

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 173 OF 2021**

**ORIGINAL CRIMINAL CASE NO. 164 OF 2020**

**CHACHA s/o NYAMBARI @MKAMA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

*(Appeal from the decision of District Court of Mkuranga at Mkuranga,  
Before Hon. H. L. MWAILOLO-RM) dated on 29<sup>th</sup> day of April, 2021 in  
Criminal Case No. 104 of 2020)*

**JUDGMENT**

*Date of last Order: 29/11/2021*

*Date of Judgment: 01/12/2021*

**MGONYA, J.**

In this case the Appellant, **CHACHA s/o NYAMBARI @ MKAMA** was charged and convicted of the **offence of cattle theft c/s 268 of the penal Code Cap. 16 [R. E. 2019]** hence the sentence of **five (5) years' imprisonment** was imposed on him. The Appeal is against both the conviction and the sentence on seven grounds as listed in his Petition of Appeal as hereunder:

- 1. That, the learned trial Magistrate erred in law and facts by finding the Appellant guilty for the offence of cattle theft whereas there was no relevant evidence given by the prosecution witnesses (PW1, PW2, PW3 and PW4) to establish whether the Appellant was really found in possession with the alleged stolen cows.***
- 2. That, the learned trial Magistrate erred in law and facts by holding on the prosecution witnesses who failed to summon the said village leader who called and/or suspected the Appellant and warn him to establish their allegation and the Appellant's apprehension in connection with the said offence.***
- 3. That, the learned trial Magistrate erred in law and facts to ground the Appellant's conviction basing on the circumstantial evidence while the same did not irresistibly point to connect the appellant with the alleged crime.***
- 4. That, the learned that Magistrate erred in law and fact to convict the Appellant basing on Exhibit P1 without taking into account that the alleged Exhibit was seized in non-compliance of the law.***

***5. That, the learned trial Magistrate erred in law and facts by failure to observe that the prosecution did not establish the chain of custody of the alleged cows comprised in Exhibit P1 which was the sole basis for the offence of cattle theft and/or found in possession and for the Appellant's conviction.***

***6. That, the learned trial Magistrate erred in law and facts by ignoring and disregarding the defence of the Appellant.***

***7. That, the learned trial Magistrate erred in law and facts by failure to observe that the prosecution has failed to prove its case beyond reasonable doubt.***

Whereof, the Appellant prays this Court to allow this appeal, quash the conviction, set aside the sentence and release him from prison.

Hearing of the Appeal was conducted by parties filing their respective written submissions in this regard as prayed. A court order in that respect was adhered to, hence this Judgement.

I have read both parties' respective submissions for and against the Appeal. However, in determining this appeal, I have preferred not to reproduce Parties' submissions and straight I

will briefly state parties' positions before I determine the grounds of appeal. It suffices to say that, the Appellant in his written submission elaborated in length the above grounds of appeal as they appear above.

In response, the Respondent, the Republic herein from the outset declared not to support the appeal. Submitting on the **first** and **third grounds of appeal**, it is the Respondent's Counsel assertion that, despite the fact that there was no an eye witness who witnessed the appellant stealing cattle, it was proved by four Prosecution witnesses before the court by circumstantial evidence that it was the appellant who stole the cattle. It is from the above explanation, the Respondent's Counsel is of the view that, at the trial, the case against the Appellant was proved beyond reasonable doubt. Further, that the Appellant was fairly convicted. Further the sentence was according to the law for the offence charged. They declared the ground **meritless**.

On the **second ground**, it is learned State Attorney's submission that since there is no legal requirement to call witnesses who witnessed a crime before the court to tender evidence, then **this ground too lacks merits**.

On the **forth ground** on the lack of seizure certificate before the admission of Exhibit P1, it is the learned

State Attorney's assertion that since he appellant confessed to the Village Leaders that he was the one who stole the cattle, there was no need of having the seizure certificate to support the mentioned exhibit. It is from the above reasoning, the Counsel ruled out the **ground meritless.**

Submitting for the **fifth ground** of Appeal, it is the Respondent's Counsel concern that the Appellant's assertion that prosecution did not establish the chain of custody to **Exhibit 1** is a misconception. The reason being that, since the said exhibit was identified by PW1, the same did not change hands, taking into consideration that the appellant was the one who returned the said cattle to the owner's (PW1) premises. It was further submitted that it is not all the exhibits that needs to have chain of custody. The case of ***KASSIMU SALUM V. REPUBLIC, Criminal Appeal No. 186 of 2018 at pages 8 & 9*** was cited to support the position.

From the above submission, the Respondent is of the view that the 5<sup>th</sup> ground deserves to be **dismissed.**

On the **sixth ground** of Appeal that the learned trial Magistrate erred in law and facts by ignoring and disregarding the defence of the Appellant, Respondent submitted that the Appellant's testimony was duly evaluated and the trial Magistrate reached to the fair decision thereto.

On the **seventh ground**, the Respondent's Counsel submitted that at the trial court Prosecution were able to prove the case beyond reasonable doubt as what was needed was to prove that there was cattle theft by the Appellant to defraud the owner, something that was done. It is from the Respondent's brief reply thereto, **finds the 7<sup>th</sup> ground too meritless.**

From the above reply, it is the Respondent's prayer that the Appeal before the court deserves to be dismissed as the same is meritless.

After the Respondent's reply to the grounds of Appeal, I am now in a position to determine the grounds of Appeal brought by the Appellant herein.

To begin with is the 1<sup>st</sup> and 3<sup>rd</sup> grounds of Appeal that **the learned trial Magistrate erred in law and facts by finding the Appellant guilty for the offence of cattle theft whereas there was no relevant evidence given by the prosecution witnesses (PW1, PW2, PW3 and PW4) to establish whether the Appellant was really found in possession with the alleged stolen cows; and that the learned trial Magistrate erred in law and facts to ground the Appellant's conviction basing on the circumstantial evidence while the same did not**

**irresistibly point to connect the Appellant with the alleged crime.**

As the two grounds are both on circumstantial evidence, the n the same will be determined simultaneously.

Referring to the trial court's decision, it came to my knowledge that the trial Magistrate confessed that there was no an eye witness to the cattle theft by the Appellant. However, he had convicted him due to the **circumstantial evidence**. Before I determine these ground, let me refer the principles on circumstantial evidence as it was held in the case of ***SADIKI ALLY MKINDI V.THE D. P. P. CRIMINAL APPEAL NO. 207 OF 2009 (Arusha February, 2012)*** where eight principles were set out on the general rules regarding circumstantial evidence in criminal cases as elucidated in **SARKAR ON EVIDENCE, Fifteenth Edition, Reprint 2004 at pages 66 to 68**. These are:

***"1. That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the***

***involvement of the accused in the crime must clinch the issue of guilt.***

- 2. That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given the benefit of doubt.***
- 3. That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred therefore.***
- 4. Where circumstances are susceptible of two equally possible inferences the inference favouring the accused rather than the prosecution should be accepted.***
- 5. There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused, and the chain***

***must be such human probability the act must have been done by the accused.***

- 6. Where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.***
- 7. Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though the party offers no explanation of them.***
- 8. If combined effect of all the proved facts taken together is conclusive in establishing guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive."***

I have to admit that the above principles were not adhered to this case and that the said circumstantial evidence to the case couldn't have commanded conviction as indeed there is no any chain of evidence so far complete as not to leave reasonable ground for a conclusion there

from consistent with the innocence of the accused. Further, the chain to the events is not accurate to show that the theft was really done by the Appellant. On the other hand, there is no a tangible series of circumstances which is dependent on one another so as to be read as one integrated whole of proof of circumstantial evidence.

It is my concern in this case too that, despite the fact that the accused, the Appellant herein was not seen stealing, but also there was no one who saw the cattle in Appellant's possession. Instead, it is just stated that he Appellant brought back the cattle to PW 1 - the owner, after he had promised to do so.

It is in record that, the matter was reported both to village Government and to Police. If that was the case, it is to my surprise as to why the Appellant was not apprehended immediate before handing the cattle to the owner; instead, he was arrested later when there was a threat to beat and burn him.

Further, the Villagers in this case are recorded to have said that one "**Steve**" is the one who stole the cattle. But from the record, it has come to the knowledge that, the said Steve, is not the appellant and nothing was put forward to clear this

doubt. There was no tangible evidence at all that connects the Appellant to the **THEFT** apart from suspicious.

All in all, it is my firm view that the case was supposed to be proved to command the said circumstantial evidence. However, that was not the case. From the above explanation, **the 1<sup>st</sup> and 3<sup>rd</sup> grounds have merits.**

The **2<sup>nd</sup> ground** of Appeal that, **the learned trial Magistrate erred in law and facts by holding on the prosecution witnesses who failed to summon the said village leader who called and/or suspected the Appellant and warn him to establish their allegation and the Appellant's apprehension in connection with the said offence.**

In determining this point, I have noted from the record that, there are two allegations which involved the Appellant, Village Leaders and the same. One is the fact that, the Appellant was about to be killed by the villagers due to his cattle stealing behaviour and as the Villagers were not happy with the Appellant's acts of stealing despite of warning him on several occasions. It is my concern that, in order these allegation to have weight, I expected even one Village Leader and a Villager to appear before the court and testify on those facts so as the said allegations have weight.

Mere words cannot make the case to excel on weight in any way. The above mentioned missing witnesses, their testimony was paramount to clear some ambiguities and hearsay allegations that arose during trial on the part of the Prosecution. It has to be reminded that, under the Law of **Evidence Act, Cap. 6, (Supra)** that whoever alleges have the duty to prove. Under the given situation and from the above explanation, the second ground is seen with weight and therefore **merituous**.

The **4<sup>th</sup>** ground states that **the learned that Magistrate erred in law and fact to convict the Appellant basing on Exhibit P1 without taking into account that the alleged Exhibit was seized in non-compliance of the law.**

In the cause of determining this ground, I have to confess that from the record, I have failed to find any **certificate of seizure** to prove the cattle was held by the Appellant. **Exhibit P1** was just at the trial court without tracing its origin that the same was found in whose possession. Particularly from the appellant to implicate him. On the matter of certificate of seizure, I would like to refer to the case of ***RIDHIKI BURUTANI VS. R. Criminal Appeal No. 40 of 2011 (HCT at Songea) (Temba, J. )*** where it was held that:

***" (1) According to the provisions of s. 38(3) of the CPA, it is mandatory that the officer seizing the property must issue a receipt not only acknowledging that he has seized the property but also to bear signatures of persons present during the search and seizure. These persons include the owner of the premises. In the present Appeal, it is stated that Tatu Issa, the owner of the premises, had informed the prosecution witnesses that the suspected stolen properties were seen at the Appellant's home. In addition, the witnesses stated that Tatu Issa witnessed the search and the listed items were recovered from the search. The issue here is, why did the police fail to issue a certificate of seizure? It is assumed here that, there was none and that is why it was never produced as exhibit to support the prosecution. For this reason, the prosecution case was not proved beyond the reasonable doubt. The allegations of search and seizure were not proved."***

From the above, it is still my concern that, it is from the record that this matter was duly reported to the police. How comes the Appellant can just come and return the cattle in the premises and nothing documentary was prepared by the police

hence they had a knowledge that the thief was returning the cattle. In all standards, as there are many doubts surrounding this matter, **this ground too holds water and therefore succeed.**

The **5<sup>th</sup> ground** is to the effect that, **the learned trial Magistrate erred in law and facts by failure to observe that the prosecution did not establish the chain of custody of the alleged cows comprised in Exhibit P1 which was the sole basis for the offence of cattle theft and/or found in possession and for the Appellant's conviction.**

This ground should not take much of the time since in the above grounds, it has also been observed that, indeed there was no chain of custody that was established to the stolen cattle. As said before, no one saw the Appellant, there was no search, no seizure certificate to that effect, who was involved on search etc. This ground too **succeeds.**

The **6<sup>th</sup> ground** states that **the learned trial Magistrate erred in law and facts by ignoring and disregarding the defence of the Appellant.**

After I have gone through the record thoroughly, I am in support of this ground since, had the Magistrate evaluated critically the Defence testimony, he could have spotted so

many contradictions and many questions from the Prosecution witnesses testimonies. However, that was not the case. It is my own evaluation that in this case, the Accused's testimony was rather straight different with that of the Prosecution witnesses. The same also carried more weight and meaning more than Prosecution case. The highlighted shortcomings to prosecution case made it weak and strengthened the Defence case; and that conviction was tentative under the circumstances. This ground has **weight**.

**On the 7<sup>th</sup> ground**, the Appellant is of the view that, **the learned trial Magistrate erred in law and facts by failure to observe that the prosecution has failed to prove its case beyond reasonable doubt**. From the above grounds, and for the explanation given thereto, it has been demonstrated that the case at the trial court was not proved beyond reasonable doubt and that indeed Prosecution failed to prove the case to the required standard to command conviction.

The term ***"to prove beyond reasonable doubt"*** was explicitly defined in the case of ***YUSUPH ABDALLAH ALLY V R.; Criminal Appeal No 300 of 2009 (Unreported)*** to mean:

***"To prove a prosecution case beyond reasonable doubt means, simply, is that the prosecution***

***evidence must be strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irritably point to the accused person and not any other, as the one who committed the offence. The said proof does not depend on the number of the witness but rather, to their credibility as per section 143 of The Evidence."***

From the above observation, **this ground too is meritious.**

In the event therefore, I **allow the Appeal, quash the conviction and set aside the sentence. The Appellant should be released from the custody immediately unless he is lawful held with another case.**

It is so ordered.

Right of Appeal explained.



**L. E. MGONYA**

**JUDGE**

**01/12/2021**

**Court:** Judgment delivered in the presence of Appellant in person and Ms. Rehema Mgimba the learned State

Attorney for the Respondent and Ms. Veronica RMA  
this 1<sup>st</sup> day of December, 2021.



  
**L. E. MGONYA**

**JUDGE**

**01/12/2021**