

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

**AT TANGA**

**CRIMINAL APPEAL NO.08 OF 2019**

(From the Judgment of Muheza District Court  
In Criminal Appeal No. 07 of 2019)

**SAID MPENI ..... 1<sup>ST</sup> APPELLANT**

**MSUSA OMARI ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

**MKASIMONGWA, J.**

In the Primary Court of Muheza District at Mbaramo, Said Mpeni and Msusa Omari stood charged with cattle theft contrary to sections 268 and 265 of the Penal Code. They were convicted of the offence and each was sentenced to suffer five years in jail. They were aggrieved by both the conviction and sentence hence appealed to the District Court of Muheza District which appeal was not successful. This is the second appeal.

In the petition of appeal, the Appellants listed four grounds from which they prayed the court to allow the appeal, set aside the conviction and sentence and for an order that they should be released out from jail. Efforts were made to serve the Respondent one Salim Mgaya but he did not at any time appear before the Court hence, the court ordered for ex-

parte hearing of the Appeal which had been dragging in court for almost two years.

On the date the appeal was placed before the court for hearing Mr. Tumaini Bakari Advocate appeared on behalf of the appellants. Before stating the arguments advanced in the case by the learned advocate let, thought briefly, the facts of the case as can be learnt from the prosecution evidence be stated. They are as that: on 28/05/2019 at Kwabastola Village one Mama Nganga caught a goat belonging to Salim Mgaya (Respondent) eating her rice pad. The Respondent went to Mama Nganga's home where he met her with the second Appellant who is a ten cell leader in the village. Mama Nganga released the goat to the Respondent on condition that the later pays a Tshs. 10,000/= compensation. When he was leaving with the goat, the first Appellant who is the Hamlet Chairman there at Kwabastola took the goat and handed it over to the second Appellant alleging that, he could not go away with the goat until when the matter is settled. The Appellants took away the goat despite the fact that Mzee Kaisela the Chama cha Mapinduzi Branch Secretary pleaded them to leave it with the respondent. The Appellant eventually sold the goat to one Bakari. They did so from the agreement entered in the Hamlet on how to handle the cattle

which trespass into farms and sale proceeds were used to pay the compensation claimed by Mama Nganga and the remained sum was deposited in the Hamlet Account. The incident was reported to the Police where he first Appellant promised to pay for the goat to the Respondent which he did not timely do hence the charges were preferred against the Appellants.

Turning back to the submission made by Mr. Tumaini Bakari in support the Appeal, the learned advocate contended that the offence/crime with which the Appellants were charged is constituted by both the *actus reus* and *mens rea* elements of a crime. For the prosecution to succeed in the charge of theft, the two elements must be proved beyond reasonable doubt. Going by the evidence on record, the prosecution did not prove the *mens rea* on the part of the Appellants. It was wrong in that circumstances of the case where the trial Court found the Appellants guilty hence entered the conviction.

In respect of the third ground of appeal, the appellant faulted the judgments of the Courts below on ground that they were based on the testimony of PW2 one Mohamed Issa Kaisela. Mr. Tumaini submitted that the later gave hearsay evidence which in terms of Sections 61 and 62 of



the Evidence Act [Cap 6 R.E 2019] is inadmissible. The learned counsel cemented his submission by referring the Court to the case of **Godzibert Rwamlelwa v. Prisca Rweyemamu Rwamlelwa [2005] TLR 417.**

Mr. Tumaini argued the second and fourth grounds of appeal together and he contended that in the case before the trial Court, the prosecution did not call witnesses who ought to have been called. Those are the buyer of the goat and Mama Nganga, the victim of the alleged act of the complaint's cattle trespass. Failure to call such witness left the case doubtful.

The learned advocate, based on the submission above prayed the Court that it allows the appeal.

I have considered the submission. I have also thoroughly read the record. Whether PW2 had given hearsay evidence so it should not have been acted upon? I find the answer is no. The evidence shows that it is the first appellant who called PW2 to the scene of the alleged crime. PW2 saw the Appellants departing from the scene taking away the goat the subject of the charges. He unsuccessfully requested the Appellants to leave the animal with the respondent but the Appellants did not agree with him. As to the sale of the said goat, PW2 told the Court that the first appellant



confessed to him to have sold the goat. The appellant even explained as to how the sale proceeds were spent. The fact that the appellants had sold the goat was told to the Court by H. 220 D/C Salim (PW3) a police officer. The later told the Court that the first Appellant admitted to him to have sold the goat. The testimony of PW3 corroborated to that of PW1 and PW2 and in no way I find the evidence given by PW2 could be treated as a hearsay one. As such the Court had correctly acted upon the evidence and contrary to the allegation by the Appellant, the evidence was not the only ground for entering conviction against the appellants by the Court.

The Appellants complain that, the prosecution did not call Mama Nganga and one Bakari as witnesses which fact made the prosecution case doubtful. In my view, the fact that the mentioned two were not called as witnesses did not weaken the prosecution case. PW1 was the victim of the alleged theft, PW2 witnessed when the Appellants departed with the goat. PW1 saw the Appellants selling the goat to Bakari. PW2 and PW3 were the ones to whom the first Appellant confessed that the appellant had sold the goat. The testimony here did not require necessarily that Mama Nganga and Bakari be witnesses to make the case.



Now is proof of *mensrea*. Section 258 (1) of the Penal Code [Cap 16 R.E 2019] defines as when is a person said to steal a property. The subsection reads as follows.

*"A person who fraudulent and without claim of right takes anything capable of being stolen or fraudulent converts to the use of any person other than the general or special owner thereof anything capable of being stolen steals that thing."*

Going by the subsection, a crime of theft is not an absolute one. Therefore in the case involving the offence of theft, the prosecution must prove both *actusreus* and *mensrea*. In the case at hand going by subsection (2) of Section 258 of the Code, the prosecution had to prove ***"intent permanently to deprive the general or special owner of the thing of it"***. The evidence on record amply demonstrated that the Appellants took the goat from the complaint/respondent. The issue is whether the taking was fraudulent that is it was with an intent permanently to deprive the owner of the goat and without claim of right. Here we do not have direct evidence to that effect from the prosecution. What is clear from the testimony of PW3 is that there was an agreement entered by the residents of the Hamlet to which the appellants were leaders to sale all the cattle which trespass into people's farms. It is again clear from the



testimonies of PW1, PW2 and PW3 that the accused/appellants were seen selling and or admitted to have sold the goat. Furthermore it is clear from the testimony of PW2 that the goat sale proceeds were spent by paying compensation to the victim of the cattle trespass and the remained sum was deposited in the Hamlet's Account. These facts do not reveal the evil intent (*mens rea*) on the part of the Appellants. Suffice it to say that, the prosecution did not prove *mens rea* on the part of the appellants. As such the appellants were wrongly convicted and sentenced of the offence.

In event, I find merit in the appeal. It is therefore allowed. The conviction entered by the trial Court and upheld by the District Court is quashed and the sentence imposed is set aside. It is ordered that the appellants be forthwith released from jail if they are not therein for other lawful causes.

**DATED at TANGA** this 3<sup>rd</sup> of June, 2021.



  
E. J. Mkasimongwa

**JUDGE**

**03/06/2021**