

**IN THE HIGH COURT OF TANZANIA**

**AT SONGEA**

**(PC) CRIMINAL APPEAL NO. 4 OF 2005**

**(Songea District Criminal Appeal No.55 of 2004 originating  
from Lumbingu Primary Court Cr.Case No. 57 of 2004)**

**LAMBETI MBAWALA .....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**Hearing Concluded: 30/4/2007**

**Judgment Delivered: 4/6/2007**

**J U D G M E N T**

**UZIA, J**

This is a second appeal. The appeal arises from the decision of Lumbingu Primary Court in respect of Criminal Case No. 57 of 2004. The appellant being unsuccessful in the Primary Court, he filed an appeal to the District Court at Songea. The appellant was also unsuccessful, hence this appeal.

The appellant was convicted for the offence of Cattle theft c/s265 and Section 268 of the Penal Code. It seems the second accused one Deodatus s/o Njovu was acquitted.

The appellant filed six grounds of Appeal, the grounds are as follow:

1. That the 1st appellate court did no appraise the evidence from its own impression and come to a sound decision.
2. The ingredients of Cattle theft were not proved beyond reasonable doubt against the appellant.
3. The appellant was denied the right to be heard; because was not allowed to summon a witness who could speak in his favour.
4. The identification of the stolen property was not watertight because the cow was said to have been driven in the night. There was no help of any light in identifying the alleged head of cattle.
5. PW.2 and PW.3 did not raise alarm to warn other people who could help to arrest the appellant and another who was acquitted.
6. The trial court erred in law and in fact for not considering his defence of alibi.

Going by the record of the Primary Court, I discovered that, the court assessors attended court session, but they were not given chance to give their opinion before the judgment was written by the magistrate in accordance with GN. No. 2/1988 which provides that, decisions of the Primary Courts are by majority vote.

Therefore, the procedural error shown above would have been considered by the District Court. Apart from that, the Court, which heard the appeal, did not appraise the evidence of the Primary Court, as a result, some issues were left unresolved. One of the glaring issue is whether the prosecution side managed to prove the offence beyond reasonable doubt.

The only evidence which links the appellant with the offence is that of PW.2, who alleged to have seen the appellant with the 2nd accused person driving a head of cattle in the night. He did not recognize the alleged beast, he just suspected to be the property of the complainant. The accused person was arrested without the alleged head of cattle and charged with the offence of cattle theft. The head of cattle was not produced as Exhibit in court. I also agree with the learned State Attorney that, the owner of a head cattle failed to tell the court the special marks of the alleged head of cattle because the head of cattle was not produced as Exhibit in court. It is unfortunate that, the trial court did not direct its mind on that important issue. The second issue is that of shifting burden of proof to the accused person. For example the following paragraph shows how the accused person was required to prove his innocence.

*“Kipi kinamfanya ashindwe kufafanua matembezi yake kuanzia tarehe 22/3/2004 hadi tarehe 28/3/2004...”*

*“Kwa kushindwa kwake kuelezea kwa ufasaha na wakati upande wa mashitaka unauzito wa kutosha Mahakama imeridhika bila shaka kuwa mshtakiwa Lambeti Mbawala alitenda kosa”*

I am sure the District Magistrate did not consider those aspects, had he directed himself properly, he wouldn't uphold the decision of the Primary Court.

After reviewing the evidence on record, I declined to support the findings of the Primary Court and that of the District Court.

The offence against the accused person one Lambeti Mbawala is not proved beyond reasonable doubt.

I therefore quash the conviction and acquit the accused person and order immediate release of the accused person unless otherwise held in connection with another matter.

**L. M. K. UZIA**

**JUDGE**

**4/6/2007**

Right of Appeal explained.

**L.M. K. UZIA**

**JUDGE**

**4/6/2007**

**I certify that this is a true and correct copy of Original Judgment.**

  
**DISTRICT REGISTRAR**  
**HIGH COURT**  
**SONGEA**