> *"It is not therefore correct to take that every apparent contravention of the provisions of the CPA automatically leads to the exclusion of the evidence in question".*

On the other hand, the appellant's contention that he was not given his rights such as calling any relative or any lawyer who could witness the interrogation is unfounded because the cautioned statement was tendered by PW6 and the appellant was asked if he had any objection, he replied that he had none. If the appellant was not satisfied with the manner of recording the cautioned statement, he was supposed to raise that concern to the trial court before it was admitted in evidence as

exhibit P3 so that an inquiry would be conducted to establish the voluntariness of the statement as observed in **Twaha Ali and Five Others**, Criminal Appeal No.78 of 2004 (unreported). In **Selemani Hassan v. The Republic**, Criminal Appeal No.364 of 2008 (unreported) the Court stated that:-

> *"It is also true that a statement will be presumed to have been voluntarily made until objection is made to its admissibility by the defence".*

Besides, we note from the record of appeal that the appellant did not complain on the irregularity of the cautioned statement before the first appellate court.

We are however mindful of the settled position that though the cautioned statement is admitted at the trial without objection from the accused, it does not lessen the duty of the trial court to ascertain the truthfulness of the confession.

Thus, in **Joseph Mkumbwa and Another** (supra) the Court stated that:-

> *"We think that, that presumption does not go with the weight to be attached to every such evidence. Admissibility of the evidence is one thing; its weight or probative value is another. In evaluating the weight to*

be attached to an alleged confession, a trial court has the duty to look at all the surrounding circumstances. It also has to see whether the law has been complied with in extracting the statement".

Applying the settled principle stated above to the case at hand, we think it is proper to see if exhibit P3 reflected the admission of the appellant on the allegation laid in the charge sheet.

We have closely scrutinized exhibit P3 and we note that to a great extent the appellant exposed the previous episodes in which he was allegedly involved in cattle stealing. Indeed the relevant part of that statement in connection with the charge laid in the first count in the charge sheet is depicted as follows:-

"Mnamo tarehe 24/07/2018 muda wa saa 00:15 hrs ndipo tulienda kwenye mji wa bibi mmoja hapo Nyabange kwa ajili ya kwenda kuiba ngómbe wake. Kabla hatujafika kwenye mji huo tuliweza kukaa polini Jirani na mji huo mpaka huo muda tuliopangiana kufika na tukaenda hapo kuwatoa hao ngómbe. Muda huo tulikuwa kundi nzima letu. Lucas s/o Chacha, Chacha s/o Kichere, Maharage s/o Maria, Bunduki s/o? Pamoja na Chacha s/o? ambaye ni mdogo wake Maria s/o Maharage. Basi tulipofanikiwa kuwatoa hao ngómbe kwenye zizi hilo tukiwa wote sita tulipitia njia za polini mpaka kufika Beria ya Kirumi lango kubwa

hao ngómbe tuwapeleke huko Kijiji cha MTANA Wilayani ROLYA kwa kuwa kulikuwa na mnada siku ya Jumatano ya tarehe 25/07/2018. SWALI: Je kama mlikuwa watu sita kwenye timu yenu kwanini ng'ombe mliswaga watu wawili. JIBU sisi tulipendekezwa na wenzetu tupeleke hao ng'ombe na mara baada ya kuuza sisi wawili tuweze kulipwa pesa kubwa zaidi ya wenzetu. Ila wenzetu walitusindikiza mpaka darajani na wakarudi na sisi tuliendelea na safari.... Mbinu tunazotumia ni kuwaiba usiku wa manane na kupeleka kwa wenye mabucha. Pia kwa wale tunaowapeleka mnadani huwa tunaenda kuchukua MOVEMENT PERMIT. Mfano hawa ng'ombe tuliowaiba leo idadi ya ng'ombe 10 tulienda Beria ya Kirumi kukata tarehe 22/07/2018 ili tuweze kuondoka tarehe 23/07/2018 na hata makubaliano yetu na yule anayekatisha vibali tuliweza kumpa pesa kidogo na kuahidiana kumtumia pesa nyingine kwenye simu. Na wenzetu walituacha sisi wawili tuwapeleke wale ngómbe halafu wao watatufuata mnadani kwa usafiri wa pikipiki lakini bahati mbaya tulipofika Kijiji cha Wanyancha bakene tulikamatwa na wananchi na kutuweka chini ya ulinzi..."

In the premises, considering the story of the accused in the extracted part of exhibit P3 and the evidence of the prosecution witness with regard to the arrest of the appellant on 24th July, 2018 at

Wanyanchabakene village, it is undoubtedly concluded that he admitted to have committed the offence of cattle theft. We are also settled that exhibit P1 which consisted among others the permit to transport the herds of cattle renders credence to the fact that preparations were made to secure the said permit before theft was done as disclosed in the cautioned statement.

Moreover, as the appellant did not object to the admission of exhibit P3 when it was tendered at the trial court, we are settled that his confession suffices to convict him with the first count of cattle theft as found by the trial court though for different reason which we have overruled as intimated above.

It is instructive to make reference to Black's Law Dictionary 8th Edition, which defines confession to mean:-

> *"An acknowledgement in express words by the accused in a criminal case of the truth of the main fact charged or of some essential part of it"*

The definition squarely applies in the circumstances of the case at hand to justify the conviction of the appellant of the offence of cattle theft. Indeed, in **Anyungu and Others v. The Republic**, (1968) E. A. 239 the erstwhile East Africa Court of Appeal stated that:-

"A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried".

In the end, we are satisfied that considering the contents of exhibit P3 on the appellant's admission and the entire evidence in the record of appeal, the appellant was properly convicted of the offence of cattle theft. We therefore dismiss the second ground of appeal.

Turning to the third ground of appeal, we do not hesitate to state that in view of the position we have taken with regard to the second ground of appeal, we entirely agree with the learned State Attorney that the prosecution proved the allegation of cattle theft against the appellant to the required standard. Ultimately, we dismiss the third ground of appeal.

Lastly, in the fourth ground, the appellant complains that the sentence of ten years imposed by the trial court and confirmed by the first appellate court is manifestly excessive. In response, Mr. Nchanila submitted that since the offence of cattle theft attracts a maximum penalty of fifteen years imprisonment, the sentence of ten years imprisonment is not excessive. However, when he was prompted by the Court whether the trial Resident Magistrate who is not a Senior Resident Magistrate could impose the sentence more than his jurisdiction

provided for under section 170 (1) and (2) of the CPA, he conceded that in view of the said provision the sentence is excessive. He explained that since the offence falls under the Minimum Sentence Act, Cap 90 R. E. 2019, section 5 (1) (b) of the Act provides for a sentence of imprisonment not below five years and not exceeding fifteen years. In the circumstance he urged the Court to determine the sentence based on the nature of offence as stated in **Bernadeta Paul v. The Republic** (1992) T. L. R 97.

On our part, in view of clear indication that the trial court and the first appellate court acted upon wrong principle of law in imposing and confirming the excessive sentence respectively, we are settled that this is a proper case in which we should interfere with the discretion of the two courts below. In the event, considering that the appellant is a first offender, we set aside the sentence of ten years and substitute thereof with five years. Moreover, considering the fact that the two cattle which were found in possession of the appellant were given to those who responded to the alarm by the complainant, we set aside the order of compensation of TZS. 900,000. Consequently, we partly allow the fourth ground of appeal.

In the final analysis, save for what we have decided with regard to the first and fourth grounds of appeal, we dismiss the appeal.

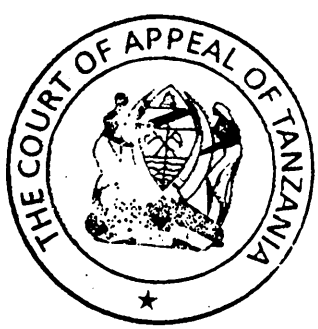
DATED at **MUSOMA** this 4th day of November, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 5th day of November, 2021 in the presence of Mr. Frank Nchanila, learned State Attorney for the Respondent/Republic linked via Video Conference and the Appellant who appeared remotely via Video link from Musoma Prison is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL