

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY AT MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO 79 OF 2021

(Arising from District court of Serengeti at Mugumu Original criminal Case No 234 of 2020)

MARWA S/O MAGABE @ MAKURIAPPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

29th March and 5th May, 2022

F. H. MAHIMBALI, J.:

The appellant was charged and convicted with the offence of animal stealing contrary to section 268(1)(3) and 265 of the Penal Code, Cap 16 R.E 2019 and consequently sentenced to 15 years jail imprisonment. It was alleged by the prosecution that on 7th day of June, 2020 at Marasomoche village within the District of Serengeti in Mara Region, the appellant did steal 4 heads of cattle valued at Tshs. 1,680,000/= the property of one Mwita s/o Ngoko. The appellant pleaded not guilty to the charge. Thus the prosecution summoned a total of four witnesses in support of the charge.

As per evidence of the case in record, it is clear that on the course of grazing cattle, the appellant met one Simon Mwita Ngoko who was also grazing the cattle of his father (PW1) and persuaded the latter that they should mix their cattle and graze together. No sooner had the said Simon Mwita Ngoko (PW2) had agreed the joint grazing deal, than when the appellant provided the latter with hooks for purposes of fishing. As the latter volunteered and went fishing, the appellant disappeared with his cattle. In his return from fishing which appears not to have been far away from their grazing point, he could not see the appellant whom they had been grazing together and that the appellant's cattle were not there. He checked his affairs and decided to return the cattle home. While at home, and in the course of cross checking the cattle he had taken grazing, they missed four out of 100. He suspected the appellant might have fooled him as he went fishing leaving his cattle with him. He then reported the matter to his father (PW1) who is the owner of the said cattle. By luck, on 8th June, 2020 while in his normal duties at the village, PW3 received a call from one citizen that he saw the appellant leading two cattle whom he suspected he had no permit. He headed to the point, where he saw the appellant with the said two cattle (heifers). They had special marks. He asked from the accused person about his

personal particulars and where he was from. As he replied that he was coming from Marasomoche village, and that he was taking the said cattle to Nyarutu village, he took the accused and the said cattle to his home, then to police station of Nyamongo where investigation commenced.

That in the course of investigation, it was established that the said cattle belonged to PW1 who identified the same as his at the home of PW3.

The appellant in his defense testimony denied to have stolen the said cattle.

On that basis, the trial court being satisfied with the prosecution evidence, convicted the appellant and accordingly sentenced him as stated hereinabove. The appellant has been aggrieved, and thus the genesis of this appeal.

During the hearing of this appeal, the appellant was unrepresented, fended for himself had nothing more to add but just prayed that his grounds of appeal as dully filed, be widely considered as submissions for his appeal. He thus prayed that he be acquitted, allegedly that was wrongly convicted by the District Court.

On his side, Mr. Malekela learned state attorney who supported the appeal argued that as per evidence in record, (page 17 of typed proceedings), the prosecution's evidence is not reliable. As the PW1's evidence is not clear where did he report the said theft incidence and how he described his stolen cattle. Describing them after being found, it is not the reliable evidence. It appears that the evidence of Mr. Mwita was so important. As he was not called to give his evidence, then the prosecution's case is almost collapsed.

He further submitted that as per evidence of PW4, it equally lacks merit as it is not jointed with the latter. He thus prayed to concede with the appeal. The decision of the trial court be reversed and the appellant be acquitted forthwith.

I have digested the parties' submissions for and against the appeal, I have equally examined the trial court's records on procedure and analysis of the evidence received, I am in agreement with Mr. Malekela, learned state attorney that the prosecution's case was disjointed. So long as it is uncontroverted that the appellant was grazing with the PW2 and that the said cattle went missing just after he had fooled PW2 – the grazer to go fishing, and that amongst the missing cattle being recovered to the appellant in the course of transporting

them to another village, it was supposed as a matter of connectivity, the purported leader from Marasomoche village to have given his evidence on that account. As he knew the appellant and that he gave him the permit, then it was important for him to give his testimony on that account. Additionally, it is not clear how the PW3 arrested the appellant with the said cattle. The evidence is not water tight on how he arrested the appellant. The informer's story is not informative enough as far as the arresting of the appellant is concerned. That said, the appellant was convicted merely because of suspiciousness. The law is, suspicion however strong, cannot ground conviction. In the instant case, the PW2's story though tasteful, cannot by itself legally speaking mount conviction. This being a criminal charge punishable with such a lengthy sentence, the prosecution's evidence ought to have been even much higher. Though witnesses must be given credence on their testimony, however the said testimony must be reliable for credence to be accorded.

I am thus in disagreement with the doctrine of recent possession invoked by the trial magistrate in the circumstances of this case as stated in the case of **The Director of Public Prosecutions V. Joachim Komba** [1984] T.L.R 213, **Julius Justine and 4 others V.**

Republic, CAT Criminal Appeal No. 155 of 2005 and **Hassan Rashid Gomela V. Republic**, Criminal Appeal No. 271 of 2018, CAT (unreported). The circumstances in this case are much wanting.

All said and done, this court holds that since the charged offence was not well proved beyond reasonable doubt, the appeal is allowed and the trial's court proceedings on conviction are quashed and the sentence thereof set aside.

In its place, this court orders the immediate release of the appellant from custody unless he is lawfully held for another course.

It is so ordered.

DATED at MUSOMA this 5th day of May, 2022.



F.H. Mahimbali

Judge