IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

PC CRIMINAL APPEAL NO. 14 OF 2020

(Arising from Criminal Appeal NO. 9/2019 at Ngorongoro District Court, originating from Criminal Case No. 62 of 2019 at Loliondo Primary Court)

MICHAEL RIMBANI .....1ST APPELANT

LULU NDIDAI .....2ND APPELANT

VERSUS

JOHN TOBIKO.....RESPONDENT

JUDGMENT

20/5/2021 & 20/8/2021

ROBERT, J:-

The appellants herein were charged and convicted at the Primary Court of Loliondo in the District of Ngorongoro with one count of the offence of unlawful possession of stolen property contrary to section 311 of the Penal Code, Cap. 16 (R.E. 2002) and eleven counts of stealing cattle contrary to section 258 and 268 of the same Act. The trial court sentenced

each of them to five years imprisonment for all offences. Aggrieved, they appealed unsuccessfully to the District Court of Ngorongoro at Loliondo. Still aggrieved, they appealed to this Court against the decisions of the lower courts.

In this matter, the prosecution alleged that on 4/12/2017 the two Chairmen of Jema and Masusu hamlets arrested the first appellant, Michael Rimbani in possession of sixty one (61) stolen donkeys and took him to Jema Police Station together with the said donkeys where the matter was registered as police report No. JEM/RB/46/2017. The suspect was granted police bail and released from custody and he didn't return to police. Since the police didn't have enough space to keep the said donkeys, they allowed the persons who identified their stolen donkeys from the said donkeys to keep them as potential exhibit and bring them to court when needed. Later, the police arrested the first and second appellants and took them to court in connection to the said allegations.

Having been dissatisfied with the judgment and conviction of the two lower Courts, the two appellants preferred an appeal to this Court armed with seven grounds of appeal reproduced hereunder:

1. *That, the 1st Appellate Court grossly erred in law by upholding the decision of the Loliondo Primary Court vide Criminal Case No. 62/2019*

while the offences therein were not proved beyond reasonable doubt against the Appellants.

2. *That, the 1st Appellate Court erred in law by failing to evaluate the evidence of the trial court (Loliondo primary Court) vide Criminal Case No. 62/2019 hence reaching an erroneous decision.*
3. *That, the 1st Appellate Court grossly erred in law and in fact by failing to consider the Appellants' arguments in their written submissions supporting the appeal hence reaching an erroneous decision.*
4. *That, the 1st Appellate Court's decision vide Criminal Appeal No. 09/2019 is problematic since it has no legal reasoning.*
5. *That, the 1st Appellate Court grossly misdirected itself as it condoned the extreme abuse of court process both at Loliondo Primary Court and Ngorongoro District Court.*
6. *That, the 1st Appellate Court erred in law by Holding that the Respondent being a Village leader (justice of peace) had mandate to file and prosecute Criminal cases in Courts of law.*
7. *That, the 1st appellate Court grossly erred in law by holding that, the fact that the Appellants were charged and plead on two counts only hence convicted with eleven counts was just mistakes/errors done which did not invalidate the offences the appellants committed.*

When this appeal came up for hearing the appellants were represented by **Mr. Moses Ebenezer**, learned Counsel whereas the respondent appeared in person without representation. At the request of parties, the Court ordered parties to argued the appeal by way of written submissions.

Before looking at these grounds in turn, I have noted that three of the grounds raised in faulting the trial court decision were not raised in the first appellate court. It is trite law that grounds not raised in the first appellate court cannot be raised at the second appellate court (see **Hotel Travertine Ltd vs NBC** (2006) T.L.R 133). Based on that, this Court will make a determination on the listed grounds of appeal in exclusion of the 2nd, 3rd and 5th grounds of appeal.

Submitting on the first ground, Mr. Ebenezer argued that, the prosecution failed to prove the charges facing the appellants beyond reasonable doubt. He maintained that the prosecution evidence left much to be desired; **first**, the ingredients of the offences charged were not met. He expounded that, the prosecution failed to establish if the donkeys purported to be stolen were actually stolen since there was no complaints reported to the authorities by the owners of the alleged stolen donkeys about the missing donkeys. Further to that, the explanation given by the appellants on how they came into possession of the alleged stolen donkeys was genuine. The 1st appellant was the herdsman of the said donkeys whereas the 2nd appellant was the owner who testified that he bought 30 donkeys from the local market and 31 others from homesteads. He produced valid receipts from the authorities and called 3 witnesses

who sold 31 donkeys to him from their homesteads. He faulted the trial Court for disregarding the testimony of the second appellant on grounds that the law forbids citizens from buying and selling cattle at their homesteads and his views that such agreements should be written.

Secondly, he faulted the trial Court for basing its conviction on the testimony of the officer responsible for issuing of receipts at the local cattle market (SUVIII) who was summoned by the court to testify on the receipts issued to the appellants and said he didn't remember to have issued any receipt to the second appellant and that they were forged without pointing out the anomalies of the said receipts.

He faulted that testimony and argued that if the receipts were forged and they purported to have the signature of that witness he should have been arrested for forgery. He referred the Court to the case of **Shabibu Badi Mruma vs Mzumbe University and Attorney General**, Misc. Cause No. 20 of 2018 (unreported) in support of his argument.

Thirdly, he submitted that the trial court reasoned that, it is forbidden by the law for citizens to purchase cattle from the homesteads without citing the said law to prove the same. **Forthly**, the trial magistrate held that, the 1st appellant had no transport document (hati ya kusafirisha

mizigo) from the relevant cattle officer because the said donkeys were stolen. He noted that, it was the respondent's allegation that everuone who wishes to sell his or her cattle outside the country must have a transport document. However, no cattle officer was summoned to substantiate the veracity of that allegation. He argued that, as the respondent failed to call a material witness in a case to prove the said allegation, the court is entitled to draw an adverse inference against the respondent. He cited the case of **Aziz Abdalah vs Republic** (1991) TLR 71 to support his argument.

Fifthly, he submitted that, the trial magistrate having exonerated the first appellant from liability on the first count of receiving stolen property at page 5 of the trial court judgment why was he still convicted and sentenced. Similarly, since the 2nd appellant was never found with the donkeys alleged to have been stolen and he had all exhibits showing he was the owner of the donkeys he cannot be found guilty of both counts.

Based on what is submitted , he prayed for this ground of appeal to be upheld.

Coming to the fourth ground, Mr. Ebenezer submitted that, the decision of the 1st appellate court is a problematic for lack of legal reasoning. The first appellate Court simply repeated the holding of the

trial Court without assigning any reason. He stated that, it is a trite law that a magistrate or judge must assign legal reasons for his decision as stated by the Court of Appeal of Tanzania in the case of **Ikindila Wigae vs Republic** (2005) TLR 365.

On the sixth ground of appeal, Mr Ebenezer submitted that, the first appellate Court erred by holding that the respondent being a village leader (justice of peace) had mandate to file and prosecute criminal cases in the court of law. He expounded that, at the first appellate Court the appellant faulted the trial court for determining the matter without complainants but the first trial court upheld the decision of the trial court and stated that the respondent being a village leader and justice of peace had the mandate to institute and prosecute criminal cases in court.

He submitted further that, this was a cooked case as the owners of the alleged stolen donkeys were available and they went to collect their donkeys at Loliondo Police station but they were the complainants in this case and they never came to court to testify about any stolen donkeys as prosecution witnesses.

He submitted that, failure to call material witnesses while they are available within reach warrants the trial court to draw adverse inference. He made reference to the case of **Esther Aman vs Republic Criminal**

Appeal No. 69/2019 CAT at Bukoba (unreported) to support his argument.

Lastly, on the seventh ground, the learned counsel submitted that, the appellants did not receive a fair trial since they were charged with two offences, tried for two offences only but convicted of eleven counts. To support his argument, he cited the case of **Musa Mwaikunde Vs. Republic** (2006) TLR 387 where this Court decided that it is always required that an accused person must know the nature of the case facing him.

He argued further that, the right to be heard which is featured in the Constitution of the United Republic of Tanzania was highly breached which caused injustice to the appellants. He maintained that the irregularity is incurable and this appeal should be quashed and set aside.

Opposing this appeal, the respondent submitted on the first ground that, the prosecution had proved all ingredients of the offences charged. He maintained that, the explanation given by the prosecution at the trial court was sufficient to establish that the appellants stole the said donkeys.

He submitted further that, the evidence brought by the 2nd appellant during the trial was unfounded and did not hold water because the law

forbids citizens from selling cattle in their homesteads in order prevent them from avoiding local government tax.

Coming to the fourth ground, he submitted that, this ground of appeal has no merit since the first appellate Court carefully evaluated the trial court records and decision on the basis of legal reasons as shown in the record.

Submitting on the sixth ground, he submitted simply that, the allegation by the appellants on this ground cannot be comprehended and it is unfounded.

On the last ground of appeal, the respondent submitted that, he concurs with the findings of the first appellate court that the errors committed by the trial court on the offences charged, tried and convicted against the appellants were minor errors/mistakes which do not invalidate the offences committed by the appellants.

In his brief rejoinder, counsel for the appellants submitted that, first, the respondent has provided general denial in his response to his submissions in chief without assigning reasons for such denial. Secondly, the respondent failed to counter the reasons raised in his written submissions in chief which he maintained that is a clear admission of factual and legal arguments on violations done by the trial magistrate and

erroneously upheld by the first appellate court. He also reiterated his submissions in chief. He prayed for the decisions of the two lower courts to be quashed and set aside.

From the submissions of the parties above, the issue for deliberation and determination by this Court is whether there is merit to this appeal.

I will start with the first and seventh grounds as they both touch on proof of offences charged in all counts. The charge sheet filed at the primary court in respect of this matter indicates that the appellants were charged with a total of twelve counts. In the first count, the first appellant, Michael Rimbani was charged alone with the offence of receiving property stolen or unlawfully obtained contrary to section 311 of the Penal Code, Cap. 16 R.E. 2002 and in the remaining eleven (11) counts both appellants were jointly charged together for cattle theft contrary to section 268 and 265 of the Penal Code, Cap. 16 (R.E 2002).

The prosecution was required to prove each count charged against the appellants herein. However, in its judgment the trial court generalized all charges and divided them into two. The trial court stated at page 1, paragraph 1 of its judgment that:

> *"Mashtaka ni Kupatikana na mali idhaniwayo ni ya wizi k/f 311 sura ya 16 K/A na wizi wa Mifugo K/F 258 na 268 Sura ya 16 K/A"*

Although in its analysis the trial court did not consider the evidence adduced in respect of each count, at page 5 of its judgment the trial Court discharged the first appellant in respect of the first count and convicted the two appellants in the remaining eleven counts of cattle theft collectively without considering the ingredients of the alleged offence in respect of the particulars of each count. For instance, in the second count the prosecution alleged that the two appellants stole 13 donkeys valued at TZS 1,950,000/= the property of one Poni s/o Taiko from Masusu hamlet on 27/11/2017. However, no evidence was brought specifically to prove this count. The said Poni Taiko did not testify in respect of the said theft and the court was not informed how the donkeys alleged to have been stolen were identified. On the same day, the appellants were also accused to have committed the same offence in respect of; the fifth count at the village of Ngobereti where they stole three donkeys the property of one Langeti Ngobelu; the seventh count at the village of Arash where they stole three donkeys from one Issya Potol; and the eighth count at the village of Maalon where they stole two donkeys the property of Molongo Potot. The individuals whose donkeys are alleged to have been stolen did not testify in court and the trial magistrate did not consider any evidence in respect of these specific counts and the likelihood of the two appellants to have committed the said offences in so many villages on the same day.

This Court is aware that, for the doctrine of recent possession to sustain a conviction, the following conditions must be met: the property must be found with the suspect; the property has to be positively identified to be the property of the complainant; the property must have been recently stolen from the complainant; and lastly the stolen thing constitutes subject matter of the charge against the accused (see **Stephen Paulo & Another vs. Republic,** CAT**,** (Criminal Appeal No. 455 of 2016) [2020] TZCA 1922; (18 December, 2020) (TANZLII)).

In the present case, there is no evidence that the conditions mentioned above were met in respect of each count to satisfy the conviction of the appellants. At the trial court, the village chairman acted as the complainant on behalf of the actual complainants and his testimony could not provide information needed to sustain conviction. Hence, the first appellant was discharged in respect of the count. At the trial Court, it was alleged that the owners of the donkeys went to collect the said donkeys at the police station before they were taken to court and they never testified at the court. It was only SMII and SMIII who testify that they collected their donkeys at the village office and not at the police station. The question to be asked here is how the trial court managed to establish that the appellants were in possession of the donkeys alleged to

have been stolen in each count. It should be noted that, it was SMIV, a police officer, who testified that SMI was the one who went at the police station with the donkeys and after interrogation he left with the donkeys alleged to have been stolen. For easy of reference, I will quote part of his statement as follow;

> *"Aliyeleta punda hakurudi polisi na ndio maana shauri halikuletwa mahakamani kwa wakati"*

It is clear from the records that, the respondent left with all the donkeys and the alleged complainants collected them from him. That act leaves a lot of doubt and suspicions on the chain of custody of the donkeys alleged to have been stolen and raises a question whether the donkeys allegedly collected by SMII and SMIII are the same with the ones reported at the police station or not given that there is no evidence on how the alleged stolen donkeys were identified. The complainants did not record their statements at the police station or anywhere with regards to any particular marks which enabled them to identify the stolen donkeys.

On the foregoing, I find merit in the two grounds of appeal.

Coming to the fourth ground, the appellants faulted the decision of the first appellate court for lack of legal reasoning. The first appellate court was of the view that since the first appellant admitted to have been

found with the donkeys alleged to have been stolen and he mentioned the second appellant as the owner of the said donkeys, that was enough evidence to prove that they are the ones who stole the said donkeys without taking into consideration how the evidence adduced addressed the ingredients of the offence charged in each count and testing the weight of the said evidence as a proof for each count. Thus, I find merit in this ground as well.

On the foregoing, this Court finds that the courts below erred in concurring that the case against the two appellants was proved on the required standard. As a consequence, the judgment of the trial court and the first appellate court are hereby reversed, the conviction quashed and the sentence set aside. I hereby order the two appellants to be released forthwith from custody unless they're held for another lawful cause.

It is so ordered.

K.N.ROBERT
JUDGE
20/8/2021