

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

**(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KIGOMA**

**(APPELLATE JURISDICTION)**

**(DC) CRIMINAL APPEAL NO. 4 OF 2021**

(Original Criminal Case No. 49/2020 of Kigoma District Court, before Hon. E.B. Mushi – RM)

**DAMAS LUCAS ..... 1<sup>ST</sup> APPELLANT**

**WILSON HOBELA @ MWANAHOBELA ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

9<sup>th</sup> March & 28<sup>th</sup> April, 2021

**I.C. MUGETA, J.**

The facts of this case are that Chasama Ntigwanamba Masesa (PW3) who lives at Lunzewe, Geita Region has a livestock farm in Uvinza District. Leonard Samwel (PW7) is the caretaker of his herd of cattle which by January 2020 counted to 385 in total. On 29/1/2020 when the cattle came back from grazing, he noticed that twenty five head of cattle were missing. He informed the owner who asked Bahati Esrom (PW2) to assist tracing the cattle which

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had each an identification mark "MSS" at the upper part of the right back leg. On 30/1/2020, night hours, Bahati arrived at Uvinza Public Market where cattle are auctioned. He met Shaban Kimwiliko (PW6) who is the Watchman at the market and keeps the register for items brought for auction. Shabani allowed Bahati to check if the stolen cattle were part of the items registered for auction. Bahati identified fifteen head of cattle with the "MSS" mark which according to Shabani Kimwiliko had been brought by Damas Lucas (the first appellant). The first appellant was arrested by Shabani Kimwiliko. In the morning the Police were notified where G. 6252 DC Abel (PW1) and F. 3374 CPL Edward (PW10) went to the scene of crime. They seized the cattle which were finally handed over to Masesa Tabu (PW8) for safe custody. After being arrested and interviewed, the 1<sup>st</sup> appellant named the 2<sup>nd</sup> appellant as his accomplice and owner of the cattle. Coplo Edward who was familiar with the 2<sup>nd</sup> appellant arrested him at the market place where he was at that time. Before the first appellant took the cattle to the market for auction, he had obtained from Ester Stephen Luhavula (PW4) a permit to prove ownership of the cattle and the right to sell them by auction. Ester is the Village Executive Officer (VEO) of Chakulu Village. At the police station the 1<sup>st</sup> appellant recorded a caution statement before DC Charles Nkimbi (PW9)

where he admitted to have obtained from the VEO the permit to auction the cattle in which he recorded that the cattle are the properties of Masesa Kulwa instead of Wilson Hobela (2<sup>nd</sup> appellant). He also admitted to have been arrested with the cattle. The certificate of seizure was admitted as exhibit P1, the 14 cattle were admitted as exhibit P2 (one cattle died before they were tendered in evidence), the permit to transport the cattle to the market was admitted as exhibit P3, the auction item register was admitted as exhibit P4 and the caution statement is exhibit P5.

In his defence the first appellant stated that he was given the cattle by the 2<sup>nd</sup> appellant while the 2<sup>nd</sup> appellant maintained that he is not even familiar with the first appellant and he knows nothing about the cattle. Both were convict of stealing certain animals contrary to section 258 (1) and 268 (1) of the Penal Code. They were made to suffer five years of jail imprisonment. The learned trial magistrate in her judgment made no discussion or finding on the alternative count of being found in possession of property suspect of having been stolen or unlawfully acquired contrary to section 312 (1) (b) of the Penal Code.

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Aggrieved by and dissatisfied with both conviction and sentence, the appellants have appealed to this court on four ground of appeal.

- 1. The charge was not proved beyond reasonable doubts.*
- 2. The circumstantial evidence adduced was not sufficient to ground the conviction.*
- 3. The evidence of the 1<sup>st</sup> appellant as co-accused was not corroborated to support the conviction of the 2<sup>nd</sup> appellant.*
- 4. The appellants were not allowed to cross examined each other.*

While the appellants appeared in person, the respondent was represented by Robert Magige, learned State Attorney. He opposed the appeal and, on the appellants' request who retained the right of rejoinder, he submitted first.

I shall determine the grounds of appeal one after another while discussing the parties submissions per their relevance to each complaint. I start with the fourth complaint.

I wish to state outright that this complaint has no merits. As submitted by the learned State Attorney the appellants were allowed to cross examine each other as reflected at page 43 of the proceedings where 2<sup>nd</sup> appellant cross examined the 1<sup>st</sup> appellant and at page 44 where the 1<sup>st</sup> appellant was

given a chance to cross examine but he put no questions to the 2<sup>nd</sup> appellant.

I dismiss this complaint.

The third complaint is about evidence of a co-accused. In this case the prosecution relied on the evidence of the first appellant to implicate the second appellant. The trial court too relied on that evidence to convict the 2<sup>nd</sup> appellant. In his submissions, Robert Magige argued that the evidence shows that it is the 2<sup>nd</sup> appellant who stole the cattle and entrusted them to the 1<sup>st</sup> appellant for auction. I agree there is such evidence on record. However, this evidence is that of a co-accused (1<sup>st</sup> appellant) which is uncorroborated by independent evidence. On corroboration the learned trial magistrate had this to say: -

*"The evidence of the 1<sup>st</sup> accused person corroborates with the evidence led by the prosecution witnesses that they conspired because the 1<sup>st</sup> accused named the 2<sup>nd</sup> accused and he showed up where the 2<sup>nd</sup> accused slept and he was arrested in his way (sic) from Manchester guest to the auction".*

With respect, the learned trial magistrate fell into error. There is no evidence on record to corroborate the 1<sup>st</sup> appellant that he was given the stolen cattle

by the 2<sup>nd</sup> appellant. The evidence of all prosecution witnesses particularly that of the Policemen (PW1 and PW10) is to the effect that the 1<sup>st</sup> appellant named the 2<sup>nd</sup> appellant and they arrested him. PW10 was specific in his evidence that he was familiar with the 2<sup>nd</sup> appellant, therefore, he arrested him right away upon being named. To PW1 and PW10 the fact that the first appellant was given the cattle by the 2<sup>nd</sup> appellant is hearsay evidence. Besides being inadmissible, hearsay evidence cannot corroborate another evidence. Therefore, the finding that the appellants conspired to steal is unfounded in evidence for want of corroboration of the 1<sup>st</sup> appellant's allegation against the 2<sup>nd</sup> appellant.

The learned trial magistrate also misapprehended the evidence on how the 2<sup>nd</sup> appellant was arrested. As a matter of evidence the 1<sup>st</sup> appellant was not there when the 2<sup>nd</sup> appellant was arrested. Therefore, he cannot validly testify on his arrest. This is proved by the 1<sup>st</sup> appellant's evidence where he testified: -

*"... when the Police came they wanted to know where did I took the cattles, I told them am (sic) a cowboy (mswagaji) the owner of the cow is Wilson Hobela who told me that he is going to*

*sleep at Manchester guest house. While they were going to the said guest they met with 2<sup>nd</sup> accused who was coming and arrested him".*

On this aspect the 1<sup>st</sup> appellant's evidence is not only hearsay but also contradicts the arresting officer (PW10) who testified: -

*"I interrogated 1<sup>st</sup> accused and said the cattle were handled to him by 2<sup>nd</sup> accused I enter the auction and arrested Wilson Hobela (2<sup>nd</sup> accused) as I knew him before".*

Since courts act on direct evidence, it is the arresting officer who has to be believed and not the 1<sup>st</sup> appellant. It was therefore, a misdirection for the trial magistrate to believe the evidence of the 1<sup>st</sup> appellant and hold that the 2<sup>nd</sup> appellant was arrested on his way from Manchester guest house to the auction. He was arrested at the auction.

In the final analysis since it is a settled principle of law that the evidence of a co-accused needs corroboration to ground a conviction against the co-accused, the evidence to corroborate the 1<sup>st</sup> appellant that he was given the cattle by the 2<sup>nd</sup> appellant is missing. Lack of corroboration notwithstanding, the 1<sup>st</sup> appellant is unreliable on how he came about the cattle. According to the permit (exhibit P3) he recorded that the cattle belongs to Masesa Kulwa.

*M. Ngeta*



In the caution statement the 1<sup>st</sup> appellant named the 2<sup>nd</sup> appellant as his accomplice. However, since the 2<sup>nd</sup> appellant is not Masesa Kulwa who is named in the permit, I find it difficult to believe the 1<sup>st</sup> appellant on his allegation in the caution statement that the cattle were entrusted to him by the 2<sup>nd</sup> appellant. Further, the caution statement is his own evidence which cannot corroborate him. A witness cannot corroborate himself by his own different pieces of evidence on same fact.

I have reviewed the judgment of the trial court it is my view that the learned trial magistrate confuses similarity of evidence among different witnesses with corroboration. The following extract from her judgment supports my finding. At page 14 of the judgment the learned magistrate held: -

*"Yet PW4's and PW6's evidence corroborate with that of PW1, PW2, PW3, PW5, PW7, PW8 and PW10".*

What follows after this sentence is a narration on how the 1<sup>st</sup> appellant was arrested with the cattle and named the 2<sup>nd</sup> appellant as his accomplice. I guess by the phrase "corroborate with" the learned magistrate meant the phrase "is similar with". This is because there is no corroboration in the evidence of those witnesses on the fact that the 1<sup>st</sup> appellant got the cattle



from the 2<sup>nd</sup> appellant. Their evidence is a repetition of what the 1<sup>st</sup> appellant told them and that evidence cannot be termed as corroborative evidence. Corroborative evidence is evidence from an independent witness or source which supports a proposition already advanced by some initial evidence from other witnesses or sources. Repeation by one witness of what another witness told him about his (that another witness) knowledge of a particular fact does not make the repeated evidence corroborative of that fact..In this case there is no evidence from the named witnesses in the above extract which corroborates the 1<sup>st</sup> appellant on his allegation that he got the cattle from the 2<sup>nd</sup> appellant. The 2<sup>nd</sup> appellant was, therefore, wrongly convicted. I acquit him. The third ground of appeal has merits.

The learned State Attorney argued the first and second grounds jointly. I shall follow this partern because the two issue are interrelated. Since I have held that the 2<sup>nd</sup> appellant is not guilty, I find no circumstantial evidence on record against the first appellant. The seemingly circumstantial evidence including being arrested at the auction place related to the 2<sup>nd</sup> appellant who is already acquitted. The complaint has no merits.

I move to the first ground of appeal. Mr. Magige submitted that since the 1<sup>st</sup> appellant obtained the permit and he was arrested with the cattle, the charge was proved beyond reasonable doubts. I cannot agree more. According to the evidence, the cattle went missing on 29/1/2020. During evening hours of the same date, the 1<sup>st</sup> appellant obtained the permit to transport them to the market place and at night hours on 30/1/2020 he was arrested with the cattle. Under the doctrine of recent possession he must be deemed to be the thief unless he gives a reasonable explanation to the contrary. He has tried to explain that he got the cattle from the 2<sup>nd</sup> appellant to take them to the market. However, this narration is self defeating. He is the one who sought and obtained the permit (exhibit P3) introducing to the VEO the owner as Masesa Kulwa. He claims to have done so on the instruction of the 2<sup>nd</sup> appellant. He has not produced evidence to support his assertion under the circumstances where the 2<sup>nd</sup> appellant has disowned him. Since he lied to obtain the permit he cannot be easily believed on associating the 2<sup>nd</sup> appellant with the theft. From the evidence on record, the trial court rightly convicted him of the charge in the first count. His appeal has no merits.

The appellants were charged with an alternative count as I explained herein above. I have also said the trial magistrate said nothing about the alternative

count in her judgment. While as a matter of fact once the charge is determined on the main count the alternative count dies a natural death, it is advisable that the trial magistrate must state its fate in the judgment. Otherwise the judgment become omnibus! As this is a first appeal where I am entitled to step into the shoes of the trial court and re-evaluate the evidence, I hold that having determined the appeal on the first count, the second count which was charged in the alternative is rendered nugatory. It is hereby dismissed.

In the event, the appeal of the 2<sup>nd</sup> appellant is allowed. The appeal of the 1<sup>st</sup> appellant is dismissed for want of merits. The 2<sup>nd</sup> appellant to be released from prison unless otherwise lawfully held for another cause. Conviction of the first appellant and sentence are confirmed. The sentence is legally sound.



  
**I.C. Mugeta**

**Judge**

**28/4/2021**

**Court:** Judgment delivered in chambers in the presence 1<sup>st</sup> and 2<sup>nd</sup> appellants and Benedict Kivuma, State attorney for the respondent.

**Sgd: I.C. Mugeta**

**Judge**

**28/4/2021**