IN THE UNITED REPUBLIC OF TANZANIA

THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL No. 69 OF 2020

(Originating from Kilosa District Court at Morogoro in Criminal Case No. 323 of 2018)

MEREJI MAKOROMA..1st APPELLANT

JOSHUA SAMBUKA MLIGO KAMEI..........................2nd APPELLANT

Versus

THE REPUBLIC...RESPONDENT

JUDGMENT

13th August, – 23rd September, 2020

J. A. DE - MELLO J;

In the **District Court of Kilosa**, the Appellants, **Mereji Makoroma and Joshua Sambuka Mligo Kamei,** were charged with the offence of **Cattle Theft** contrary to **section 258 (1)** and, **268 (1)** of the **Penal Code, Cap. 16 R.E 2002**, ultimately convicting and, sentencing both to serve five years (5) imprisonment. Being aggrieved, the two Appellants lodged this Appeal, on the following grounds;

1. **That, the Trial Magistrate erred in law and fact for non-compliance of section 214 (1) of the criminal Procedure Act, Cap 20, R.E 2002.**
2. **That, the Magistrate erred in law for the failure to read over to the accused the memorandum of undisputed fact against the mandatory provision of section 192 (3) of the Criminal Procedure Act.**
3. **That, the prosecution erred in law for the failure to read the charge to all accused after substitution of the said charge.**
4. **That, the Trial Magistrate erred in law and fact for relying on caution statement of the first accused to implicate him which was obtain illegally.**
5. **That, the prosecution did not prove their case against the appellants to the standard required by law.**
6. **That, the Trial Magistrate erred in law and fact to convict the Appellants who were not properly identified at the scene of crime.**

7. **That, the Trial Magistrate erred in law and, facts to convict the appellants while no identification parade that has been conducted to identify the accused.**

This Appeal was disposed by written submissions where by both parties filed theirs, within time. In this appeal, I do not intend to reproduce factual settings of the case.

Dropping the first and seventh grounds, the Appellants also joined the fifth and sixth grounds together as they commenced their submissions. Starting with the second ground, that of failure to read over to the accuseds the memorandum of undisputed facts, it was against the mandatory provisions of **section 192 (3) of the Criminal Procedure Act,** which requires after the Magistrate to do so after recording, they observed. Page eight (8) of the proceedings is very clear on this as they relied on the case of **Republic** vs. **Abdallah Salum@Haji, Criminal Revision No. 4 of 2019, CAT at Dar Es Salaam** and **Republic** vs. **Francis Lijenga, Revision No. 3 of 2019, CAT** at **Dar Es Salaam** in support of the ground. With regarding to the third ground, the charge was not read over to all the accused following substitution of the said charge as seen under **page 3-4** of the typed proceedings. The substitution prayed by the Public

Prosecutor was with intention of adding the 4th accused but, not read over as required by law. The case of **Thuway Akonaay** vs. **Republic (1987) TLR 99** was cited in that support. On the fourth ground, is the relying of the caution statement of the first accused, notwithstanding that, it was retrieve illegally, without consent and, obtained out of torture, let alone the second the procedure for admitting it, which was highly improper. It was read out before it was admitted, which is a fundamental irregularity as seen in the case of **Robinson Mwanjisi and Three Others** vs. **Republic [2003] TLR 218**, making reference to **page 17** of the typed proceedings. Lastly, on the fifth and sixth grounds, the prosecution did not prove their case to the standard required by law, citing **section 110 (1)** and **(2)** of the **Evidence Act, Cap. 6, R.E 2019,** that, of, **'one who alleges must prove'.** It is their belief that, none of the two, was identified at the crime scene with no stolen cattle's that has been found in the appellants custody, as exhibit as was what the case of **Waziri Amani** vs. **Republic [1980] TLR 250.** The Appeal be allowed, the conviction and sentence be set aside, as the two are released.

The Republic opposed second and, third grounds but, supported the rest.

In opposing the second ground, State Counsel observed compliance with **section 192** as depicted in the proceedings. Regarding the third ground, **page 3** of the typed proceedings has the prosecutor very clear, when prayed to substitute the charge sheet, aimed at adding another accused and, no changes were made other than adding the accused only. During the preliminary hearing the charge sheet was read as reflected in **page 7** of the proceedings. However and, as already observed, the rest of the grounds were full supported by the Republic, that, the prosecution case was not proved beyond reasonable doubt, as required by law. The evidence of visual identification which the Trial Magistrate relied upon to convict the Appellant, was not water tight as shown in **page 13** of the proceedings, where **PW2** who was the only witness identified the accused, while the **1st Appellant** testified to do so through a solar lamp, much as he never mentioned the name of the alleged culprit nor his physical appearance and, whatever familiarity, if all. The case of **Waziri Amani** vs. **Republic [1980] TLR 250**, which settled for all the requirement for identification, with a view of eliminating any mistaken identity. Another weakness, he observed, was lack of connection on which information lead to the arrest of the 1st Appellant, as read at **page 16** of the proceedings.

Also there were no identification parade conducted to confirm if the person arrested was the real suspect as mentioned by **PW2.** The case of **Herode & Another** vs. **The Republic, Criminal Appeal, No. 407 of 2016, Court of Appeal of Tanzania, at Mbeya,** was shared for this position.

Nothing new was in the Appellants rejoinder, other than reiterating the submissions in chief.

Having gone through all the submissions, it is vivid clear that, the Trial Magistrate relied on the evidence of **PW2** who claimed to have seen the 1st accused through an opening with a bleeding eye and, aided by a solar lamp. This was corroborated by **PW3** when tendered the caution statement as it indicated in **page 5** of the lower Court's judgment. We all are aware how the evidence of identification by recognition has been held by Courts to be more reliable than an identification of a stranger. However, caution is made that even when a witness is purporting to have recognized someone he/she knew before, mistakes cannot be ruled out.

In the case of **Oden s/o Msongela & Others** vs. **D.P.P, Consolidated Criminal Appeals No. 417 of 2015 & 223 of 2018, Court of Appeal Of Tanzania, at Mbeya,** cited **Dadu Sumano's** case as hereunder;

"The Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it".

In the proceedings on **page 13, PW2** clearly stated that he saw the accused, as he was beaten with a club, the scene being backed up by a solar lamp. Is this enough in terms of identification? The questions to ask ourselves are; **how long did the witness have the accused under**

observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? In the case of **Anthony Kigodi** vs. **Republic, Criminal Appeal No. 94 of 2005 (Unreported)** this Court stated as hereunder:-

"We are aware of the cardinal principle laid down by the erstwhile Court of Appeal of Eastern Africa in Abdullah bin Wendo and Another vs. REX (1953) 20 EACA 116 and followed by this Court in the celebrated case of Waziri Amani vs. Republic [1980] TLR 250 regarding evidence of visual identification, no Court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the evidence before it is absolutely water tight".

Courts are cautioned not to act on evidence, unless all the possibilities of mistaken identity are eliminated and that, the evidence before it, is absolutely water tight. This alone suffices to dispose the case, as it is not contested that, identification was not water tight, let alone failure to

conduct identification parade which is a mandatory. True, the prosecution failed to prove how the appellants were arrested, which the case of **Herode & Another** vs. **The Republic, Criminal Appeal, No. 407 of 2016, Court of Appeal of Tanzania, at Mbeya, (Unreported)**

Having said the foregoing, I am satisfied that, the prosecution failed on its part to prove the charge as levied against the Appellants to warrant their conviction. I therefore allow the Appeal, quash the conviction and, set aside the sentence of five (5) years imprisonment passed against them. The Appellants are to be released forthwith, unless otherwise lawfully held.

It is so ordered.

X

Signed by: J.A. DE-MELLO

JUDGE

23rd September, 2020