

# IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

## CRIMINAL APPEAL NUMBER 53 of 2012

(Originating from the Rufiji District Court at Utete, Criminal Case No. 118/2010  
M. Matitu-PDM)

**SEIF KIBUKI.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

## **JUDGMENT**

**Date of last Order:** 10-07-2012

**Date of Judgment:** 17-07-2012

**JUMA, J.:**

The appellant SEIF KIBUKI appeals against the judgment of the Rufiji District Court. In the District Court of Rufiji at Utete, appellant and Bambaku Mbonde were charged with the offence of cattle theft contrary to section 265 and 268 of the **Penal Code Cap. 16**. Particulars of the offence were that on 4<sup>th</sup> November 2010 at about 18:00 p.m. at Utete village, the two accused persons jointly and together stole ten goats valued at

TZS. 450,000/= the property of one Hindi Salum Nindai. In his judgment dated 27<sup>th</sup> December 2011, the trial Principal District Magistrate (M.T. Matitu) concluded that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellant and his co-accused. The two were each sentenced to serve five years in prison and each was ordered to pay compensation of one goat.

The background facts leading up to this appeal traces back to the evening of 4<sup>th</sup> November 2010 when the complainant Hindi d/o Salum Nindai (PW1) and her young sister went to a local grazing field to collect and lead her grazing goats back home. They were surprised to find only four goats remaining at the grazing field. The complainant reported the loss to the police. It was a month later on 6<sup>th</sup> December 2010 when the complainant was summoned to go back to the police station to identify remains of a goat. She was told that two people had been arrested while they were slaughtering a goat in circumstances that appeared suspicious to the arresting police officer.

Evidence at the trial court showed that it was the police constable Masimango (PW2), who actually arrested the

appellant. The police constable was on patrol along the banks of a river. He saw two people busy slaughtering an animal. On seeing the approaching police officer, Bambaku Mbonde ran away carrying with him his bush knife and portions of the meat. The appellant did not run away but remained where he was. He told the police constable that he did not understand why Mr. Mbonde had decided to run away from the scene. The appellant explained to the police officer how he had earlier been asked by Mr. Mbonde to assist him to slaughter the goat. Constable Masimango arrested the appellant together with the meat he found at the scene.

On behalf of the defence, Kulwa Tua (DW2) testified on how earlier on the same day he was working for the appellant at the appellant's farm when Mr. Mbonde appeared and invited the appellant to slaughter Mr. Mbonde's goat. Few minutes later the appellant returned to where Mr. Kulwa Tua was working. This time appellant was in the company of a police officer, carrying goat meat. Kulwa Tua was informed that Mr. Mbonde ran away when he saw the police officer.

Attorney who appeared for the respondent Republic, did not support the conviction of the appellant. The learned State Attorney submitted that the way the complainant identified the remains of the goat did not prove that the goat that was being slaughtered was amongst the goats stolen from the complainant. Ms Massawe stated further that the purported identification of the goat by mark on the head and colour was not sufficient because the complainant did not specify which colour she was referring to and what type of the mark distinguished her goat from other goats.

The learned State Attorney also submitted that the trial magistrate failed to evaluate the evidence regarding the absence of the guilty knowledge on the part of the appellant. According to Ms Massawe, there was no evidence to show that the appellant ought to have known or suspected the goat he was invited by Mr. Mbonde to assist in the slaughter had in fact been stolen. That's why while Mr. Mbonde ran away when he saw the approaching police officer, the appellant did not run away. By those submissions, Ms Massawe contended that conviction of the appellant by the trial District Court was not supported by cogent evidence.

Before I re-evaluate the evidence that was before the trial court, I must express my unease about the failure of the judgment of the trial court to comply with mandatory contents of judgments prescribed by section 312-(1) of the **Criminal Procedure Act**. Apart from the requirement that judgments must be written under the personal direction and superintendence of the presiding judge or magistrate in the language of the court; judgments must contain the point or points for determination, the decision thereon and the reasons for the decision. Section 312-(1) of the **CPA** is couched in mandatory language in so far as content of a judgment is concerned.

In his considered judgment, the trial Principal District Magistrate did not include the point or points for determination, the decision thereon and the reasons for the decision as required by section 312-(1) of the **CPA**. In his two-page judgment, apart from revisiting the evidence of witnesses, the trial court did not show the point or points for determination and the decision on those points for determination. The Principal District Magistrate arrived at the

guilt of the appellant without showing the process towards that guilt when he stated:

*"All in all the evidence of PW2 established that both accused were at the place of slaughtering the goat where all of them were found at place where 2<sup>nd</sup> accused managed to run away in the presence of PW2. The goats which were stolen have been identified by the owner who is PW1. Therefore after the above explanation this court found that the prosecution has proved their case beyond reasonable doubts, all the accused persons are found guilty and convicted accordingly."***-page 2 of the judgment.**

Ingredients constituting the offence of cattle theft contrary to section 265 and 268 of the **Penal Code Cap. 16** for which an appellant was charged and convicted should, at very least, have provided the trial Principal District Magistrate with some guidance on the ingredients requiring proof, determination and assignment of reasons on each such ingredient of the offence. In order to prove the offence of stealing of the ten goats, the prosecution was required to bring its case within the ingredients of the offence of theft found in the definition of theft under section 258 (1) and (2) (a) of the **Penal Code**:

*258.-(1) A person who fraudulently and without claim of right takes any thing capable of being*

*stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing.*

*(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say–*

*(a) an intent permanently to deprive the general or special owner of the thing of it;*

Subjecting the facts of the present appeal with the ingredients of theft under the above-cited section 258 (1) and (2) (a) of the **Penal Code**, the first essential ingredient constituting the offence of theft is the taking of goats without any claim of right. Taking of the goats is the physical part or *actus reus* of the offence of theft for which the appellant was charged and convicted.

The only link between the appellant and the physical taking of goats from their grazing grounds is the appellant being found assisting his co-accused slaughtering a goat. But prosecution did not prove beyond reasonable doubt that the goat that was being slaughtered was amongst the goats that were taken from their grazing fields a month earlier. Chances of the complainant recovering her stolen goats increased if her

goats had distinguishing marks. It was the legal duty of the trial court to examine the circumstances in which the remains of a goat were identified by the purported owner. Unfortunately, the trial magistrate merely stated that- ***The goats which were stolen have been identified by the owner who is PW1.*** The learned State Attorney is with due respect correct in her submission that the way the complainant casually identified the remains of the goat at the police station was not in my opinion sufficient to prove that goat was amongst her goats which had a month earlier been stolen.

The learned State Attorney is also right to discredit the purported identification of the goat by merely mentioning of a mark and colour without going further to specify the type of the colour or the mark which marked out the goat as belonging to the complainant. I do not therefore agree with the trial magistrate that the *actus reus* of stealing of the goats was proved beyond reasonable doubt. There is no cogent evidence that proves beyond reasonable doubt that the slaughtered goat indeed belonged to the complainant. Merely being found with remains of a goat does not in itself prove that it was the same goat that was stolen a month earlier. Appellant did not dispute



the fact that he was arrested while he was assisting Mr. Mbonde to slaughter what Mr. Mbonde had earlier told the appellant was his own goat. At the very least, appellant was labouring under an honest and reasonable belief that the goat belonged to Mr. Mbonde.

After re-evaluating the evidence record of the trial court in light of the submissions of the learned State Attorney, I am satisfied that no offence under section 265 and 268 of the **Penal Code** has been made out against the appellant. For all above reasons, I hereby allow the appeal, consequent upon which the conviction is quashed and the sentence of five years imprisonment and the order of compensation of the value of one goat imposed upon the appellant is set aside. Appellant is accordingly set at liberty.

**DATED at DAR ES SALAAM this 17<sup>th</sup> July, 2012**

  
**I.H. Juma,**  
**JUDGE**

Judgement is delivered this 17<sup>th</sup> day of July, 2012 in the presence of the appellant and Ms Shelly, State Attorney (for the Respondent).

  
**I.H. Juma,**  
**JUDGE**