

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 5 OF 2021**

*(Originating from the decision in Criminal Case No. 147 of 2019 of District Court of Rufiji, at Kibiti by Hon. F.P. NTULO, RM dated 20<sup>th</sup> December, 2019)*

**HASHIM ATWASH RASHID..... 1<sup>st</sup> APPELLANT**  
**IDRISA ATWASHI MTIMBUKO..... 2<sup>nd</sup> APPELLANT**  
**ISMAIL MOHAMED..... 3<sup>rd</sup> APPELLANT**  
**HARUBU TENGEZA MKWERA.....4<sup>th</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*13<sup>th</sup> October, & 10<sup>th</sup> December, 2021*

**ITEMBA, J.**

In the District Court of Rufiji, the abovementioned appellants were arraigned to answer a charge of cattle theft contrary to section 268 read together with section 258 of the Penal Code, Cap 16 R.E: 2002. It was alleged that on 21<sup>st</sup> September, 2019 at or about 12:00 hours at Kivinja village within Kibiti District in Coast Region, the appellants willful and unlawfully stole two cows valued at Tshs. 2,000,000/= the property of one Amos Edward Mtemi.

The prosecution case was that, on the material date, the appellants were caught with the stolen cows which they had already slaughtered and

skinned. It was testified by Amos Edward Mtemi (PW5), that on the material date he lost two of his cows. He started searching and saw the appellants skinning cows but since he was alone he decided to go back home and inform Rabecha Manat Mangati (PW1), Maganga Manati Mangati (PW2) and Hamisi Narat Rengu (PW3). That, they went together at the crime scene arrested the appellants and reported the matter to the police. All the testimonies by PW1, PW2, PW3 were in common that on the fateful date they all happen to find the appellants skinning the stolen cattle and arrested them and that the appellants had a bush knife and an axe. It was F.77 41 DC. Geoffrey (PW4) an investigator who testified to have gone at *locus in quo* together with the Officer in Charge – Criminal Investigation Kibiti and found the appellants under arrest. They seized the meat, an axe and a bush knife (the said exhibits were tendered and admitted collectively as Exh. P4) (allegedly to have been used to skin and chop meat). The inventory of the said meat and seizure certificate were admitted as exhibit P1 and P2 respectively.

In their defence, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants denied the allegations against them and contended that on the material date they were together with the 4<sup>th</sup> appellant one Harubu Tengeza Mkwera when the complainant went and asked if they have seen his two cows and they honestly said no. Surprisingly, the 4<sup>th</sup> appellant using the mobile phone, called and hired a motorcycle to carry his luggage. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants noted some blood stains and realized that it was the 4<sup>th</sup> appellant who committed the offence. According to Idrisa Atwashi Mtimbuko (DW2) herein and Ismail Mohamed Mtupa (DW3), Harubu Tengeza Mkwera (DW4) told them that he had slaughtered a cattle as he wants some money to go home and see his

family. It was the testimony of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants that upon realizing the 4<sup>th</sup> appellant's conduct, they decided to go home and while on their way they were arrested by a group of people. Harubu Tengeza Mkwera (DW4) the fourth appellant herein, testified that on the material day he was phoned by his friends who asked him to assist them in preparing charcoal and they happen to have met but before they left, they were surrounded by group of masai people who started beating them and eventually they got arrested. In essence of his testimony, the 4<sup>th</sup> appellant was suggesting that the offence was committed by 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants.

After hearing the prosecution and the defence cases, the District Court of Rufiji convicted all the appellants as charged and sentenced them to serve 7 years of imprisonment. The trial court's decision was based on the evidence of PW5 the owner of the stolen cattle and that of PW1, PW2, and PW3 who testified to have found the appellants skinning the meat, as well as the evidence by PW4, the police investigator. A verdict was entered against the 4 appellants on the ground that the 4<sup>th</sup> appellant could not slaughter and skin the two cows by himself and that eye witnesses found all four appellants together skinning the two cows.

Upon being aggrieved by the decision of the trial court, the appellants, launched nine (9) grounds of appeal and later on lodged 6 additional grounds of appeal, henceforth there were a total of 15 grounds of appeal which for brevity can be condensed into the following three (3) main grounds;

***First;** That the trial magistrate erred in law by failing to give the appellants an opportunity to cross examine each other during hearing of defence case. **Second;** The evidence used to convict the appellants was not credible. **Third;** There was no sufficient evidence by the prosecution to prove beyond reasonable doubt that the appellants were guilty of the offence.*

At the hearing, the appellants fended for themselves whilst the respondent/Republic was ably represented by Ms. Rehema Mgimba, learned State Attorney.

When the appellants were given opportunity to amplify to their grounds of appeal, they adopted the petition of appeal and the additional grounds therein. They reserved their arsenals for rejoinder; if the need arises.

Ms. Mgimba expressed her stance at the very outset that she supported the appellants' appeal. The learned sister submitted in generality that the prosecution case was not proved beyond reasonable doubt. She articulated that the appellants were charged with an offence of cattle theft contrary to section 268 and 258 of the Penal Code and one of the ingredients to prove the said offence is ownership of the stolen property. Ms. Mgimba argued that the testimonies of PW1, PW2, PW3 and PW5 were to the effect that they found the appellants with two cows, but page 19 of the typed proceedings of the trial Court indicates that PW5 told the Court that he identified the cows by their color which was the red.

It was vehemently argued by Ms. Mgimba that it is a legal requirement for the owner of the stolen property to give a special mark and not a general identification of a property. To bolster her preposition, she

cited the case of **Ramadhani Hamis @ Joti vs. Republic**, Criminal Appeal No. 513 of 2016, in which at page 9 the Prime Court of the land had held that the identification of a property should be more than general.

Ms. Mgimba accentuated that identification done only by color is not enough, according to her, PW5 failed to prove ownership before the trial Court and hence the case was not proved beyond reasonable doubt. The learned State Attorney had a stance that she supports the appeal because essential ingredient of theft was not proved and thus she did not proceed with other grounds of appeal. The learned sister concluded that despite the fact that the appellants had mentioned each other, their evidence is that of a co-accused which needs corroboration. She added that corroboration was lacking as PW5 had failed to prove ownership of the allegedly stolen cows.

Given the response by the learned State Attorney, the appellants had nothing to rejoin. They just prayed the sentence of 7 years of imprisonment to be set aside.

I have meticulously considered the grounds of appeal and concurring arguments by the parties. Having so done, the central issue for determination by this court is ***whether this appeal is meritorious.***

Ms. Mgimba had submitted that the evidence against the appellants was shaky to conclude that it was proved beyond reasonable doubt that the appellants committed the offence. Ms. Mgimba rightly explained that, PW5; who was the complainant and the owner of the alleged stolen cattle did not testify any further with respect to special mark (s) of the respective cows which would differentiate them from other cows. It is apparent from the records that PW5 testified to have identified his two stolen cow by red

color and he believed the cattle were his. In his testimony he simply stated at page 17;

*"...When I saw the cattle being skinned I could identify them to be mine I identified them by they did not skin the head and also all were red in colour that's all what I have for today."*

It is apparent from the above excerpt in the testimony of the complainant that PW5 did not testify on any marks, let alone distinct marks, of the alleged stolen cattle. He simply mentioned their colour and heads which both are common in the pastoralist societies. In cases of this nature, identification of allegedly stolen cattle is of paramount importance. A mere mention of the colour alone for identification, I believe is not enough since cows are common animals at the locality where this offence was committed. Therefore, reliance on only colour, will likely lead to a mistaken identification. See the case of **Jackson John vs. Republic**, Criminal Appeal No. 515 of 2015 (Unreported) where the identification of a motorcycle by colour only was held to be not enough.

Likewise, in the case of **Ramadhani Hamis @ Joti (Supra)** relying on the position in **David Chacha and 8 Others vs. Republic**, Criminal Appeal No. 12 of 1997 (Unreported) it was stated;

*"It is a trite principle of law that properties suspected to have been found in possession of accused persons should be identified by the complainant conclusively. **In a criminal charge it is not enough to give generalized description of the property.**"* [Emphasis is added]

[See also the **Vumilia Daud Temi vs. Republic**, Criminal Appeal No. 246 of 2010 (Unreported), **Ally Zuberi Mabukusela vs. Republic**, Criminal Appeal No. 242 of 2011 (Unreported)]

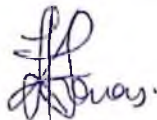
In the case at hand, the fact that the allegedly stolen cattle were not sufficiently identified as distinct from other cattle, sheds doubts in the prosecution case as to whether the cattle which the complainant (PW5) purported to identify were actually the ones stolen from him. The question as to ownership of the cattle found with the appellants remains baffling. Under those premises, prosecution case is tainted with doubts and this situation requires the case to be decided in favour of the appellants.

I therefore agree with the learned state attorney that the case against the appellants was not proved beyond reasonable doubt. The raised issue is answered positively and this ground is enough to dispose of the appeal.

Consequently, I allow this appeal, conviction entered and the sentence passed against the appellants by the trial Court are, respectively, quashed and set aside. I order the immediate release of all the appellants from the prison custody unless they are otherwise lawfully held.

It is so ordered.

Dated at Dar es salaam this day of 10<sup>th</sup> December, 2021.

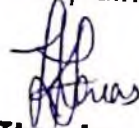


**L. J. Itemba**

**JUDGE**

**10/12/2021**

Rights of the parties have been explained.



**L. J. Itemba**

**JUDGE**

**10/12/2021**

Judgement delivered at Dar es Salaam this 10<sup>th</sup> day of December, 2021 in the presence the appellants in persons, Ms. Emma, RMA, and in the absence of the respondent.



**L. J. Itemba**

**JUDGE**

**10/12/2021**

