

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HIGH COURT CRIMINAL APPEAL NO. 46 OF 2020

(Original Criminal Case No. 90 of 2018 of the District Court of Bukombe District at Bukombe)

SHIJA MATUNGE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

01 & 10/07/2020

RUMANYIKA, J.:

The appeal is against conviction and custodial sentence of 15 years for the offence of cattle theft Contrary to Section 268(1) and (3) of the Penal Code now Cap 16 R.E. 2019 (the code). It is also worth to be noted here that Sifa Andrea @ Kalidushi, Yuda Robet, Shija Matunge, Kalidushi Mussa, Mashaka Lucas and Hoja Masasila @ Kunzyenza (the 1st, 2nd, 3rd, 4th, 5th and 6th accused) respectively were arraigned in the District Court Bukombe on 19/04/2018. Only the 3rd accused (the appellant) preferred this appeal. Unless the context otherwise required therefore the other accused will not feature any more in this judgment.

The grounds of appeal are 7 (seven) essentially they revolve around 5 points:-

- (1) That the learned trial resident magistrate erroneously convicted the appellant only basing on hearsay evidence.
- (2) That the learned trial resident magistrate improperly evaluated the evidence as there was no direct evidence to connect the appellant.
- (3) That the appellant was convicted and sentenced unheard.
- (4) That the appellant was excessively sentenced.
- (5) That now that co-accused had confessed and was convict, the learned trial resident magistrate should not have convicted the appellant.

Whereas the appellant appeared in person and he had nothing additional to the memorandum of appeal, Ms. Lilian Meli learned state attorney appeared for the Respondent Republic.

Ms. Lilian Meli learned state attorney submitted; (1) that the prosecution case was proved beyond reasonable doubts the appellant having been found in possession of 12 heads of the cattle through mark "50" duly identified by pw1 (the complainant) and the appellant was named by the co and 1st accused (2) that even where the cautioned statements (Exhibit "PE1", PE2" and "PE3") were expunged on the ground that they were not read out in court, yet still the remaining evidence sufficiently proved the prosecution case the appellant even having not cross examined one or in any way contest the evidence.

Pw1 one Rutakwa Rubonankebe the complainant stated that Pw5 was herdsman on the material date and time of robbery of the 40 heads of cattle on duty.

Pw2 Musa Machibya Masaga of Mwambagalo village also the local 10/10 leader stated that in his capacity he witnessed payment of 4 heads of cattle being dowry for sister of one Faustine Mlyasende which heads of cattle through Mark "50" on the left thigh the complainant identified also without a transit permit the 1st and 2nd accused were found driving the same that on that basis the latter were apprehended and interrogated and the 1st accused led to recovery of the other heads of cattle away at Kasamwa.

Pw3 H.2295 PC Wiston of Isulwa Butundwe police post stated that as he was at work on 09/04/2018 and following the incident together with him 4 heads of cattle having been produced to him by Pw3 and some other villagers, during interrogation the 1st accused confessed to have stolen 40 heads of cattle and he led to recovery of another 12 heads of cattle possessed by the appellant leave alone 3 more heads of cattle in possession of the 4th accused which heads of cattle Pw5 properly identified.

Pw4 Meneja Mtainga and Pw5 Juma Mabula only testified to the effect of where and when were the heads of cattle stolen. That is it.

Pw6 E.4032 D/Sgt. Kelvin of Runzewe police station stated that following the incident and as he was on 10/04/2018 at 3.30 at work but duly assigned by boss the Ocs, he interrogated the 1st accused who in the course also mentioned the appellant and recorded his (1st accused) cautioned statement (Exhibit "PE1").

Pw7 F.3461 DC Cpl. Deus stated that following the incident and report he interrogated them and recorded cautioned statements of the

confessing 5th and 6th accused (Exhibits "PE2" and PE3") respectively referred.

Pw8 E.5179 DC Gozibert stated that following the incident and report accordingly he interrogated and recorded cautioned statement of the 4th accused who led to arrest for the 1st accused hence the 16 heads of cattle (Exhibit "PE6") collectively.

As said before, only one of them preferred the instant appeal I will therefore not reproduce evidence of the other five.

The 3rd accused (the appellant) denied the charges. Nevertheless he stated that he owned a parcel of land worth shs 2.0m which one (in exchange of some 20 heads of cattle) he offered to sell to the desirous 4th accused then he (the appellant) received the same but shortly the 4th accused changed mind and he took away the heads of cattle. That is it.

The issue is whether the prosecution case was beyond reasonable doubts proved against the appellant. The answer is yes, the reasons being that with the evidence of Pw6 the appellant may or may have not been found in possession of a portion of the stolen heads of cattle much as on that one, the appellant's cautioned statement was improperly admitted in evidence and therefore as it was, correctly so in my considered view submitted by the learned state attorney, I shall expunge it from the record.

Moreover in blacks and whites in his evidence the appellant is on record at times admitting that having had some heads of cattle business with the 4th accused (in exchange of shs. 2.0m worth parcel of land) only that shortly the 4th accused changed mind. Now that the appellant did not tell what was the size of the land? When exactly was the business

transacted by them? And who witnessed it much as the appellant admitted having had received some and the heads of cattle were recovered hardly 6 days later. Whether or not shortly the 4th accused changed his mind it was immaterial in my considered view. As argued by the appellant there might have been no direct evidence to connect him yes, also as said not found in physical possession of the heads of cattle fine! But given the nature and scope of the appellant's testimony and the evidence of Pw8, not only he had knowledge that the 4th was in possession of the heads of cattle but also the appellant had vested interest in the heads of cattle. The appellant therefore constructively though he possessed the heads of cattle that is the essence of the doctrine of recent possession under which the learned trial resident magistrate he should have convicted the appellant.

With all what I have endeavored to discuss herein above, the issues of hearsay evidence, improper evaluation of the evidence, violation of right to be heard and a conviction on evidence by co-accused shouldn't have been raised. With regard to the custodial sentence the provisions of Section 268 (1) and (3) of the code are crystal clear. The sentence of 15 years in jail served both the penal purposes and justice of the case.

The appeal is dismissed in its entirety. It is ordered accordingly.

Right of appeal explained.


S. M. RUMANYIKA
JUDGE

08/07/2020

Judgment delivered under my hand and seal of the court this
10/07/2020 in chambers in the absence of the parties with notice.



S. M. RUMANYIKA
JUDGE
10/07/2020