

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

**AT MWANZA**

**CRIMINAL APPEAL NO. 112 OF 2021**

*Appeal from Judgment of the District Court of Misungwi at Misungwi (Marick, DRM) the Criminal Case No. 111 of 2020 in the dated 6<sup>th</sup> of April, 2021.)*

**MATHIAS GARO @ LUCAS ..... 1<sup>ST</sup> APPELLANT**

**PHILIPO MUSA ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

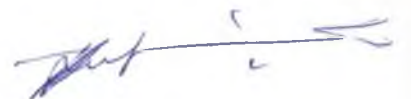
**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*30<sup>th</sup> August, & 8<sup>th</sup> November, 2021*

**ISMAIL, J.**

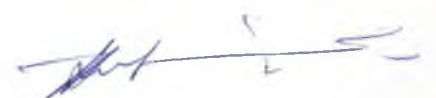
The appellants were jointly, and together with Lulyalya Malangwa, DW3, arraigned in the District Court of Misungwi at Misungwi, facing two counts. These were theft; and being in possession of property suspected of having been stolen or unlawfully acquired, contrary to sections 268 (1), (3), and 312 (1) (b), respectively. It was alleged that in the night of 1<sup>st</sup> September, 2020, at Nyasamba village within Misungwi District, Mwanza Region, the appellants stole a herd of nine cattle, valued at TZS. 4,500,000/-



. The stolen cattle belonged to a Mr. Dotto Zacharia, and were allegedly found in the appellants' possession. Both of the appellants denied charges.

Brief facts of this case as gathered from the record are as pretty easy to discern. On 1<sup>st</sup> September, 2020, Doto Zacharia, who testified as PW1 woke to a shock of his life. He found nine of his cattle missing from his kraal. He immediately reported the incident to the village authority and the vigilante. As the search got under way, he received a call from Misungwi police station, requiring him to call at the station and identify the cattle that were suspected to have been stolen. He did that and positively identified them as being those that had gone missing from his kraal. It was further stated that the said cattle were recovered from two suspects who had been rounded up by villagers, baying for their blood. The suspects happened to be the appellants. The allegation was that the appellants were in the process of selling the cattle and had offered them to PW3. Aware that there was a complaint involving theft of the same number of cattle, PW3 informed the police and the appellants were put under restraint when they tried to escape. The stolen cattle (Exhibit P 01) were seized (vide Exhibit P 02) and were handed to the Police vide Exhibit P 03.

The appellants were arraigned in court where they pleaded not guilty to the charges. Besides the appellants themselves, they also marshalled two



other witnesses who testified in their defence. In the case of the 1<sup>st</sup> appellant, the contention is that he was arrested with 8 cows and that these cows had permits (Exhibit D-01). This is contrary to the testimony of PW1 and PW2 who said that none of the stolen cattle were cows. He testified that none of the cattle handed to PW1 were his or found with them.

In the case of the 2<sup>nd</sup> appellant, his defence was that he was put in custody because he jumped bail, only to be joined with the 1<sup>st</sup> appellant and another suspect, and accused of the offence he did not commit.

At the conclusion of the trial proceedings, the 3<sup>rd</sup> accused was acquitted while the 1<sup>st</sup> and 2<sup>nd</sup> appellants were both convicted of both counts. They were sentenced to imprisonment for two years for the 1<sup>st</sup> counts, while in the case of the 2<sup>nd</sup> count, the sentence was a one-year prison term. These sentences were ordered to run consecutively.

The conviction and sentence irked the appellants, hence the institution of the present appeal. Five grounds of appeal have been raised, as paraphrased hereunder: **one**, that the trial magistrate erred in law and in fact when he relied on the evidence which was contradictory and that the prosecution did not call a village leader who received information on the theft; **two**, that the trial magistrate erred in law and fact in convicting the appellants based on the appellants' cautioned statement which was not read

over to them as required by law; **three**, that the trial erred in law and in fact in admitting exhibits P1 and P2 without considering that particulars in the said exhibits differed from the charge sheet; **four**, that the trial magistrate failed to consider the evidence in totality and hold that the prosecution failed to prove the case beyond reasonable doubt; and **five**, that the trial magistrate erred in law and in fact by convicting the appellants for cattle theft while there were no peculiar marks on them to prove PW1's ownership of the said cattle.

Hearing of the appeal was done through audio tele-conference that saw the appellants fend for themselves, unrepresented, while the respondent was represented by Ms. Georgina Kinabo, learned State Attorney. Noting that the appellants are lay and unrepresented, it was ordered that the order of speech should be altered by having Ms. Kinabo submit first before the appellants get their turn.

Ms. Kinabo began with the expression of contentment with the decision of the trial court, meaning that he was not supporting the appeal. With respect to ground one, her argument is that there were no contradictions in the prosecution's testimony. Summarizing the testimony, Ms. Kinabo argued that PW1 stated what happened at around 2.25 am on the fateful day and how he heard the noise, only to find that his herd of 9 cattle had been stolen,



efforts employed to recover the stolen property, and the way he managed to identify them. PW2 and PW3 corroborated the story and that the stolen cattle were found in the hands of the appellants, and that all were brown in colour.

The counsel argued that that there is no legal requirement that village leaders must be available when an arrest is effected, arguing that, in this case, the appellant was arrested by the visitors.

Submitting on ground two, Ms. Kinabo conceded that it is true that the 1<sup>st</sup> appellant's statement was only tendered during the inquiry as an ID and that the trial magistrate did not indicate if the same was tendered as an exhibit. She argued that that was irregular and the exhibit ought not to have been considered. This is unlike 2<sup>nd</sup> appellant's statement which was tendered and admitted. She was quick to point out, however, that the testimony of PW1, PW2 and PW3 was enough to prove the case against the appellants.

On ground three, Ms. Kinabo argued that this ground is weak. She contended that there was no difference between Exhibit P1 and P2. The counsel contended that the charge is clear that both of these exhibits talk about the same thing.

Submitting with respect to ground four, the respondent's counsel argued that PW1 has stated how theft occurred, how he reported the matter

and eventually found the cattle at the appellant's house. She also argued that PW2 saw the cattle and the appellants, and that these cows were recovered and handed to PW1, as evidenced by Exhibit P3. With regards to PW3's testimony, Ms. Kinabo argued that he received an offer for the sale of the cattle by the appellants, and that it is PW3 who reported the matter to police. She further argued that the 2<sup>nd</sup> appellant's cautioned statement was a confession that corroborated the testimony adduced by the prosecution, and that 3<sup>rd</sup> accused's testimony corroborated the prosecution's case. The same applied to DW4.

Regarding ground five, the respondent's contention is PW1 identified the cattle by their colours, ruling out any possibility of mistake identity.

Ms. Kinabo contended that the prosecution case was sufficiently proved and that the appeal is lacking in merit. She prayed that the same be dismissed.

The 1<sup>st</sup> appellant's submission was general, as it did not make specific reference to the grounds of appeal. He submitted that he had evidence that he purchased 8 cows in an auction in Shinyanga. He contended that his permit was withheld by police, alleging that the same was fake, and they never returned it back. The 1<sup>st</sup> appellant argued that he managed to secure



a letter from Shinyanga, and he tendered it in court and was admitted, in lieu of the confiscated permit.

Referring to the testimony adduced by PW3 and PW4, the 1<sup>st</sup> appellant argued that a contradiction exists between the narration of PW3 and PW4, as compared to what PW5 stated. He argued that PW3 testified that the cattle recovered did not have bulls. He further argued that the cattle were brought for testimony 98 days later and were different from those that were allegedly recovered. He argued that description of the colour of the cattle did not present any peculiarity as red cows are everywhere. He argued that the prosecution ought to have described special marks which would distinguish them from the rest of the red cows. He maintained that he bought his cows on 29<sup>th</sup> August, 2020 at Salawe Shinyanga, and that the prosecution should have called the Salawe people to confirm what he said. He wound up by decrying the decision to convert the 3<sup>rd</sup> accused person into a witness. He took the view that such decision was inappropriate.

For his part, the 2<sup>nd</sup> appellant contended that he was arrested for some other offence but police joined him in this case after he refused.

Overall, the appellants prayed that their appeal be allowed.

The rival submissions by the parties bring out one important question. This is as to whether the appeal presents any merit to justify the appellants'

quest for setting aside the trial court's decision. My disposal begins with settlement of the 4<sup>th</sup> and 5<sup>th</sup> grounds. While ground four alleges that the prosecution did not prove its case beyond reasonable doubt, ground four faults the trial court for convicting the appellants while the prosecution failed to give any peculiar description of the cattle, the subject matter of the alleged theft.

It is common knowledge that, in criminal cases, conviction can only be secured if the prosecution proves that the accused have played a culpable role in the commission of the offence with which they are charged. This means that it is the prosecution's legal and evidential duty to prove one's guilt. This position is derived from the provisions of section 110 of the Evidence Act, Cap. 6 R.E. 2019 which apportions such burden in its broad sense. With respect to criminal cases, this responsibility has been incisively restated through case law. In ***Joseph John Makune v. Republic*** [1986] TLR 44, it was observed:

*"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence. There are few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities ...."*



It was restated, yet again, in the subsequent decision of the Court of Tanzania in ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported), wherein it was held as follows:

*"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shift back to prosecution."*

The 1<sup>st</sup> appellant's contention is that the case was not proved beyond reasonable doubt. Looking at the circumstances of this case, proof of the case against the appellants would entail proving that the cattle which were allegedly stolen truly belonged to PW1. To be able to do that, the prosecution ought to have tendered evidence which would give special marks that would distinguish the cattle from the rest, and pin ownership to PW1. Ideally, this was to be done by PW1 himself. The requirement of giving a description of the peculiar features or marks is an imperative prerequisite and it has been emphasized in many judicial pronouncements. In the case of ***Mustapha Darajani v. Republic***, CAT-Criminal Appeal No. 242 of 2005 (unreported), the Court of Appeal held as follows:

*"... In such cases description of specific mark to any property allegedly stolen should always be given first by the*

*alleged owner before being shown and allowed to tender them as exhibits."*

This requirement was reiterated in the subsequent decision of the upper Bench in ***Gwisu Nkonoli & Others v. Republic***, CAT-Criminal Appeal No. 359 of 2014 (unreported). It was held:

*"It is now settled that, a detailed description by giving special marks of the alleged stolen items has to be made before such exhibits are tendered in court. That act will avoid doubts as to the correctness of the alleged stolen items.... In the instant case, no special marks were tendered at the trial court as exhibits. We are of the considered opinion that such a failure is a fatal omission in the prosecution case."*

See also: ***Bundala s/o Mahona v. Republic***, CAT-Criminal Appeal No. 224 of 2013; and ***Godfrey Lucas v. Republic***, CAT-Criminal Appeal No. 151 of 2014 (both unreported).

Inspired by the decisions cited above, I take the view that PW1's failure to provide a detailed description of the cattle allegedly stolen and recovered from the appellants was a fatal omission on the part of the prosecution, and it cannot be said that the case for the prosecution was proved. It is a shortfall that justifies the appellants' contention that the whole evidence adduced by

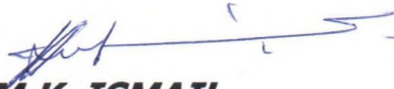
the prosecution failed to establish the appellants' guilt. Consequently, I see merit in these grounds of appeal and I allow them.

Given the strong weight that these grounds carry in the appeal, I hold that the appeal succeeds. I quash the conviction, set aside the sentence and order that the appellants be set free, unless is held in custody for some other lawful cause.

It is so ordered.

DATED at **MWANZA** this 8<sup>th</sup> day of November, 2021.



  
**M.K. ISMAIL**  
**JUDGE**