IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLANT JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 27 cf 21cf 33 cf 146 OF 2013

CRIMINAL CASE NO. 57 OF 2012

OF THE DISTRICT COURT OF KIGOMA

BEFORE:- HON. E.G. MRANGU RESIDENT MAGISTRATE I/C

KISHANGA S/O DAUD & OTHERS .....APPELLANT
(Original accused)

VERSUS

THE REPUBLIC .....RESPONDENT
(Original Prosecutor)

JUDGMENT

5th Feb & 10th Feb 2014

S.M.RUMANYIKA, J

The consolidated appeal numbers 21, 27, 33, 146 and of 2013 come at the instance of Yahaya Joseph, Emil Tacho, Peter Moris @ Makonda and Kishanga Daud. They are the 1st, 2nd, 3rd and 4th appellants respect.

Having been dissatisfied with charge, conviction and a subsequent sentence of 30 years term in jail each for the armed robbery c/s 287 A of the Penal Code cap. 16 R.E 2002. At, and by the District court – Kigoma (Criminal case NO. 57 of 2012). The impugned judgment dated 29.8.2012.

I think it results into no harm here, also to state that Charles Tunugu (5th accused then) was convicted for the cognate reception of the stolen property. Therefore suffered a custodial sentence of three 3 years. But preffered no appeal. Unless it is compelling otherwise, this judgment won't touch him much.

A close look at their four memoranda, lengthy, bulky, and argumentative as they would seem to be, they would in essence, suggest and fault the learned resident magistrate as follows:-

(1) Basing the conviction on an unreliable and improper visual identification solely by Pw1. But only on dock identification of the accused.

(2) Pw3's evidence being not credible. Given the material contradictions on the issue of the appellants having found possessing the stolen heads of cattle.

(3) No independent evidence was lead to corroborate the fact that the appellants shot three times in air making sure that the robbery was successful.

(4) The learned trial Resident Magistrate convicting them basing on uncorroborated evidence by co – accused.

(5) Conviction whilst the prosecution case was not proved beyond reasonable doubts.

(6) Reliance by the learned trial resident magistrate on the evidence of the 5th accused who had some interest to serve.

The appellants appeared in person, whilst Mr. Mkandala learned state attorney represents the Republic respondents.

When the appeal was called now for hearing, the appellants submitted generally but a bit combined, like saying that the 1st accused (Kishanga Daudi) was only an innocent victim. Having been engaged on payment by the 4th accused (Peter s/o Moris @ Makonde), to drive him the heads of cattle to the market around. That no charge of stealing or at all was proved as against him.

Emil s/o Tacho (2nd accused) simply submitted that he had nothing material to add to his memorandum of appeal. But urged me just to decide on the matter.

On his part, Yahaya s/o Joseph (3rd accused) submitted additional to his memorandum of appeal, that no independent villager appeared to testify in court on the alleged shooting by the appellant in air. Scaring the would be intervenors.

Peter s/o Moris @ Makonda (4th accused) submitted that the 1st accused/appellant committed the offence not his agent or at all.

In his reply, Mr. Mkandala submitted that the evidence was over whelming and properly. And so was both conviction and sentence. The material heads of cattle were traced and found possessed by the appellants in the bush immediately. And the latter readly admitted the offence. That indeed having been terrified by the invading appellants, Pw1 could, given the circumstances, not ably and properly identify them. The learned state attorney submitted.

It is evident in a nutshell that just in the afternoon of the material date, Pw1 was invaded grazing some three hundreds of heads of cattle around. They drove a dozen of cattle away with them. He identified the thugs to be the appellants and another not in this appeal. After they had shot in air to make it a success. And that by aid of foot prints, the cattle were traced back. Whereby the appellants were found just selling the same. To concretize their evidence, the prosecution had the cautioned statements of the 5th accused then in the stock.

However, the appellants are on record to have disowned the evidence very bitterly. Whereas the 1st appellant and the 5th then implicate the 4th accused in that the former was a mere innocent victim having been only engaged by the latter to drive the cattle to the market, the 4th accused/appellant denounces all the allegations

made by the two. And so are the remaining appellants. They still deny the charges. Nor were they found possessing the cattle. Like saying that they were simply fixed by the prosecution.

Now the central issues are 2: One; whether the appellants were properly identified by Pw1 (a boy of eighteen years old). Lonely grazing the cattle at the time. Two, whether the appellants were found possessing the heads of cattle. In fact if the source of light was the sole determinant of proper visual identification by a witness, then Pw1 would have had no reason not to identify the thugs in the midday. But given the prevailing circumstances then; the young boy grazing some hundreds of heads of cattle on an extensive grassland/ bush, he is being scared by some ammunitions in the air, assaulted with sticks by the armed assailants whom he didn't know before, but yet managed though terrified, to identify what instrument was being held by every individual assailants, I cannot, as Mr. Mkandala readily confessed very correctly in my considered opinion, be convinced that the young Pw1 identified the appellants with all the chances of mistaken identify ruled out. Ground 1 (one) of the appeal succeeds.

However, I do not see it being disputed that the heads of cattle were traced within the 1st three days. Whereby half of the dozen was found disposed. The period lapsed was, based on the nature of the property stolen reasonable by any stretch of the imagination.

At the beginning, the issue of them being possessing the heads of cattle was thought to be controversial. As long as none of the appellants was found selling, purchasing the same or otherwise doing such act. Save for an adverse inference that the Pws drew. Given the circumstances. However it is trite law that possession of a property needs not necessarily be physical and or contagious. Suffices the prosecution to show that a person interested had the knowledge of the property being there. Case of NURDIN AKASHA V.R (1995) TLR 246.

Going by the evidence of the 1st accused and having admitted possessing the cattle, but that he was a mere innocent (agent of the 4th accused), the evidence is self sustainable. That he just drove the heads of cattle on such be half, satisfied with the documentary permit that the 4th appellant had at the moment. For him and with all intents and purposes I will say that the evidence casted doubts on the prosecution case. Whether or not irregular and or fake permit is immaterial. Therefore even the alternative offence of possessing or receiving a stolen property was still remote. Much as the evidence was corroborated by his co – accused (5th accused) and the said permit originated not from him (1st appellant).

Another crusial piece of evidence was the an un objected cautioned statements of the 5th accused then. It is evidence by co – accused yes! which needs to be corroborated before grounding any

conviction of a fellow granted! But one implicates himself at the same time. What a coincidence! Therefore the question of one having some interest to serve is neither here nor there. Leave alone admission by the 4th appellant/accused to have requested the 5th accused to fetch him buyer of the cattle. Really it was one Yona who was never charged either. A totality of all this may suggest thus, that the evidence by co – accused was corroborated sufficiently. In fact it is even very unfortunate that these charges were laid at the 5th accused's door.

That is to say that the 4th appellant never objected to the production in evidence, of the 5th cautioned statement (exhibit "P2"). In that requested by the 4th appellant, he only found him the buyer of the six (6) material heads of cattle and was paid for the job. Without any description of the prevailing circumstances and manner of the sale on which any reasonable man may have well concluded that the 5th knew the plot before. Moreover the 2nd and 5th accused were in as far as charge for which 5th accused was altimately charged and convicted, when registered on 6/8/2012, not even had it read to them by the trial court. Then the prosecution was just closed! Without even being availed opportunity to respond to the new charges formerly. They weren't fairly heard. This missigiving suffices to quash the conviction. In fact the plot was known to the 4th appellant only. Leave alone the fact that at times he ran away escaping the arrest.