

**IN THE HIGH COURT OF TANZANIA
(DODOMA DISTRICT REGISTRY)**

AT DODOMA

(APPELLATE JURISDICTION)

DC CRIMINAL APPEAL NO. 4 OF 2020

(Original Criminal Case No. 61 of 2018 of the District
Court of Kondoa at Kondoa)

1. MEJA GIDICHIBO @ KIDARI

2. KIDARI KAMALILI

3. NGAFEI BARIDIDA

.....**APPELLANTS**

VERSUS

THE REPUBLICRESPONDENT

23/3/2020 & 23/4/2020

JUDGMENT

MASAJU, J.

The Appellants, Meja Gidichibo, Kidari Kamalili and Ng'afei Baridida were together and jointly charged with the offence of Cattle theft contrary to sections 265 and 268 of the Penal Code, [Cap 16], in the District Court of Kondoa at Kondoa. They were both convicted of the offence and sentenced to six (6) years imprisonment. The Appellants were also ordered to compensate the victim seventy four (74) cows.

Aggrieved by the said conviction and sentence, the Appellants have appealed to the Court against the conviction and sentence. Their joint petition of Appeal bears two (2) grounds of appeal in which they essentially argue that the prosecution case against them was not proved beyond reasonable doubt in the trial Court.

When the appeal was heard in the Court on the 3rd day of April, 2020 both Appellants were advocated by Mr. Samwel Mcharo, the learned counsel, while the Respondent Republic was in service of the learned State Attorney, Ms. Lina Magoma.

The Appellants' learned counsel while submitting in support of the appeal, he consolidated the two grounds of appeal into one and argued that there was no direct evidence implicating the Appellants with the crime as per section 62 (1) (a) (b) (c) of the Evidence Act, [Cap 6]. That the victim of crime, Maina Karainee (PW2) acted on hearsay evidence in holding the Appellants accountable for the crime. The learned counsel cited the case of **DPP V. Elias Mwashitete [1997] TLR 319** to support his submissions.

The Appellants went on submitting that Bakari Sokoine (PW1), the Cattle shepherd did not witness the Appellants stealing the cattle but only testified on seeing the 1st Appellant going to ask for his lost cattle and then leaving. That, after PW1 took the herd of cattle home, he discovered some of the cattle missing, he then informed PW2 of the said theft.

That, PW1's colleague, Juma Mainaa (PW3), also did not see the Appellants stealing the cattle. The Appellants went on submitting that, the

Cautioned Statement (Exhibit P7) of the 1st Appellant do not belong to him since the 1st Appellant is literate who write and read as per Exhibit D1. The Appellants finalized their submissions by praying the Court to allow the appeal and quash the conviction and set aside the sentence against the Appellants.

The Respondent Republic contested the appeal save for the 2nd Appellant whom they supported his appeal. The Respondent Republic submitted that there was direct evidence by PW2, PW3, Bira Mohamed Bira (PW5) and F 8362 D/C Gotam (PW6). That PW5 is the Village Executive Officer (VEO) and PW6 is the one who arrested the 3rd Appellant. That, there was therefore direct evidence. That the doctrine of recent possession as stated in **Paul Maduka V. R (CAT) Criminal Appeal No. 110 of 2007, Dodoma Registry** that a person found in possession of stolen property, the burden of proof lies to him to prove his innocence. That, the 3rd Appellant was found in possession of eleven (11) heard of cattle, and in his testimony he did not claim ownership of the cattle.

The learned State Attorney, finalized her submissions by submitting that the prosecution case was proved beyond reasonable doubt as against the 1st and 3rd Appellants save the 2nd Appellant whose case was not proved because of section 33 (2) of the Evidence Act, [Cap 6] for want of corroboration despite of being mentioned by the 1st appellant. The learned State Attorney prayed the Court to dismiss the appeal in its entirety save for the 2nd Appellant.

In his Rejoinder, the learned counsel for the Appellants maintained his submissions in chief and added that the 3rd Appellant was allegedly arrested at Swaga swaga game reserve with the cattle thus their doubting how the said Appellant could be able to live there in with livestock.

It was alleged by the prosecution in the trial Court that, the shepherd, PW1 together with PW3 were grazing PW2's cattle and upon taking back the cattle they realised that 74 cattle were missing. That while grazing the 1st Appellant went to them looking for his lost cattle, he did not find them and he decided to leave. That, PW2 was then informed of the incident and then started looking for his lost cattle, since PW1 and PW3 did not see anyone stealing the 74 cows.

That, PW2 then reported the matter to Kondo Police Station after he was informed by an informer of the whereabouts of his cattle. It is then the OCD assisted PW2 with police men who went together with him to 3rd Appellant's house and found eleven (11) cows and arrested him as well and that the 3rd Appellant, mentioned the 1st Appellant as the owner of the cows who handled them to him for grazing. That was on the 3rd day of February, 2018.

The case was taken to Court on the 20th day of February, 2018. The 1st Appellant was arrested on the 25th day of April, 2018 while the 2nd Appellant was arrested on the 1st day of May, 2018. There is indeed no reason as to why it took 2 -3 months in arresting the 1st and 2nd Appellants considering the fact that the 3rd Appellant allegedly mentioned them. And there was no any evidence if the 1st and 2nd Appellant were nowhere to be

found. Prosecution also failed to prove the fact that the 3rd Appellant mentioned the 1st Appellant since there was no 3rd Appellant's cautioned Statement to that effect, neither did the 3rd Appellant testify so in the trial Court. The fact was only alleged by PW2 with no corroboration from any other witness. The arresting officer (PW6) who testified claimed not to know the 1st and 2nd Appellants.

The prosecution tendered the 1st Appellant's alleged Cautioned Statement (Exhibit P7) which was objected by the 1st Appellant on the ground that he is not illiterate, that he can read and write and he did tender Exhibit D1 to prove that fact. The Cautioned Statement was however admitted. The Court finds the Cautioned Statement to be taken out of time since the 1st Appellant was arrested at 4:00 hours and the Cautioned Statement taken at 13:15 hours without any extension of time thereto, contrary to section 50 (1) and 51 (1) of the Criminal Procedure Act, [Cap 20]. The prosecution also failed to bring any fingerprint expert to prove if really it was the 1st Appellants Cautioned Statement. Exhibit P7 is therefore expunged from prosecution's case evidence.

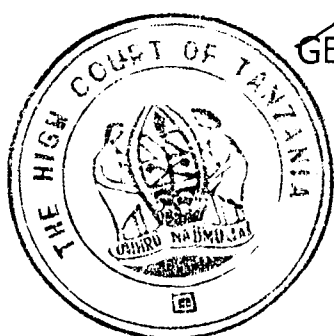
Section 38 (1) of the Criminal Procedure Act, [Cap 20] was also violated since search was conducted by a unauthorized person (PW6). PW6 did not prove to be the police officer in-charge of Kondoa Police Station or to be having any written authority by the Police officer In charge of the station as required by the above cited provision of law since it was not an emergency situation which required no search warrant. PW6 tendered a certificate of seizure (Exhibit P6) as the result of the search

conducted. The Exhibit P6 is thus expunged from prosecution's evidence since it was unlawfully obtained.

There is also doubt on prosecution's case that, if really the 3rd Appellant did mention the 1st Appellant why did it take eighteen (18) days to take the case to Court.

The eleven (11) cows allegedly found in possession of the 3rd Appellant were said to be handed over to Chizenga Seif Mhuma (PW4), a militia man, for keeping them, the cows were tendered in Court as Exhibit P1 by Pw2, the victim/owner, the Court finds nothing wrong with that since there was no dispute over ownership of the cows and PW2 was in a better position to identify them and expound on his ownership of the said cattle.

That said, the prosecution case was too fraught with gaps to be proved beyond reasonable doubt. The appeal is therefore allowed. The conviction, sentence of six years imprisoned and compensation order respectively, thereto, are hereby quashed and set aside accordingly. The Appellants shall be released from prison forthwith unless otherwise being held for another lawful cause.



GEORGE M. MASAJU

JUDGE

23/4/2020