

IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 2 OF 2016

ORIGINAL CRIMINAL CASE NO. 225 OF 2013

THE DISTRICT COURT OF DODOMA DISTRICT AT DODOMA

YUSUPH MADELEMO @ PIASON APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

5/10/201 & 21/10/2016

JUDGMENT

SEHEL, J:

Yusuph Madelemo @ Piason who is the appellant in this appeal, was charged with stealing by agent Contrary to Section 273 (b) of the Penal Code, Cap 16. It was alleged in the charge sheet that on 10th June, 2013 at Ipala village within the Municipality of Dodoma, the appellant stole 51 cows which among them, 10 heads had been entrusted to him in 1998 by Bakari Mapumba for grazing and

agricultural activities, which later on gave birth and become 31 cows all valued at Tshs 11,350,000/= . He denied the charge. However at the end of the trial he was found guilty as charged and was convicted accordingly. He was sentenced to three (3) years imprisonment. The court also ordered "31 heads of cows and 16 calves be returned to the complainant Bakari Mapumba". He was aggrieved. Through the services of Nyangarika and company Advocates, he lodged his petition of appeal to this court.

At the trial, the prosecution adduced evidence to the effect that in April, 1998 Bakari Mapumba (PW1) entrusted 10 cows to the appellant that bears Mark X. Amongst these cows, seven were females and three males. The appellant is to benefit from manure and milk. In May, 2013, PW1 requested Simon Mapumba (PW2) and Elia Mapumba to go to the appellant and bring back his 31 cows but the appellant refused to release the cows claiming that they are his. Both PW1 and PW2 said it was Dan Mkunga, village Executive Officer and village life stock Officer who counted 31 cows at the boma of the appellant in May, 2013. Richard Ally Chimya (PW7) who was VEO

of Ipala in 2013 testified that on 17/7/2013 he went to the boma of the appellant and counted heads of cattle and he found 36 cattles. He tendered the document showing the heads of cattle as Exh.P2. This witness was later on recalled after the court went to visit the appellant's boma and in his testimony he said when they went on 8/5/2015 they found 18 heads of cattle.

The prosecution also paraded witnesses who witnessed the handing over in 1998. These are Lameck Nhunga (Pw3); Bakari Omary (PW4) ; and Amos Msagwa (PW5). The accused caution statement was tendered as Exh.P1.

In his defence the appellant said he married PW1's daughter in 1989 and he paid PW1 six (6) cow and one goat as bride price. These cows had mark "X" and that mark "X" is within their family. He said after two weeks PW1 brought five heads of cattle; three females and two males. The accused said these are the cows that he paid as pride price and was requested to look after them. In 2003 PW1 took 37 cows and he gave him 3 cows as payment for the work done as such PW1 does not owe him any cow. The trial magistrate in his decision stated

that since this explanation was not raised during the hearing of the prosecution witnesses then he ruled out the accused's defence.

In his ground of appeal, the appellant said according to the circumstances of the case the case is not a Criminal one rather a Civil Case. It was also pointed that there are contradictions on the prosecution's witnesses in respect of the number of cows such that led to the trial magistrate to issue astonishing order.

In short there is no dispute that the appellant was entrusted with cows by PW1 in 1998. Therefore the crucial issue here is whether the offence of stealing by agent of 31 cows appeared in the charge sheet was proved beyond reasonable doubt.

PW7 in his testimony said he went to the appellant, boma in 2013 and found therein 36 cattle and he tendered Exhibit P2 to prove the same. However, this Exhibit P2 does not show or suggest as to whether the cattle found in the appellant's boma are the ones belong to PW1, the complainant. It should be noted that on 8/5/2015 when the trial court visited the boma, they were only 18 cows. It should also be

noted that the appellant in his defence ~~the~~ maintained that the cows entrusted to him were returned to PW1 in 2003 and he was given 3 cows as payment for the work done. This is also the version that he gave to the police as reflected in Exhibit P1.

In the case of **Fadhili Majura Vs. Republic, Criminal Appeal No. 207 of 2004 (unreported)** the Court of Appeal of Tanzania held that where the appellant defence version raises a reasonable doubt on the prosecution story then the benefit of that doubt should be given to the appellant.

In the matter at hand, in deed the appellant's story raises doubts to the prosecution case though the trial magistrate ruled it out with the reason that the appellant did not raise it during the hearing of the prosecution evidence. With due respect, the story of the appellant at the trial is the same as stated at the police as evidenced by Exhibit P1. Further, as correctly submitted by Mr. Nyangarika, the evidence of the prosecution has apparent contradictions in the number of cows such that led to the trial magistrate to issue astonishing order. The charge sheet talks of 31 cows, PW1, PW2 and PW3 talks of 31 cows but PW7

talked about 36 and 18 cows. Also Exhibit P2 talks about 36 cows but the trial magistrate ordered for the return of "31 cows with 16 calves". It is not known where the trial magistrate got these numbers from. It is not coming from any of the prosecution witnesses. With these glaring contradictions coupled with confusing order and plausible defence from the appellant then I find that the appellant's appeal has merit.

I therefore quash the conviction, set aside a 3 years sentence and an order of the return of 31 cows and 16 calves is also set aside. The appellant is to be released forthwith from prison unless lawfully held in connection with another offence.



B.M.A. Sehel

JUDGE

21st October, 2016