IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA

APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 49 OF 2013
(From Original Criminal Case No. 11 of 2012 in the District Court of Sumbawanga)

ALEXANDER MILAMBO ..... APPELLANT
Versus
THE REPUBLIC ..... RESPONDENT

17th December, 2014 & 22nd January, 2015

JUDGMENT

MWAMBEGELE, J.:

The appellant Alexander Milambo was arraigned in and convicted of the offence of stealing animals c/s 268 (1) & (2) of the Penal Code, Cap. 16 of the Revised Edition, 2002 by the District Court of Sumbawanga and sentenced to a prison term of five years. It was alleged that on 29.09.2012 at Nkundi Village, Sumbawanga District, the appellant did steal three cows valued at Tshs. 2,700,000/= the property of SAAFI Company [illegible] Aggrieved by the conviction and sentence, he has come to this [illegible]

for easy reference, can be put [illegible]

1. Prosecution did not prove their case to the required standards

2. Trial court erred in law and facts to cast the burden of proof of innocence over the accused in acting and finding the appellant guilty over defence witness inconsistence of their evidence.

3. The trial court erred in law and fact to act on a grave contradictory evidence of the prosecution over identification of the cattle without seeing the real one.

4. The trial court erred in law and fact to ignore the fact that all the marks i.e. V and ZIGZAG claimed to be the exclusive one by SAAFI CO. LTD was well found in all the cattle evidence brought by the defence and that the ring (pete) mark claimed by some of the prosecution was not at all shown by the prosecution was not at all shown by the prosecution.

5. That the trial court erred in law and fact to admit the cattle and skin exhibits ignoring the abjection that the same had been unreasonably delayed in the hands of the plaintiff for the purpose of forcing the marks which did not really exist at the day of purported commission of the offence.

At the hearing of this appeal on 17.12.2014, the appellant appeared in person under custody of the prison officers. Mr. Chambi, the learned Counsel who also represented him in the trial court, was present to argue the appeal for and on behalf of the appellant. He was assisted by Ms. Lugaganga, learned State Attorney, who appeared for and on behalf of the respondent Republic.

Mr. Chambi, learned Counsel for the appellant divided the five grounds of appeal in two groups. He argued the first three grounds together and the last two grounds together as a second set. On the first set of grounds, Mr. Chambi submitted that it is the duty of the prosecution to prove a case against an accused person beyond reasonable doubt. He cited the provisions of section 110 (1) & (2) of the Evidence Act, Cap. 6 of the Revised Edition, 2002 and ***Said Hemed Vs R*** [1987] TLR 117 as authorities for the proposition that the standard of proof in criminal cases is beyond reasonable doubt and when that burden shifts on the accused person, it is on the balance of probabilities.

The learned Counsel for the appellant went on to submit that the prosecution evidence had it that the appellant stole head of cattle from SAAFI Company which were white in colour and had marks "S" or "SF" which were allegedly exclusive marks for head of cattle belonging to SAAFI Company. And other marks which were allegedly exclusive to SAAFI cows were zigzag and "V" marks on the ears and that they were hornless belonging to the *borani* specie, he submitted. However, the exhibits tendered, he submitted were quite at variance with the prosecution evidence. As for the carcass, skin and head of the slaughtered animal found in possession of the appellant, he submitted that while the skin was reddish grey in colour,

court and resolved in favour

Suleiman Marando Vs Serikali ya Mapinduzi, Zanzibar (SMZ) [1998] TLR 375.

The learned counsel submitted on the second set of grounds of appeal that the zigzag and "V" marks were not exclusive to head of cattle belonging to SAAFI Company as the appellant brought four head of cattle belonging to him which had similar marks. He added that the prosecution evidence had it that the SAAFI cows had rings in the ears but the head of cattle and the carcass found in possession of the appellant had no such rings.

The learned counsel concluded that the prosecution evidence at the trial was not sufficient to ground a conviction and prayed that the appeal be allowed and the appellant released from prison.

On the other hand, Ms. Lugongo for the respondent Republic was of the view that the case against the appellant was proved to the hilt. She therefore supported the appellant's conviction and sentence meted out to him. She had two reasons in taking this view. First, that the appellant was found in possession of a carcass with its skin and head both of which were identified by the prosecution witnesses by its colour and marks to be the property of SAAFI Company. Secondly, one live animal was found in the appellant's cowshed and was fully identified by the prosecution witnesses to be belonging to SAAFI Company and the appellant confessed to be not his. That it is in the testimony of Michael Makwida PW1 who testified to the effect that the appellant told them that there was one head of cattle in his cowshed which was not familiar to him.

In the circumstances, the learned State Attorney submitted, the doctrine of recent possession was applicable and was rightly applied in the present case. As for the discrepancy respecting the colour of the carcass of one of the allegedly stolen cows, Ms. Lugongo was of the view that the discrepancy was not a major one to destroy the prosecution case as the same does not go to the root of the case. She thus urged the court to ignore it. The learned State Attorney, however, conceded to the complaint by the appellant's counsel that the reasoning in the judgment was not elegant. But she was quick to add that the flaw did not weaken the prosecution case which was quite strong to prove the case against the appellant beyond reasonable doubt. She thus prayed to this court to dismiss the appellant's appeal and endorse the decision and sentence of the trial court.

The counsel for the appellant rejoined that the discrepancy as to the colour of the carcass was a major one which goes to the root of the matter. It is a discrepancy which a prudent court would not ignore, he submitted. As for the live animal found in possession of the appellant and was alleged to have been among the head of cattle recently stolen from SAAFI Company, the learned counsel stated that it belonged to the appellant and he [illegible] other cows which had the similar mark [illegible] head of cattle. And as to the [illegible] he admitted to have [illegible] head of cattle in his kowshed which was [illegible] counsel stated that the appellant never said that. He thus stated that the appellant discharged

enough burden as to the property found in his possession that it was his property. As for the inelegant reasoning in the judgment, the appellant's counsel stated that an improperly reasoned judgment is no judgment at all. He thus reiterated that the appeal be allowed and the appellant left free.

I have dispassionately read through the record of this appeal in the light of the rival submissions by both counsel. The strength of the prosecution case is in the fact that the appellant was found in recently stolen head of cattle. The live head of cattle had marks allegedly peculiar to SAAFI Company cows. This is testified to by all the five prosecution witnesses. Michael Makwiba PW1; a veterinary doctor of the complainant company testified to the effect that he, together with a certain Constancea Lingamila PW2; a Village Executive Officer (VEO), went to the homestead of the appellant and found him with meat, skin, head, as well as one live cow which had the marks of the complainant company. The skin had an "S" and the head had a "V" and zigzag marks on the ears. The live animal with marks identified to be peculiar to cows belonging to the complainant company was found in the appellant's cowshed. The appellant, allegedly, told PW1 and PW2 beforehand that there was a strange cow in his cowshed. The live head of cattle was tendered and admitted in evidence as Exh. PI and the meat, skin [illegible] were admitted as Exh. PII, I presume, collectively. PW2 added that Exh. PI had also an "SF" mark on the right thigh.

The testimonies of PW1 and PW2 had support of the rest of the prosecution witnesses. Jestus Mauluge PW3, though his testimony supported that of PW1 and PW2, his was not explicit on the marks. However, Edward Mizengo PW4 was quite explicit on the marks; an "SF" mark in the leg and a "V" mark on the ear. Likewise ASP Kalinga PW5; a police officer who had the conduct of this case and had gone to the *locus in quo* and found PW1 and PW2, was quite detailed on the marks; both of the skin and head and that of the live animal.

The appellant, in his defence, came up with a story that both the slaughtered animal and the live one belonged to him. In fact he is said to have brought to court his other animals which had similar marks. They were brought for identification as they were not tendered as exhibits. They are therefore not part of the record of this case. An identical situation was the case in ***Godbless Jonathan Lema Vs Mussa Hamisi Mkanga & 2 others*** , Civil Appeal No. 47 of 2012 (CAT unreported). In that case, during a trial in the High Court, the petitioner presented certificates for verification by the court and the documents were so verified by the court and returned to the party who presented them. They were not tendered in evidence. On appeal, the Court of Appeal held that the documents were not part of the record and that the course taken was contrary to the well established procedure. The court of appeal articulated:

> "... the procedure or 'presenting' the certificates is contrary to the well known procedure of

tendering documents in courts. Ordinarily such evidence must come direct and tendered by the owner of such document. We wish to point out that generally speaking the Evidence Act is intended to provide guidance on how and what evidence can be taken in judicial proceeding in order to prevent or at least minimize the chances of a miscarriage of justice. Without following the basic safeguards in the law of evidence, a trial court can easily deteriorate into a kangaroo court (see **Henjewele v R,** Criminal Appeal No. 209 of 2005). Furthermore the record does not show the appellant to have been given opportunity to say something in connection with the 'presentation' of the certificates in question as per the well established practice. To crown it all the same were returned to Mr. Allute on the same day. So, then they are not part and parcel of the record, notwithstanding the manner in which they were presented. In view of the legal flaws shown above, we are of the settled mind that there is no evidence on record to show that the respondents were registered voters ..."

I wish to state at this juncture that ***Godbless Jonathan Lema*** was an election petition and the court was grappling with presentation of documents. However, I equally am of the considered view that the reasoning would apply in any criminal matter as the present one and on presentation of nondocuments like cows, machines *et cetera*.

In the case at hand, after fielding its last winess, the defence prayed to court that the court sees the two cows which were within the court precintcs with a view to proving the same belonged to the appellant and had identical marks like the one which was found in the appellant's cowshed. The court, the prayer having met no objection from the prosecution, granted the prayer and moved outside the courtroom to see the said cows. After that, the court recorded:

> "Court: outside of (sic) the court I saw two black female (sic) *borani* cows. No horns. One has 'A' mark and another 'A1' mark and ears of zigzag.
>
> Sgd. (Mwanjokolo)
>
> RM
>
> 29.04.2013".

Despite the fact that the foregoing excerpt was inelegantly taken, the message coming out of it is, with necessary glossing, clear: the court observed the two cows and that one was marked "A" and another was marked "A1" and both had zigzag marks on the ears. The procedure opted

by the trial couurt had three major procedural flaws. First, it was contrary to the well established procedure as ullucidated above in ***Godbless Jonathan Lema***. The cows were just presented for observation with a view to proving that the same belonged to the appellant just like exhibits PI and PII. They were not tendered in evidence. They are therefore not pary of the record ot htid case. The second flaw is that the court was turned into a witness thereby abrogating it main duty of being an umpire. Thus by the court saying it had observed the cows and describing, *inter alia*, its marks and colour, was playing nothing but the role of a witness. What ought to have been done in the circumstances was the court to receive evidence to that effect from a witness and the best witness in this respect would have been the appellant himself who would have tendered the two cows as exhibits and and the court would have recorded the proceedings accordingly. Thirdly, what transpired in the instant case also had the effect of doing injustice on the part of the prosecution because, no time was accorded to it to comment or cross-examine on the same. Suffice it to say that the two cows brought to court by the defence so as to prove the head of cattle in the cowshed of the appellant were just like Exh. PI and PII, are not part of evidence in this case.

The sum total of the foregoing is that the appellant did not suffiently prove how he came into possession of the stolen live cow which was adequately iddentified by the prosecution witnesses to be part of the recently stolen cows belonging to the complainant company. It is trite law that once an accused person is found in possession of recently stolen items, the burden is upon him to prove that he lawfully acquired the same. This burden, as

was stated by this court in ***Maruzuku Hamisi V R*** [1997] TLR 1, following ***Hamisi Vs R*** [1963] EA 209, is not a heavy one. Failure of an accused person to lawfully account how he came into possession of recently stolen items, it may be presumed that he is the actual thief or guilty receiver. I find fortification on this stance in the case of See also: ***Mustafa Darajani Vs R*** Criminal Appeal no. 277 of 2008 (CAT unreported) in which it was held:

> "... where an accused person is found in possession of property recently stolen which property was duly identified by the complainant, then such an accused person is taken to have been either the actual thief or guilty receiver."

[see also: ***Amani Kikoba Vs R*** Criminal Appeal No. 293 of 2013, ***Magesa Chacha Nyakibali & Another Vs R*** Criminal Appeal No. 307 of 2013 both unreported decisions of the Court of Appeal and ***DPP Vs Joachim Komba*** [1984] TLR 213; the decision of this Court, to mention but a few].

In the instant case, the appellant failed to account how he came into possession of the live animal (Exh. PI); the subject of the charge, which was identified to be among the recently stolen from the appellant company and amply identified by the PW1 through to PW4 in the presence of PW5; an Officer Commanding Criminal Investigation Department (OC-CID) and who had the conduct of this case. I find and hold that there was enough

material brought to the fore by the prosecution to found a conviction against the appellant.

As for the sentence, the appellant was sentenced to serve a term of five years in jail. The offence with which he was charged, on conviction, attracts a sentence of up to fifteen years in jail. It is my well considered view that the sentence of five years meted out to the appellant met the justice of this case. I find no sufficient grounds to meddle with it.

In the upshot, I find no merit in this appeal and consequently dismiss it in its entirety. Order accordingly.

DATED at SUMBAWANGA this 22nd day of January, 2015.

J. C. M. MWAMBEGELE
JUDGE