IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 119 OF 2021

(Originating from the District Court of Kilosa, at Kilosa in Criminal Case No. 31 of 2019 by Hon. Lyon, SRM)

PETRO MLEY MLIMBA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: ***16/8/2021***

Date of Judgment: ***08/9/2021***

ITEMBA, J;

In the District Court of Kilosa, the appellant one Petro Mley Mlimba was arraigned to answer a charge of cattle theft contrary to section 258 (1) and 268 (1) of the Penal Code, [Cap 16 R.E 2002]. It was alleged that on 13th January, 2019, at Magomeni area within Kilosa District, he had stolen a herd of 60 goats valued at Ths. 5,600,000/=, the property of Amos Edward.

The prosecution case was that, on the incidence, the owner of the stolen goats, who testified as PW1, was at home. The appellant and his colleagues, came at PW1s premises aiming to steal, the dogs started barking, something which made PW1 to awake the children, PW2, one George Kiunge and the rest to calm the dogs. However, the children informed PW1 that they were seeing people coming towards them with torch lights. PW1. Decided to

go outside the house but before he reached there the bandit threw a crub to him. He went back inside. PW2, testified that the appellant did grab them and they were able to identify him through a torch light. PW3, one Adela Victoria who introduced herself as a wife of PW1, testified to the effect that at that night she was watching through the window and saw three maasai people among whom she identified the appellant as there was solar light. Both PW2 and PW3 stated that they knew the appellant before the incident because he had been visiting their house severally.

It was the prosecution testimony by PW1, PW2 and PW3 that the bandit had chased PW1 inside and took the 60 said goats. PW4 namely Joseph Muhesa who was the neighbour did testify that he found PW1 crying and explained to him that he had been beaten up with maasai people. PW1 further narrated to PW4 that his goats had been stolen by the same people. The two started following up and searching for bandits and goats but ended in vain. It was PW1 who testified to have reported the incident at the police station where PW5, G.9772 P.C. recorded his statement. PW1 mentioned the appellant being among the maasai people who perpetuated the offence. The appellant was arrested and interrogated by PW5.

In his sworn evidence, the appellant told the trial court that on 12th January, 2019 at around 8 am, he had taken his cousin to hospital. He went back home at 6 pm. On the next morning he woke up and started treating the cattle. He was told by his neighbour that he had been mentioned as one among the suspected people who had stolen PW1 goats, so he decided to report at the police station where he was arrested.

After hearing the prosecution and the defence cases, the District Court of Kilosa convicted the appellant as charged and sentenced him to serve 15 years of imprisonment. The trial court's decision was based on the evidence of visual identification by the testimonies of PW1, PW2 and PW3 who testified to have identified the appellant at the scene by the aid of solar light.

Upon being aggrieved by the decision of the trial court, the appellant, who through the service of Mr. Simon Lameck Mpina, learned advocate, launched the following four (4) grounds of appeal:-

"That, the trial Court found the conviction against the appellant despite the glaring doubts created by prosecution witnesses.

1. *That, the 15 years imprisonment sentence imposed by the learned trial magistrate is absolutely illegal.*
2. *That the trial court erred at law and fact to hold that the matter was proved beyond reasonable doubt despite material contradiction of evidence offered by the victim (PW1) and that PW2, PW3 and PW4.*
3. *That, the trial court found conviction against the appellant based on defective charge."*

When the matter came for hearing, the appellant was represented by Mr. Simon Lameck Mpina, learned advocate whereas the respondent/Republic was ably represented by Ms. Jenifa Masue, learned Senior State Attorney.

Upon being given an opportunity to amplify on the grounds of appeal, Mr. Mpina prayed to abandon the second ground of appeal and submitted on the remained ones.

On the first ground, Mr. Mpina contended that the trial court wrongly convicted the appellant in reliance to the evidence of visual identification. He argued that in the case of **WAZIRI AMANI vs. R**, [1980] TLR 250, the Court of Appeal had outlined factors to be considered to rely on visual identification evidence, which are; one, time; which he contended that neither of the witnesses had stated for how long they witnessed the appellant at the scene committing the said alleged offence. Two; the source and intensity of light. The counsel contended that the witnesses had claimed to have identified the appellant through the solar light, however, neither of them explained the intensity of the said solar light as there are different levels of light. Three; the distance between the witness and the identified person, which the counsel stressed that PW2 who testified to have identified the appellant, did not explain the distance between him and the appellant at the scene. The appellant counsel further cemented that the testimony of PW1 and PW2 raises a possibility of mistaken identity. To bolster on his preposition, he referred the case of **Rasul Amir Karan @ Juma & 3 others vs. The Republic**, Criminal Appeal No. 368 of 2017.

As to the 3rd ground of appeal, Mr. Mpina submitted that there is material contradiction between the testimony given by PW1 and that of PW4. He explicated that the evidence of PW1, PW2, PW3 does not corroborate each other on the fact that PW1 was beaten. Only PW4 stated that and in saying so he contradicts PW1. Mr. Mpina further contended that PW1 states that he was chased and came back alone but his wife PW3, states that PW1 was chased and came with other people at the scene. Again PW1 states that the incidence took place on 13/1/2019 midnight but PW3 mentions

14/1/2019 at 2AM. For, that reason the appellant's counsel accentuated that such evidence raises doubts and it should be resolved in favour of the appellant. To support his contention, he cited the case of **Hussein Iddi and another vs. R, (1986) T.L.R 166,** which states that whenever there are doubts in prosecution case, they have to be resolved in favour of the accused.

On the 4th ground of appeal, the learned counsel contended that the charge sheet was defective as it only contains provisions of section 258 (1) and 268 (1) of the Penal Code without inclusion of section 258 (3) of the same Code which mentions the specific animals stolen. He argued that section 268 (1) is too general.

In reply, Ms. Masue expressed her stance at the outset that she was supporting the appeal. The main reason being the predicaments transpired on the evidence of visual identification which the trial court relied to convict the appellant. She conceded to the fact that the intensity of the source of light (solar light) was not stated by the witnesses and subscribed fully with the decision **Rasul Amir Karan @ Juma & 3 others (supra)** which requires a witness to explain about the intensity of the light.

She further added that PW1, PW2 and PW3 testified to have known the appellant before the incidence, hence the witness ought to have described the appearance of the appellant as it was held in **Rasul Amir Karan @ Juma & 3 others (supra).** Ms. Masue to cement on the point, she added another case of **Scapu John and another vs. Republic,** Criminal Appeal No. 197 of 2008 (Unreported).

Despite conceding on the first ground, she had a reservation on the second and third grounds. In respect of the second ground, Ms. Masue had a different view on contradiction of evidence of PW1, PW2 and PW3. She articulated that there was no contradiction as page 8,9 and 11 of the proceedings indicates that the witness were consistent that PW1 was chased away. On the issue that PW1 was beaten up by PW4, she was of the view that it is just a hearsay evidence from PW1. Again, in the issue of contradiction of time when the crime was committed, Ms. Masue explicated that it was just a minor defect which can occur especially when the crime happened at midnight. She contended that such defect cannot go to the root of the case.

On the fourth ground of appeal, the learned state attorney contended that the charge sheet was not defective simply because the particulars of offence were clear to the appellant that the animals which were referred to were the goats. She then accentuated that the absence of section 268 (3) of the Penal Code is not fatal and even so such omission is curable under section 388 of the Criminal Procedure Act, Cap 20 R.E: 2019.

Ms. Masue then concluded that the conviction was based on the evidence of PW1, PW2 and PW3 specific on visual identification however the said visual identification was not properly established.

I have meticulously considered the grounds of appeal and submissions of both parties. Having so done, the central issue for determination by this court is ***whether the evidence in record was watertight to ground conviction of the appellant.***

To address this question, I have considered the points of consensus in respect of the anomaly which have transpired on the evidence of visual identification. From the records, it true that PW1, PW2 and PW3 testified to have identified the appellant at the scene of crime through a solar light, however, they did not describe its intensity. This leaves a doubt as to whether such light was sufficient enough for them to recognize rightly the people who were at the scene. But again, neither of the eye witnesses bothered to tell the trial court from which distance they were to where the appellant was, for proper recognition, through the said solar light. It is also true from the records, that neither of the witnesses explained as for how long did they observe the appellant while at the scene, to ensure that there is no mistaken of identity.

The law on visual identification is settled. There are numerous decisions made by the Supreme Court of the Land underscoring that the evidence of visual identification is of the weakest kind and no court should act on such evidence unless all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence before it is absolutely water tight. [See **Waziri Amani (Supra)** and **Raymond Francis v. Republic,** [1994] TLR 100.]

It is very crucial to note that in a criminal case where determination depends essentially on identification, evidence on conditions favoring a correct identification is of utmost importance.

In the case of **Scapu John** (supra), the supreme Court of the land among other things, mentioned the said conditions which have to be complied for exclusion of all possibilities of mistaken identity. The court held that;

> *" ...Water tight identification, in our considered view, entails the exclusion of all possibilities of mistaken identity. The court should, inter alia, consider the following;*
>
> - ***How long the witness had the accused under observation***
> - ***What was the estimated distance between the two.***
> - ***If the offence took place at night which kind of light did exist and what was it's intensity***
> - *Whether the accused was known to the witness before the incident.*
> - *Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like, which may have interrupted the latter's concentration."*
>
> [Emphases is added]

Despite the fact that PW2 and PW3 testified to have known the appellant before the incidence, however, this did not exonerate them from the onus of describing the intensity of the source of light which they relied upon to identify the appellant. In **Issa Mgara vs. Republic**; Criminal Appeal NO.37 of 2005 (Unreported), the Court of Appeal of Tanzania when encountered with similar circumstances of the case, among other things it held that;

> *"...**Clear evidence on source of light and it's intensity is of paramount importance.** This is because as occasionally held, even*

when the witness is purporting to recognize someone whom he knows/as was the case here mistakes in recognition of close relatives and friends are often made." [Emphasis added]

Basing on the above-mentioned authorities, it is undisputed fact that the evidence of visual identification which the trial court relied upon to convict the appellant is tainted with shortfalls, from which it prudent to deliberate the same as insufficient as well not watertight to justify conviction. This is all because the question of solar light's intensity is not resolved, the distance between the witnesses and the appellant again left baffling, worst enough the time taken by the witnesses to observe the appellant and his alleged colleagues was not explicated. Hence, the evidence of visual identification was not proved to the satisfaction.

I would end my deliberation by identification issue and proceed to quash the conviction and set aside the sentence. However, I am obliged to consider, albeit briefly, the fourth ground of appeal that on defectiveness of the charge sheet, which suggests retrial if disposed positively. The appellant was arraigned under section 258 (1) and 268 (1) of the Penal Code (Supra). Section 258 (1) which defines the offence of stealing in general terms as it states as follows;

258.-(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing.

Moreover, the offence of cattle theft categorically is created and it's punishment is stipulated under section 268 (1) of Code, which states that;

> *268.-(1) Where the thing stolen is any of the animals to which this section applies the offender shall be liable to imprisonment for fifteen years.*

The counsel for the appellant had submitted that there was necessity of citing section 268 (3) of the Penal Code which specifies animals which are subject to stealing. The section reads;

> *(3) This section applies to a horse, mare, gelding, ass mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig.*

In this regard, I wish to restate the obvious that, it is the charge sheet which lays a foundation of a trial because the principle has always been that, an accused person must know the nature of the case facing him before making his defence. See- **SIMBA NYANGURA VS REPUBLIC,** Criminal Appeal No. 144 of 2008 (unreported).

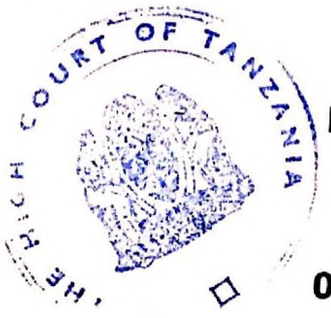
Section 135 of the CPA, imposes mandatory requirements that a charge sheet should describe the offence and make reference to the section and law creating the offence. From the wording of section 268 (1); it particularly, creates the offence as well as the punishment of cattle theft. The question I am asking myself is whether through the omission of citing the specific provision which indicates the animals referred under section 268 (1) prejudiced the appellant? I believe the answer is no, simply because the particulars of the charge sheet were very clear that the animals which were alleged to have been stolen, were 60 goats valued at Ths. 5,600,000/= which

were the property of Amos Edward (PW1). The same was read over to the appellant and he pleaded not guilty.

I agree with the learned Senior State Attorney that, such omission is curable under section 388 of the CPA, because the charge so framed could safely vouched that, the appellant was made to understand the nature of charges facing him in order to prepare an informed or rational defence, this is because the stolen animals were well explicated in the particulars under the charge sheet. Hence, the fourth ground of appeal lacks merit and it is hereby dismissed.

Without going any further, I am convinced that the so discrepancies embodied on the first ground of appeal addressed and sustained, is enough to censure the trial court's findings. The remaining evidence in record is so weak which indicates that the respondent failed to prove the charge against the appellant beyond reasonable doubt. I therefore see no reason to delve into other ground of appeal. In the event, the appeal is allowed, both the conviction and sentence meted out against the appellant is quashed and set aside, it is further ordered that the appellant should be released from prison custody forthwith unless if he is detained for some other lawful cause.

It is so ordered.



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Judgment read in the presence of the Appellant in person, Mr. Simon Mpina, Advocate for the Appellant, Ms. J. Masue, Senior State Attorney for the Respondent and Ms. Tupokigwe, RMA.

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Rights of the parties have been explained.

L. J. Itemba

JUDGE

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