THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA.

CRIMINAL APPEAL NO. 180 OF 2019.

(Arising from Criminal Case No. 36 of 2017, in the District Court of Ileje District, at Itumba).

1. **BONIFACE S/O SICHONE.....1ST APPELLANT**
2. **MASHAURI S/O KAYINGA.....2ND APPELLANT**
3. **GABRIEL S/O MPEMBE.....3RD APPELLANT**
4. **ALIKO S/O PATSON KAYUNI.....4TH APPELLANT**

Versus;

THE REPUBLIC .....RESPONDENT.

JUDGEMENT

27/04 & 14/07/2020.

Utamwa, J.

In this first appeal the appellants are four, namely; BONIFACE S/O SICHONE, MASHAURI S/O KAYINGA, GABRIEL S/O MPEMBE and ALIKO S/O PATSON KAYUNI hereinafter called the first, second, third and fourth appellant respectively or the appellants cumulatively. They are challenging the Judgement (impugned judgement) of the District Court of Ileje District, at Itumba (the trial court) in Criminal Case No. 36 of 2017.

Before the trial court, the appellants were jointly and together charged with seven counts of animal stealing contrary to section 268 of the Penal Code, Cap. 16 R. E. 2002 (now R. E. 2019). They stood in similar positions to those related to this appeal, to wit; the first, second, third and fourth accused persons correspondingly.

It was alleged regarding the first count that, on the 28th of September, 2017 at about 05:00 hours, at Ikumbilo area within Ileje District in Songwe Region, the appellants did jointly and together steal two goads from one

Edwine s/o Kayinga valued at Tanzanian shillings (Tshs.) 100, 000/=. The particulars under the second count, alleged that, the same appellants, at the same material time and place and in the same manner did steal two goats from one Musa s/o Msomba worth Tshs. 120, 000/=.

Regarding the third and fourth counts, it was alleged that, the same appellants, at the same material time and place, and in the same manner, did steal two goats from one Peckson s/o Mulungu valued at Tshs. 100, 000/= and one goat from Lenisoni s/o Malanga worth Tshs. 60, 000/= respectively.

It was further alleged under the fifth and sixth counts that, the appellants, at the same material time and place, and in the same manner did steal one goat from one Lusekelo s/o Panja valued at Tshs. 65, 000/= and two goats from Bright s/o Swila worth Tshs. 100, 000/= correspondingly.

As to the seventh count, the prosecution alleged that, the appellants, at the same material time and place, and in the same manner did steal two goats from one Gudwelo s/o Mkumbwa valued at Tshs. 120, 000/=.

All the appellants pleaded not guilty to all counts of the charge, hence a full. Ultimately, through the impugned judgment, they were all convicted of all counts and each was sentenced to serve in prison for fifteen years regarding each count. The trial court did not however, make any direction on how the sentences could be served, concurrently or consequently?. The appellants were also ordered to pay compensation of Tshs. 1, 000, 000/= to the complainants after completing the sentence.

The appellants were aggrieved by the entire impugned judgment. They then preferred this appeal through Mrs. Joyce Kasebwa, learned counsel. The appeal was based on the following five grounds of appeal:

1. That, the trial court erred in law and fact in basing the conviction on a defective charge.

2. That, the trial court erred in contravening the provisions of section 210 (3) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (now R. E. 2019).
3. That, the trial court erred in law and facts in convicting and sentencing the appellants on extraneous matters that were not adduced by witnesses.
4. That, the trial court erred in law and facts in convicting the appellants though the charge was not proved against them beyond reasonable doubts for want of a proper analysis of the chain of custody.
5. That, the trial court erred in law and facts for convicting the appellants though they had not been properly identified at the scene of crime.

Owing to these grounds of appeal, the appellants' counsel urged this court to allow the appeal, quash the conviction, sentenced and the entire impugned judgment and orders of the trial court. He also prayed for the appellants to be let free.

The respondent/Republic, being represented by Ms. Mary Mgeni, learned State Attorney, resisted the appeal. Following the consensus by the parties, the court directed the parties to argue the appeal by way of written submissions. The appellants' counsel accordingly, filed her submissions in chief. The respondent did not file the replying submissions at all.

Due to the default by the respondent to file the replying written submissions according to the scheduling order set by the court, the appellant's counsel filed other written submissions. In such additional submissions she argued that, the default by the respondent should be considered as a failure to conduct their case since this is the stance of the law. She supported this position by a long list of precedents including the case of **Harold Maleko v. Harry Mwasanjala, DC Civil Appeal No. 16 of 2001, High Court of Tanzania (HCT), at Mbeya** (unreported, by Mackanja J, as he then was) and **Seti Tete v. Mwanjelwa Saccos, Misc.**

Civil Application No. 22 of 2018, HCT, at Mbeya (unreported, by Mongella, J.).

On a later date when the appeal was coming for setting the date of judgment, the learned State Attorney for the respondent appeared and addressed the court to the following effect: that though the appellants' counsel had served her written submissions in chief to the respondent's office timely, the same were mixed up with other documents in the registry of the respondent. This caused the learned State Attorney to receive the submissions belatedly when the time limit set by the court had already expired. She thus, prayed for extension of time to file the replying written submissions that she had already prepared. The appellants' counsel resisted the prayer for extension of time and made reference to her additional written submissions on the legal consequences of the default by the respondent.

The court made an order (dated 27th April, 2020) rejecting the respondent's prayer for extension of time. It however, reserved the reasons for the order and directed that the same had to be adduced in this judgment, as I hereby do. Indeed, the law is now settled as rightly argued by the respondents counsel that, failure by a party to file written submissions within the time prescribed by the court amounts to a serious default equated to the non-preparation for the hearing of the matter. This is because, written submissions in fact, take place of oral hearing itself. Entertaining ungrounded delays in filing written submissions will thus, amount to condoning the floating of court orders and delays in finalising cases. This trend will cause injustice, chaos in courts and mistrials. This is because, the parties' constitutional right to fair trial, the elements of which include the right to a speedy trial, will be impeded.

In the matter at hand, the respondents' main reason for the delay and for extension of time was that, the appellants' written submissions in chief were mixed up with other documents in the respondent's registry. It is trite and settled law that, in exercising the discretional powers for granting extensions of time to perform any legal act, courts should be satisfied by

the party applying for the extension that, there are sufficient reasons to do so. I do not consider the mixing up of documents in the registry of the respondent as being among one of the sufficient reasons for extending time. Rather, that is a sign of something else implying laxity or disorganisation.

The above narrated reasons are the basis for the order made on 27th April, 2020 refusing the extension of time prayed by the respondent to file the replying written submissions.

I will now, proceed to decide the appeal by considering only the written submissions in chief of the appellant's counsel, the record and the law. My adjudication plan is that, since the appellants' counsel abandoned the first ground of appeal in her submissions, I will firstly consider the fourth and fifth grounds of appeal cumulatively since they are interrelated. They essentially raise a challenge that the trial court convicted the appellant though the charge was not proved beyond reasonable doubts. In case need will arise, I will also examine the second and third grounds of appeal. This plan is based on convenience and the fact that, I consider the fourth and fifth grounds to be the strongest grounds capable of disposing of the entire appeal if upheld.

Now the major issue regarding the fourth and fifth grounds of appeal is *whether or not the prosecution proved the charge against the appellants, or any of them beyond reasonable doubts*. According to the prosecution evidence on record, which said evidence was adduced by eleven witnesses, on the material date and night, the complainants, at different times, noted that their respective goats were missing. They reported the matter to the local leaders and investigation was accordingly launched. It was later revealed that PW. 8, one Mbwiga Omari Ndongole, a driver of a motor vehicle, had been hired by three men, including the second appellant, to carry eight goats from Ikumbilo area to Tunduma. It was on the same material night. The second appellant showed to him (PW. 8) a receipt for paying animal-transporting revenue in his own name. Investigation then led to the arrest of the first appellant who mentioned other culprits. All the

appellants admitted before the local leaders that they had committed the offence. The fourth respondent lead to the place where carcases of a goat was discovered, but were rotten. However, when the matter was reported to police, all the appellants refuted the fact that they had committed the offence.

In their respective sworn defences, the appellants denied the charges against them. They claimed that, they did not steal any goat and they were arrested in different places after the material date. They were locked up in the village office and then taken to police station, hence this case.

The trial court believed the prosecution story and found that, the circumstantial evidence was tight enough to implicate the appellants though they were not identified at the science of crime. The learned counsel for the appellants is essentially complaining that, there was no proper analysis of the chain of custody of the exhibits involved in the case. She is also contending that, the appellants were not properly identified at the scene of crime.

In my view, the argument by the appellants' counsel that there was no continuous chain of custody of exhibits is not that much forceful. This is because, the exhibits that were tendered in court were only the receipt for payment of revenue related to the transportation eight goats (exhibit P. 1) and exhibit P. 2 (the inventory or police form No. 12 related to the destroyed carcases of one goat for being rotten). It is not thus, clear from the submissions of the appellants' counsel as to how the two exhibits were improperly handled. As to the improper identification, I also find that, the argument is misplaced. This is because, the trial court did not, in anyway base the conviction against the appellants on their identification at the scene of crime. As hinted before, it entirely based the conviction on circumstantial evidence.

I will now discuss the sufficiency or insufficiency of the prosecution evidence before the trial court. It is trite law that, for circumstantial evidence to base a conviction it must pass the test set by case law. The

test has been well explained by the Court of Appeal of Tanzania (CAT) in its various decisions. In the case of **Protas John Kitogole and another v. Republic [1992] TLR 51** at page 57-58, the CAT guided thus, and I quote it for a readymade reference:

> "...the test is that, in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of the inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and it never shifts."

In so deciding, the CAT followed the decision in the case of **R. v. Kipkering-arap Koske and another (1949) 16 E.A.C.A. 135**

The pertinent sub-issue at this stage is therefore, *whether or not in the case at hand, the circumstantial evidence adduced by the prosecution before the trial court met the legal test for supporting the conviction against all the appellants or any of them*. In my settled view, the circumstances of the case do not attract answering the sub-issue affirmatively on the following grounds: in the first place, the prosecution evidence showed that, the appellants admitted before the local leader (i. e. PW. 10, one Emmanuel Kavishe, the Word Executive officer or WEO) that they committed the offence. However, no details were made on the circumstances under which they were interrogated and admitted the same. Again, the PW. 11 (DC. Charles), the police investigator of the case, testified that when he interrogated the appellants, they denied to have committed the offence. It cannot thus, be easily believed that the appellants voluntarily admitted to have committed the offence before the local leader.

It is also in record that, in convicting the appellants, the trial court considered the prosecution evidence that, PW. 8 who allegedly transported the goats for the appellants was warned through telephones by the appellants. The warning was to the effect that, that he should not tell anybody that he had transported the goats. However, PW. 8 did not

mention the telephone numbers used to communicate to him so as to vindicate firmly that they belonged to the appellants and they were the ones giving the warnings. Again, no witness from the telephone services providers/company who came to testify showing that it was the appellants' respective telephone numbers which were used in such conversations with the PW. 8. The evidence by PW. 8 on the warnings could not thus, be believed as implicating the appellants.

Furthermore, it is apparent that the appellants were convicted because PW. 8 (Mbwiga) had testified that he had transported eight goats for the second appellant and others on payment. It was also because one of the appellants had directed the search team to where the carcases of a goat were found. This was recently after the theft of the goats. Nevertheless, there was no scintilla of prosecution evidence that the goats transported by the PW. 8 and the one found rotten belonged to any of the victims. This is because, no any special marks (or distinguishing features) were mentioned by the complainants to identify the goats and differentiate them from others goats as required by the law. The law guides that, identification of a stolen good that are commonly owned is by special marks; see the case of **Maingu Komore v. Republic, High Court Criminal Appeal No. 104 of 1983, at Mwanza,** (unreported) and **Philipo Makala v. Republic, High Court Criminal Appeal No. 106 of 1985, at Mwanza** (unreported).

Some prosecution witnesses in the case at hand tried to identify their goats by skin colours. PW. 1 (Edwin Kayinga) for example, testified in cross-examined by the second appellant that, one of his stolen goats was black and white while the other was white and red. Nonetheless, colours of animals cannot form peculiar marks since those are common features in many other goats.

Moreover, according to the impugned judgement and the evidence, it can be said that, though the trial court did not expressly say so, it in fact, convicted the appellants because they were found in possession of the stolen goats recently after the theft. The alleged possession was actual

following the evidence of PW. 8 that he had transported the goats. The alleged possession was also constructive following the fact that the fourth appellant allegedly directed the search team to where the carcases of a goat were found. The trial court thus, purportedly applied the doctrine of recent possession, which said doctrine is essentially based on circumstantial evidence.

At this juncture, I will highlight, in a nutshell though, what the doctrine of recent possession is all about. The CAT in the case of **Julius Justine and 4 others vs. Republic, CAT Criminal Appeal No. 155 of 2005, at Mwanza** (unreported) held that, the doctrine is to the effect that; a person who is found in possession of stolen goods soon after the theft is either the thief or has received them knowingly that they have been stolen, unless he satisfactorily accounts for the possession of the same. The CAT however, warned that, the doctrine must be applied with care because, it is rebuttable, and it does not replace the principle of presumption of innocence which is in favour of the accused. The accused's duty is only to give reasonable explanation on the possession, and even if he gives a weak explanation, it is not necessary that he will be convicted. In so deciding, the CAT followed the case of **George Edward Komowski v. R. [1948] 1 TLR. 322.**

The law also guides that, some important conditions must be met before the doctrine is invoked to base a conviction. These conditions (*among others*) are as hereunder listed.

I. The theft or crime indicated into the charge sheet (complained of) must be established.

II. The accused must indeed be found in possession of the goods in question.

III. The goods must be found with the accused within short period after the said theft or crime. As to what is a short period, there is no hard and fast rule. It will depend much on the circumstances of each case and the nature of the goods involved.

IV. The goods so found in possession of the accused must bear reference to the stolen goods, subject matter of the charge sheet. i. e. they must be properly identified as properties of the complainant (in the case) stolen at the material time and place as per the allegations into the charge sheet.

V. The accused must fail to give reasonable explanation on how he came across the said goods.

VI. The burden of proving the aspects mentioned above lies on the prosecution, and the standard of proof thereof is the orthodox one used in criminal justice, i. e. of beyond reasonable doubts. The accused person has no duty to prove his innocence in respect of the possession of the goods, he is only charged with the duty to give reasonable explanation.

These conditions must be met cumulatively and not alternatively.

In the case at hand, not all the conditions were met according to the prosecution evidence. There was for example, no evidence proving the condition numbered "**IV**" herein above, i. e the seven complainants did properly identify the goats as their own respective properties which had been stolen at the material time and place mentioned into the charge sheet at issue. In fact, even the procedure for identifying stolen properties/goods was not followed in the case at hand.

In law, there are two steps forming the procedure for identifying stolen goods for purposes of applying the doctrine of recent possession. These are what I can call the pre-trial step/procedure and the in-trial step/procedure. The two steps are for purposes of convenient discussions in this judgement.

The pre-trial step/procedure for identifying stolen goods was underscored by this court in the case of **Fadhili Mohamed vs. Republic [1974] LRT. 5,** following **Republic v. Morris Fabian, High Court Bulletin No.5 of May 1963** (by Spry, J. as he then was)**.** The court guided that, the desirable practice to be followed on identification of such goods is, *inter alia*, this; that when a person reports a theft to the police,

he should be called upon to describe the goods fully. The description should include the make of goods, manufacturer's number, quantity and any distinguishing features such as, size, colour, defects, reparation etc. Moreover, a person should normally not be asked to identify property suspected to be stolen unless he has first reported on his loss as shown above.

Regarding the in-trial procedure of identifying stolen goods this court (Mrema, J. as he then was), also made useful guidelines in the case of **Anonisye Ambukege vs. Republic, High Court Criminal Appeal No. 82 of 2003, at Mbeya** (unreported). It emphasized that, bland assurances in identifying stolen goods/exhibits (in courts) are not acceptable even in civil cases for they may cause dangers (of injustice). Such evidence of identification (of stolen goods) must be water tight. In criminal trials, the complainant in court should be asked for the marks of the stolen property before the same is shown to him, from which his ownership can be established to the court beyond reasonable doubts. For this procedure, it can be clear to the court that the complainant was able to identify the property. In setting these guidelines the court followed the cases of **Henery Gervas vs. R [1967] HCD. 129** and **Nasoro Mohamed vs. R [1967] HCD. 445.**

Furthermore it was guided by this same court (Moshi, J. as he then was) in the case of **Obadia Ngosipe vs. Republic, High Court Criminal Appeal No. 136 of 1996, at Mbeya** (unreported) that when an identifying witness is testifying in court on the identity of the stolen property, the trial court must make a note in the record of the case indicating the method on how the witness identifies the property. The note will assist an appellate court to form some opinion as to the likelihood of the accuracy of the identifying procedure. In so deciding, the court followed the decision in **Mbeswa s/o Chiloya v. R. [1970] HCD. 210** (Georges, CJ. as he then was). A year later, Moshi, J. (as he then was) emphasised the significance of this procedure in the case of **Jumanne s/o Shigowelo vs. Republic, High Court Criminal Appeal No. 11 of 1998, at Mbeya** (unreported).

The **Fadhili Mohame case** (supra) also underscored the following three guidelines regarding the in-trial identification step/procedure; it underlined that, a person identifying goods in court as being his, should always be asked how he can distinguish them and his reasons recorded. Again, a court in considering evidence of identification should consider the truthfulness or otherwise of the witness and the possibilities of honest mistake (i.e. where no distinct features are present). The court should also consider the possibility of similar articles existing in the locality. Furthermore, an extraordinarily large quantity of any particular goods or an unusual combination of articles may of course, have evidential value assisting the court to decide whether goods found in possession of accused are those that were stolen.

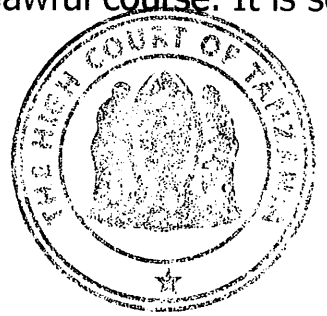
Now, in the case at hand, the pre-trial step/procedure of identifying the allegedly stolen goats was not followed. This is because; there is no evidence adduced by the prosecution that the seven complainants mentioned any special identification marks for their respective goats when they reported the theft to the local leader or to the police station. The in-trial step/procedure was also not followed since the seven complainants did not also mention the special marks of their respective stolen goats before the trial court.

Again, the receipt (exhibit P. 1) issued in the name of the second appellant for payment of revenue for transporting the goats does not help. This is so because; it does not also mention any special marks of the goats so transported. The same situation applies to the inventory (exhibit P. 2) which does not indicate in any way, the peculiarity of the rotten carcases of the goat. In fact, the PW. 8 himself did not tell the trial court any special marks of the goats he had allegedly transported for the appellants.

Owing to the above reasons, I underscore here that, there was no proper identification of the allegedly stolen goats. I am also of the view that, the doctrine of recent possession was not properly applied by the trial court in convicting the appellant. I therefore, answer the sub-issue posed above negatively to the effect that, in the case at hand, the circumstantial evidence adduced by the prosecution before the trial court did not meet

the legal test for supporting the conviction against all the appellants. Consequently, I answer the major issue posed above negatively that, the prosecution did not prove the charge against all the appellants beyond reasonable doubts as required by law. The fourth and fifth grounds of appeal are therefore, upheld though on different reasons from those adduced by the appellants' counsel.

The finding I have just made above is strong enough to dispose of the entire appeal without testing the rest of the grounds of appeal. I will not thus, test them. Instead, I make the following orders; I allow the appeal, I quash the conviction and set aside the sentence and orders made by the trial court against all the appellants. I further order that, all the four appellants, shall be released from the prison forthwith unless held for any other lawful course. It is so ordered.



JHK. UTAMWA

JUDGE

14/07/2020.

15/07/2020.

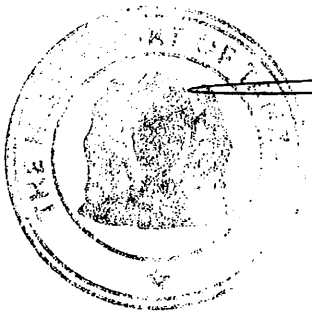
CORAM; HON. P. R. Kahyoza, Deputy Registrar.

Appellants: All present through virtual court link, from prison and Ms. Joyce Kasebwa, advocate (through virtual court link).

Respondent; Mr. H. Kihaka, State Attorney (through virtual court link).

BC; Mr. E. Kibona, RMA.

Court: Judgment delivered in the presence of the parties through virtual court link.



P. R. KAHYOZA

Deputy Registrar

15/07/2020.