

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI DISTRICT REGISTRY)**

AT MOSHI

CRIMINAL APPEAL NO. 22 OF 2020

(Originating from Criminal Case No. 155/2018 Mwanga District Court)

IMANI S/O JEREMIA @ KENGEREMINGI 1ST APPELLANT

PAULO S/O NOA 2ND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

MUTUNGI.J.

The Appellants herein have raised nine grounds of appeal against the decision in criminal case no. 155/2018 delivered by the District Court of Mwanga at Mwanga. Before the trial court, the Appellants were charged with the offence of cattle theft contrary to **section 268 (1) of the Penal Code Cap 16 R.E. 2002**. The facts thereto being that, the Appellants jointly and together between 1st June to 30th June 2018 at Roboo-Kiryia Village within Mwanga District at Kilimanjaro Region did steal 32 cows @ valued at Tshs. 700,000/= total valued at Tshs. 22,400,000/= the property of Keipai s/o Ngeli.

The prosecution side did marshal two witnesses after which the Appellants defended themselves. At the end of the trial the Appellants were found guilty and sentenced each to five years' imprisonment.

They are now seen before this court as already observed through the window of appeal. The court has scrutinized the grounds of appeal and if summarized, they amount into one major ground of appeal that, whether the case against the Appellants was proved to the standard required in criminal jurisprudence. The proof in criminal cases is a common phenomena in that it should be beyond any reasonable doubt, meaning it should leave no stone unturned.

What then was the evidence of the prosecution side? It is on record that on the material day PW1 (Complainant) received information from his homestead and specifically from the livestock keeper one Israel that his cows (32 of them) had been stolen. He called and informed his relatives among whom was PW2. These carried out a search everywhere in all the surrounding area only to find one Imani (first Appellant), Paulo (second Appellant), Raya and one more moving some of the stolen cows in a stationary vehicle. As soon as the

Appellants and their colleagues saw PW2 and his group, they boarded the vehicle and left. PW1 then reported the matter to the Police Station. Immediately after tracing their where about, they were accordingly arrested. PW1 did identify the Appellants since the first Appellant was his neighbour. In defence, the two Appellants strongly refuted the allegations and denied to have stolen PW1's cows which have never been recovered to date.

When the appeal was called up for hearing the Appellants prayed it be argued by way of written submissions which prayer was readily granted by the court. In summary, the Appellants faltered the way they were identified. They submitted that it was hard to comprehend how PW2 did identify them when he found them allegedly wading some cows in the vehicle. He did not give any special description of the Appellants on the fateful day. They also faltered the marks on the alleged stolen cows since there was no evidence at all on the marks alleged to have been put on the cows by PW1. It was PW2 who stated the marks and not the owner. The number of the stolen cows, this too leaves a lot to be desired. There was no proof whatsoever if at all PW1 owned 32 cows. In light of the foregoing inconsistencies and

in sufficient evidence, the Appellants prayed their appeal be allowed and they be set at liberty.

The Respondent dully represented by Mr. Omari Abdallah Kibwanah (Senior State Attorney), submitted that by and large the prosecution had miserably failed to prove the case as per the required standard in criminal cases. He thus joined hands with the Appellants that, in view thereof the conviction and sentence should be quashed and set aside and the Appellants be set free.

In deliberating the appeal at hand, the court will be guided by the common knowledge and settled law that the prosecution side has a strong burden of proving its case beyond reasonable doubt. The same was underscored in the case of **Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda vs. Republic [2006] TLR 395** that: -

"As is well known, in criminal trial the burden of proof always lies on the prosecution."

In the appeal in question, the only star witness is PW2 who was not around when the crime was committed. All he saw were the alleged culprits trying to load two cows in a vehicle. He

did not give the description of the vehicle nor the number plates. In the settled view of the court this only goes to suggest that, he was at a far distance. He claimed to have seen the marks on the cows but still this was at a distance, which raises a doubt if at all he clearly saw the marks he mentioned to PW1 (Complainant).

PW2 raises yet a fundamental question on the way he identified the Appellants. It is a well settled principle in criminal law that the aspect of identification should be water tight and should not leave room for mistake identify. There is a basketful of authorities on this principle, among these is the case of **SHAMIR JOHN vs. THE REPUBLIC**, Criminal Appeal No. 166 of 2004 where the Court of Appeal of Tanzania observed that: -

“.....whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Courts should warn themselves of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.....”

It is now trite law that the Courts should closely examine the circumstances in which the identification by each witness was made. The Court has already prescribed in sufficient details the most salient factors to be considered. These may be summarized as follows; How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? What interval had elapsed 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?"

This was further fortified in the case of **MATHEW STEPHEN @ LAWRENCE vs. THE REPUBLIC**, Criminal Appeal No. 16 of 2007, where the Apex Court of this land had the following to say: -

*"To exclude all possibilities of mistaken identity, the Court has therefore to consider the following. **First**, the period under which the accused was under observation by the witness. **Second**, the distance separating the two during the said observation. **Third**, if it is at night, whether there was sufficient light. **Fourth**, whether the witness has seen the accused before and if so, when and how often. **Fifth**, in the course of examining the accused, did the witness face any obstruction which might interrupt his concentration. **Sixth**, the whole evidence before the Court considered, were there any material impediments or discrepancies affecting the correct identification of the accused by the witness".*

By PW2 simply mentioning that he identified the culprits by their names was not enough proof. Neither could PW1 be a hundred percent sure that those mentioned by PW2 (just names) were his thieves and the neighbours he knew. The distance that separated PW2 and the alleged thieves is unknown.

In a nutshell the trial court had no sufficient evidence to proceed to convict the Appellants. It was not enough to

equate the cows whose proof is wanting to the allegedly theft. Being residents in the same village with PW1 and PW2 does not necessarily mean if their names are mentioned they become thieves. This was one of such cases where there was completely lack of evidence and the trial court should have acquitted them forthwith. On the same footing, I proceed to quash the conviction and sentence metted out, consequently the appeal is allowed and the two Appellants set free unless held for some other lawful cause.



B. R. MUTUNGI
JUDGE
23/10/2020

Judgment read this day of 23/10/2020 in presence of both Appellants and Mr. Kibwana (S.S.A) for the Respondent.

B. R. MUTUNGI
JUDGE
23/10/2020

RIGHT OF APPEAL EXPLAINED