

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
AT SUMBAWANGA**

**CRIMINAL JURISDICTION**

**CRIMINAL SESSION CASE NO. 42 OF 2015**

**REPUBLIC**

**VERSUS**

**ALEXANDER s/o STIMA**

*Date of last Order: 10/11/2020*

*Date of Judgment : 18/11/2020*

**JUDGMENT**

**C.P. MKEHA, J**

The information filed against the accused person, Alexander s/o Stima is that on 27<sup>th</sup> day of August 2014 at Mbuluma village, within Kalambo District in Rukwa Region, the accused, did murder one Joseph s/o Marekani. When the information was read over to the accused, he protested his innocence. Whereas Mr. Mwashubila and Ms. Amani learned State Attorneys represented the Republic, Ms. Neema learned advocate represented the accused person.

It was established and consequently proved during Preliminary Hearing that the deceased is indeed dead. Report on Post Mortem Examination that was admitted into evidence without objection indicates that the cause of death was a shock due to severe external bleeding. The said report (Exhibit P1) indicates that the deceased's body was found with a large cut wound around

the neck (involving both large blood vessels on the left side). And that, the deceased's clothes had been soaked in blood. Also that, there was large amount of clotted blood. Thus, it was proved during preliminary hearing that the deceased died unnatural death. It thus remained a duty on part of the prosecution to prove that, the deceased's death was the accused's contrivance as alleged in the information.

The prosecution's evidence against the accused person is pegged to the doctrine of recent possession. That, some few days after the deceased's death, the accused was found possessing nine (9) head of cattle out of twenty (20) head of cattle which were under the deceased's control and care taking, immediately before his death (deceased's).

Although the prosecution examined ten (10) witnesses, its case depends at large, to the testimonies of PW1, PW2, PW3 and PW4. The first prosecution's witness testified at length on how events leading to the accused's arrest happened.

That, on 27/08/2014 PW1, Martin Lameck bought twenty (20) head of cattle at Ntalamila Cattle Auction. He then handed the same to his herdsman one Mr. Joseph Marekani who would drive the said cattle to Myunga village where PW1 resided.

According to PW1, the herdsman commenced his journey as from Ntalamila Cattle Auction at about 13.00hrs on 27/08/2014. The herdsman was expected

to arrive at PW1's home the next day, that is, on 28/08/2014. PW1 and his herdsman were communicating through the use of cellphones as to how the latter was proceeding with his journey. PW1 lastly heard from his herdsman on 27/08/2014 at about 19.00 hours when his herdsman was approaching Mbuluma village.

Then on 28/08/2014 PW1 received a call from PW9 who was by then working as the Village Executive Officer for Mbuluma village. The said call informed him that there were about 11 head of cattle found at Mbuluma village without a herdsman and that, a dead body of a person who worn a black coat and black boots was found in the same village. Description of the Village Executive Officer regarding appearance of the dead body and the found cattle, made PW1 discover that, his herdsman had been killed and that the found cattle belonged to him. The Village Executive Officer advised PW1 to report the event at the Police Station.

PW1's testimony goes on to indicate that, when he went at the Police Station in view of reporting the event, he found that, already, the Police had information in respect of the event and that, they had already gone at the scene of crime in view of collecting the deceased's body. As such notwithstanding PW1's formal report to the Police Station, which was made on 28/08/2014, the Police did not bother to reduce PW1's statement in writing. Therefore, matters regarding the way PW1 would identify his stolen/ missing

cattle if found, were not reduced in writing in the first information to the police.

Later on, on the same day, that is, on 28/08/2014 the Police brought the deceased's body at Matai Police Station. PW1 got a chance of verifying that indeed, the dead body was of his herdsman. Even then, PW1 did not record his statement at the police station.

PW1 went on to testify that, between 28/08/2014 and 02/09/2014, efforts were made to find the remaining nine (9) head of cattle. PW1 testified further that, on 01/09/2014 the accused was found with two out of the complainant's missing cattle, which had been under the deceased's control immediately before his death. PW1 added that, shortly thereafter, on the same day, while the accused was already under arrest a search was mounted at his farm and five other head of cattle were retrieved therefrom. In view of PW1, the accused was not allowed to go and witness the search mounted to his farm as he was by then under arrest, at Nkomachindo Village office.

PW1 further testified that on 02/09/2014 he received information that two other head of cattle had been found at Kasesha cattle Auction. PW1 rushed at Kasesha Police Station and found the two head of cattle. According to PW1, those who were found with the two head of cattle at Kasesha Cattle Auction notified the police that they bought the two head of cattle from the accused.

Upon being cross examination PW1 admitted that, in his testimony, he never pointed to any specific mark of the said cattle rather than general description of black and white colours.

When the witness was questioned by the court on whether he made a written statement to the police, his first response was that, he never recorded any statement at the police. Upon reflection, the witness told the court that his statement to the police was made on 05/09/2014, after he had managed to retrieve all the twenty head of cattle.

The testimonies of PW2, PW3 and PW4 were similar. Their testimonies were to the effect that on 28/08/2014 at about 19.00hrs, the accused approached PW2's family in view of seeking assistance to have his seven head of cattle kept at PW2's kraal. According to the three witnesses, the accused obtained the said seven head of cattle as part of his inheritance from his father.

The three witnesses testified that, PW2 allowed the accused to really keep the said seven head of cattle at his (PW2's) kraal. The next day, the accused made a proposal to sell to PW2 two bulls out of the seven head of cattle.

PW2 really bought two bulls from the accused. As PW2 was on his way to Kasesha Cattle Auction in view of selling amongst others, two bulls bought from the accused, he was arrested for being found with stolen cattle. PW2 testified that, those who had lost the two bulls identified them to be theirs. Upon being cross examined PW2 told the court that, he could not tell with

certainty how the complainant identified the two bulls at Kasesha Police Station.

When PW2 was questioned by one of the Gentlemen Assessors as to the end result of the other five head of cattle, the witness replied that his servants returned the remaining five cattle to the accused. However, when PW3 was asked by the same assessor as to what was the end result of the other five head of cattle, the witness told the court that, he did not know where the other five head of cattle had gone. PW3 was PW2's son.

PW5 happened to be a Police Officer who arrested the accused. The witness found the accused at the VEO's office at Nkomachindo village. According to PW5 at that time, two bulls suspected of having been stolen were outside the village office. PW5 saw the said bulls from a distance. PW5 insisted that, there was no Seizure Certificate in respect of the head of cattle which allegedly, the accused was found possessing.

PW8 testified to the effect that in identifying the complainant's head of cattle the complainant was guided by a photograph taken by the complainant when he bought the same at the Cattle Auction. The said photograph was not tendered into evidence as an exhibit. The rest of the prosecution witnesses had nothing different from the testimonies of the witnesses referred to hereinabove.

At closure of the prosecution's case the court ruled out that a case to answer had been established by the prosecution. The accused was invited to make his defence.

The accused testified as a sole defence witness. DW1 testified that although he was arrested for an offence of cattle theft, he did not steal cattle. DW1 told the court that, there was no any document proving that the purported found cattle really belonged to PW1. According to the accused, PW1 did not identify the stolen cattle to be really his. The accused further testified that the evidence of PW2 to PW4 was also doubtful as there was no written evidence to the effect that he really sold two head of cattle to them. The accused further attacked the prosecution's case for failure to tender the purported found cattle in court or else any document in lieu of the said cattle. The accused pressed for an acquittal.

During final submissions Mr. Mwashubila learned Senior State Attorney insisted that a case of murder against the accused had been proved under the doctrine of recent possession as the accused was found with some cattle which were under the deceased's control, immediately after the killing of the deceased. The learned Senior State Attorney referred to the testimonies of PW2, PW3 and PW4 as witnesses who saw the accused with seven head of cattle later on identified by PW1 to form part of the stolen cattle which were under the control of the deceased before his killing.

The learned Senior State Attorney submitted that the accused had no satisfactory explanation on how he came to be found with stolen cattle after the death of the herdsman.

Ms. Neema learned defence advocate submitted that, the prosecution had failed proving its case beyond reasonable doubt. The learned defence advocate submitted that not all the necessary elements for proof of recent possession were proved against the accused person. The learned advocate insisted that the purported stolen cattle were found in the hands of PW2, PW3 and PW4. The learned advocate submitted that PW1 failed to convince the court on how he actually identified the purported stolen cattle. The learned advocate insisted that, the second ingredient was not proved at all. The learned advocate added that there was no Certificate of Seizure evidencing that the said seven cattle were really found within the accused's hands or under his control.

One of the Gentlemen Assessors opined that the accused be found guilty of cattle theft and not murder. The second Assessor advised that the accused be found guilty as charged. The third assessor advised that the accused be found not guilty as identification of the said head of cattle remained doubtful.

The only issue for determination is **whether there is sufficient evidence on record to the effect that, the deceased's death was the accused's contrivance.** As earlier hinted the present case is pegged on the doctrine of



recent possession. Therefore proof of death in this case is dependent upon success of the prosecution in proving each element required to be proved under the doctrine of recent possession. Under the doctrine of recent possession if a person is found in possession of property recently stolen and gives no reasonable explanation as to how he had come by the same, the court may legitimately presume that he is a thief or a guilty receiver. The doctrine applies in murder cases as well.

In the case of **Mustapha Maulidi Rashidi Vs. The Republic, Criminal Appeal No. 241 of 2014**, the Court of Appeal of Tanzania held that, for the doctrine of recent possession to apply as a basis of conviction, it must be proved, first, that the property was found with the suspect, second, that, the property is positively proved to be the property of the complainant, third, that the property was recently stolen from the complainant and lastly that, the stolen thing constitutes the subject matter of the charge against the accused. It was insisted in the above cited case that the fact that the accused does not claim to be the owner of the property does not relieve the prosecution to prove the above elements.

In the present case although the complainant learnt on 28/08/2014 that his herdsman had been killed and that his head of cattle had been stolen, he did not record his statement at the police station. The complainant's statement that was read during committal proceedings, which was the basis of his

examination in court was offered to the police on 05/09/2014. That was three days after the complainant had been handed all the twenty head of cattle.

Can it be safely said that the purported stolen property was positively proved to be the property of the complainant?

Principles of identification require that, there should be positive identification of the stolen items by the identifying witness who is supposed to give peculiar and special marks distinguishing his properties from other similar items. In the case of **Ally Zuberi Mabukusela Vs. Republic, Criminal Appeal No. 242 of 2011** the Court of Appeal held that, in all such cases the claimant should make a description of special marks on an item before it is shown to him and allowed to be tendered as an exhibit.

In this case, the complainant recorded his statement at the police after he had been handed the purported stolen cattle. Whatever special marks he might have told the police did not feature earlier before recovery of the purported stolen cattle. The complainant had sufficient time for recording his statement even before recovery of the purported stolen cattle. Subsequent identification done by the complainant with reference to his statement to the police is held to be unreliable. **See: 1. Mustapha Darajan Vs. Republic, Criminal Appeal No. 242 of 2015. 2 Yohana Paulo Vs. The Republic, Criminal Appeal No. 281 of 2012.** In the two cited cases the principle is, the victim of theft must have given a description of his stolen items for him to

claim later that the recovered items are those which were stolen from him. For the foregoing reasons, I differ with the first and second assessors but agree with the third assessor. I hold that, for failure of the complainant to prove that the recovered cattle were indeed his properties that had been recently stolen, the doctrine of recent possession cannot be brought into play. It is for that reason I hold that the prosecution has failed proving the charges against the accused. I thus acquit the accused person of the offence of murder under section 312 (3) of the Criminal Procedure Act. I proceed to order immediate release of the accused from custody unless he is held therein for other lawful cause.

Dated at **SUMBAWANGA** this 18<sup>th</sup> day of November, 2020



  
**C.P. MKEHA**

**JUDGE**

**18/11/2020**

**Court:** Judgment is delivered in the presence of Mr. Mwashubila learned Senior State Attorney for the Republic, the accused and Ms. Neema learned advocate for the accused.



  
**C.P. MKEHA**

**JUDGE**

**18/11/2020**

**Court:** Right of Appeal fully explained.



  
**C.P. MKEHA**

**JUDGE**

**18/11/2020**