

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**(DAR ES SALAAM REGISTRY)**

**CRIMINAL APPEAL NO. 288 OF 2016**

*(Originating from The District Court of Morogoro at Morogoro, Criminal Case No 221 Of 2014*

*Before: Hon. A. Msacky– RM Dated 15<sup>th</sup> April, 2016)*

**PETER SYLIVESTER ASSEY----- APPELLANT**

***VERSUS***

**THE REPUBLIC ----- RESPONDENT**

**JUDGMENT**

**Last order date:** 08<sup>th</sup> June, 2018

**Judgment date:** 19<sup>th</sup> June, 2018

**MLYAMBINA, J.**

The District Court of Morogoro (A. Msacky, RM.) sitting at Morogoro, convicted the appellant of the first count of conspiracy to commit an offence contrary to section 384 of the Penal Code Cap 16 (R.E.2002) and of the second count of Cattle theft contrary to section 258 (1) and 268 of the Penal Code (*supra*). The appellant was sentenced to serve three (3) years for the first count and five (5) years for the second count. The sentence was ordered to run concurrently. Aggrieved by the conviction and

sentence, the appellant has preferred this appeal on the hereinafter grounds; -

1. That, the learned trial Magistrate erred in law and in fact by convicting the appellant basing on circumstantial evidences of prosecution which was uncorroborated as required by law.
2. That, the learned trial Resident Magistrate erred in law and in fact by considering bicycle exhibit P3 tendered by the prosecution against the appellant admitted un-procedurally without summoning a person who owned it as it was marked Hamis Trans.
3. That, the trial Resident Magistrate erred in law and in fact by considering inventory (exhibit P2) tendered by prosecution admitted un-procedurally, without summoning an expert (veterinary) who certified the said inventory so that to prove genuineness.
4. That, the learned trial Magistrate erred in law and in fact convicting the appellant who was not properly identified in the scene of crime considering the distance the appellant was, as the PW1 failed to state clothes colour worn by the appellant on the material date.

### **WHEREFORE**

- a. The appellant prayed that the Court to allow this appeal, quash the conviction and leave him at liberty.

- b. The appellant prayed that he be present during the hearing of this appeal.
- c. That, the appellant prayed to the Court to grant any relief (s) that deems just and fit to grant.

Elaborating on the grounds of appeal, the appellant told us that he is a layman but he trusts the lodged grounds of appeal. The appellant went on to state that they were convicted and sentenced for five years imprisonment but his fellow was acquitted on appeal.

The appellant stated that, he was charged on an offence of theft but the evidences were contradictory. Thus, others said six animals were stolen, others said eight animals were stolen and others said ten animals were stolen. In view of the appellant, it was a manufactured case with a planned evidence.

The appellant, therefore, prayed this Court be pleased to quash and set aside the conviction and sentence and declare him at liberty.

In reaction, Christin Joas-the learned State Attorney for the Republic supported the conviction on the reasons that: **First**, PW1 and PW3 were eye witnesses who identified the appellant. **Second**, though the offence was committed in the night all witnesses gave evidence that there was electricity light which

made them identify the appellant. **Third**, PW1 and PW3 knew the appellant prior committing the offence. **Fourth**, PW1 and PW3 were just 10 metres from the scene.

Another reason advanced by the learned State Attorney was that the appellant was seen riding a bicycle with a sulphate bag, when the appellant saw the PW1 and PW3 run away and left the sulphate bag. It was the submission of the learned State Attorney that PW1 identified his pigs had "V" mark. That, thought the pigs were slaughtered, PW1 corroborated his evidence.

On the point of a bicycle, the learned State Attorney stated that the bicycle ridden by the appellant was tendered before the Court together with its inventory as exhibit P2 and P3. Thus, the appellant never objected.

In rejoinder, the appellant stated that the bicycle was written Hamis Express and Hamis Trans. That, there was no any connection of those names with the appellant. On identification, the appellant stated that when PW1 was asked, he said that he did not identify the appellant if he was tall or short.

I have read the evidence on record carefully. I have considered the grounds of appeal, submission of the appellant and that of the learned State Attorney. I must observe that the issue of

identification of the appellant in this appeal carries a great weight in proving the prosecution case. It is now settled law that in a case entirely depending on the evidence of identifying witness such evidence must be absolutely water tight to justify a conviction. In **Waziri Amani v. R [1980] TLR 250** it was observed that; -

*"The first point we wish to make is an elementary one and this is the evidence of identification, as Courts in East Africa and England have warned in a number of cases, is of weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight"*

In the case of **Hamis Shingo (appellant) vs the Republic, Criminal Appeal No. 586 of 2015 Court of Appeal of Tanzania at Dodoma** (unreported) it quoted with approval its own earlier decision in the case **Said Chally Scania vs Republic, Criminal Appeal No. 377 of 2013 (unreported)** in which it was observed that; -

*"...we think that where a witness is testifying about identifying another person in un-favorable circumstances,*

*like during the night, he must give a clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all aids to unmistakable identification like proximity to the person being identified, the source of light and its intensity...”*

Indeed, as submitted by the learned State Attorney, the condition for visual identification includes for the witness to mention the source of light, its intensity, length of time being identified and familiarity. (See **Omary Msawila Mrisho vs the Republic, Criminal Appeal No. 593 of 2015 Court of Appeal of Tanzania (unreported)**)

In the instant case, I had time to find out if the prosecution evidence on identification was absolutely water tight for the following main reasons.

**First**, the appellant was not identified by a single eye witness. The records are clear to the effect that PW1 and PW3 were the witnesses who identified the appellant with their eye.

**Second**, it is undisputed that the offence was committed in the night, however, all witnesses gave evidence that there was electricity light which made them identify the appellant. PW3 at page 23 of the proceedings is recorded to have stated that “*at my house there is a light (electricity light) where you can be able*

*to find someone at the long distance".* Such evidence was not challenged.

**Third**, on familiarity, both PW1 and PW3 evidenced that they knew the appellant prior committing the offence. For-instance at page 17 of the proceedings, PW1 stated that "*I managed to identify Peter Assey who used to come to my home place and I know even their parents*". There was no dispute on that point.

**Fourth**, on the point of distance, PW1 gave evidence that the accused persons were about 5 metres from the scene. (see page 19 of the typed proceedings).

In further proof of the prosecution case, PW1 did tell the trial Court that it is the appellant herein who assisted to show the co-accused persons and where they lived. (page 19 of the typed proceedings). The appellant has not resisted such evidence at equal weight.

On contradiction of numbers of slaughtered pigs, I have observed that the contradictions were not so serious to vitiate the trial findings. For example, at page 19 of the typed proceedings shows that PW1 stated 4 pigs were stolen, PW2 and PW3 never mentioned the number of stolen pigs. At page 25 of the typed proceedings, PW4 stated inter alia that "*he found the*

*pig who died and there were a blood spread and another pig who was beaten by big blunt object."*

It is true the evidence of PW1 is to the effect that; he failed to identify the clothes of the accused, but in our found view, such weakness alone cannot be a good ground of disproof of a prosecution case. The appellant was known to PW1. It is from such familiarity the appellant was easily identified. It is also correct that exhibit P2 was admitted without summoning an expert (veterinary) who certified its genuine. The remedy of such un-procedural defects is to expunge exhibit P2. But the expungement of exhibit P2 will not affect the decision because it does not disprove the established evidence that the appellant committed the charged offence.

There is a question of a bicycle, PW4 at page 27 stated that the bicycle was written the name of Hamis Express, the pigs were there too. PW3 at page 23 stated the accused person decided to run away and left the bicycle and sulphate bag, PW1 at page 18 stated that the accused run away and left the sulphate of pig and bicycle. With such evidences in record, it is true that the bicycle been in the name of Hamis Express was not connected with the appellant. However, the important point here is that the bicycle was been used by the appellant on the material date. It

does not matter whether it belonged to him or not because the issue was not to establish ownership of the bicycle.

With the afore observation and findings, it follows clear that the decision of the trial Court was not reached on a mere circumstantial evidence. It was reached upon the prosecution side proving their case as per the requirement of the law. Therefore, the appellant appeal is dismissed, the trial court conviction and sentence are upheld respectively. It is ordered accordingly.



**Y. J. Mlyambina**

**Judge**

**19/06/2018**

Dated and delivered this 19<sup>th</sup> day of June, 2018 in the presence of the appellant in person and learned State Attorney Monica Ndakidemi for the respondent.



**Y. J. Mlyambina**

**Judge**

**19/06/2018**