IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 99 OF 2022

(From the decision of the District Court of Chunya at Chunya in Criminal Case No. 69 of 2021)

NENGO LUTONJA.....1ST APPELLANT

LUTONJA NENGO.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 16/08/2022
Date of Judgement: 12/09/2022

MONGELLA, J.

The appellants are father and son. They were charged and convicted for the offence of cattle theft contrary to section 268 and 265 of the Penal Code, Cap 16 R.E. 2019. The particulars of the offence state that the offence was committed on or about 29.03.2021 at Sambuli Mwaya village within Chunya district and Mbeya region whereby they stole eleven heads of cattle worth T.shs. 7,700,000/-, property of Masunga Giliku.

They were convicted and sentenced to five years imprisonment. Unsatisfied, they preferred the appeal at hand on seven grounds being:

1. *That, the trial magistrate erred in law and fact when convicted and sentenced the appellants for the offence of cattle theft without any exhibit (cattle) be founded to the appellants (sic).*

2. *That, the trial magistrate erred in law and fact when convicted and sentenced the appellants regard that there was no any police officer appeared before the court to prove the allegation. (sic)*

3. *That, the trial magistrate erred in law and fact by convicting and sentencing the appellants without the key witness known as SITA GILIKU who was not appeared before the court so as to corroborate with the evidence of PW2. (sic)*

4. *That, the trial court erred in law and fact to convict the appellant regard that the case was framed by PW1 as he was intended to grab the cattle of the appellants (sic)*

5. *That, the trial magistrate erred in law and fact by his failure to properly evaluate the evidence thereby making wrong decision.*

6. *That, the defence of the appellants were not considered by the trial magistrate where is fatal. (sic)*

7. *That, the charge against the appellants was not proved by the prosecution side without reasonable doubt. (sic)*

The appellants fended for themselves. They however had nothing to submit than to pray for their grounds of appeal to be adopted as their submission and to hear from the learned state attorney.

The respondent was represented by Ms. Zena James. She opposed the appeal. Ms. James started by collectively arguing on the 1st, 4th, and 7th grounds which she was of the view that they all revolve on the issue whether the prosecution proved the case beyond reasonable doubt. She had the stance that the case was proved beyond reasonable doubt. Referring to the testimony of PW1, she said that this witness testified to be the owner of the stolen cattle and that the cattle were stored at PW2's cattle camp on 25.03.2021. That on 29.03.2021 he received information from PW2 that 7 herds of cattle were stolen by the appellants. Given the information, PW1 went to the crime scene and the 1st appellant was arrested. When interrogated in the presence of PW1, the 1st appellant confessed into stealing the cattle and prayed for mercy and for the matter not to be reported to the police.

Ms. James added that PW1's testimony was corroborated by that of PW2 who testified that on the date of the incident at 09:30hours in the morning, he saw the appellants stealing the cattle. PW2 said that eleven herds of cattle worth T.shs. 7.7 Million were stolen. Considering that PW2 mentioned the appellants early, Ms. James referred the case of ***Nebson Tete vs. Republic***, Criminal Appeal No. 419 of 2013 in which it was ruled that the ability of the witness to name the suspect at the earliest possible opportunity is an all assurance of the credibility of the witness' testimony. She added that PW1 testified to have received information from PW2 to

the effect that it was the appellants who had stolen the cattle, making PW2 a key witness, and the 1st appellant confessed into committing the offence. On those bases she found the offence proved beyond reasonable doubt and prayed for the grounds of appeal to be dismissed.

The 2nd and 3rd grounds were also argued collectively. Ms. James found the persons, that is, the police officer and one Sila Giliku not being key witnesses as claimed by the appellants. She cited **section 143 of the Evidence Act, Cap 6 R.E. 2019** which does not compel a specific number of witnesses to be presented to prove a certain fact. She was of the view that there was no need of calling such witnesses as the appellants, in their defence, never disputed being arrested and taken to the police station. Regarding Sila Giliku, she referred to the memorandum of agreed facts whereby the appellants never disputed that the Sila Giliku and PW2 were present at the camp. In the circumstances, she was of the view that his evidence would not be different from what PW2 testified thus no relevance in calling the said witness. She further referred to the case of ***Goodluck Kyando vs. Republic*** [2006] T.L.R. 101 in which the import of section 143 of the Evidence Act was discussed at length.

Addressing the 5th and 6th grounds collectively, Ms. James found the same baseless. According to her, the trial court evaluated the evidence of both sides and reached a proper decision. She invited the Court to go through page 4 to 7 of the trial court to see for itself. She argued that by not acquitting the appellants it does not mean that the trial court never evaluated their evidence. She prayed for the conviction and sentence to be upheld.

In rejoinder, the appellants reiterated their prayer for their grounds of appeal to be adopted and considered. They urged the court to set them free as they never committed the offence.

After considering keenly the appellants' grounds of appeal, the submission by the learned state attorney and gone through the trial court record, I find that the appeal can be disposed under one main ground as to whether the case was proved beyond reasonable doubt. In the course of deliberating this ground I shall address all the issues raised in the rest of the grounds of appeal.

The appellants, particularly under the 5th and 6th grounds, faults the trial court for improperly evaluating the evidence on record and for not considering the defence evidence. As much as I find the claims unfounded, I shall re-evaluate the evidence and re-consider the defence evidence for interest of justice. The law empowers the first appellate court to re-evaluate and reconsider the evidence on record and come up with its own decision. See: ***Mkaima Mabagala vs. The Republic***, Criminal Appeal No. 267 of 2006; and ***Iddi Shaban @ Amasi vs. Republic***, Criminal Appeal No. 2006.

The record shows that the prosecution mounted 3 witnesses and the defence mounted 2 witnesses who were the appellants themselves. PW1 was the victim known as Masunga Giliku Mbuli. He testified that the stolen cattle was his and were being ferried from Sumbawanga where be bought them to Mapogoro area where there is a cattle market. The cattle were with one, named Kagi (PW3). He said that on 25.03.2021 PW3 while

on the way with the cattle phoned him telling him that the cattle were exhausted and needed to rest. They agreed he finds a place for the cattle to rest. PW3 found the 2nd appellant's place whereby the 2nd appellant agreed to harbour the cattle at his place for some few days. It was 25 herds of cattle. PW1 as well sent two of his men to the 2nd appellant's place to take care of the cattle and to take them to Mapogoro. These were one Manyandishe Ngusa (PW2) and one Sita Giliku. On 29.03.2021 PW2 phoned him informing him that the 11 herds of cattle were stolen and he mentioned the appellants to be involved. PW1 went to the scene and found the appellants had already left the scene. He reported the incident to the police whereby the appellants were arrested. He said that when the appellants were being taken to the police station, the 2nd appellant confessed on the way and pleaded not to be taken to the police station. He also promised to show them where the stolen cattle were kept, however he later changed and they had to take him to the police station.

PW2 testified as an eye witness to the cattle theft. He testified that he was sent by PW1 to take the cattle which was 25 herds of cattle, but before leaving the place he saw the appellants separating the cows. When he asked the appellants as to why they were separating the cows, the appellants threatened to beat him up leading him to leave them. He then informed PW1 of the incident. PW3 testified to have been with the cattle at the 2nd appellant's place whereby he had sought refuge with permission of the 2nd appellant for the cattle to rest following a long journey. He said that after communicating with PW1 he was permitted to find a place for the cattle to rest and he found the 2nd appellant's place.

Then PW1 sent PW2 and one Sita Giliku at the place whereby he left them there with the cattle before the theft occurred.

On their part, the appellants denied being involved in the cattle theft. They testified that they were apprehended by the police and PW1 while on their way from Matondo to Mapogoro to see their sick father. That after being apprehended they were taken to the police station whereby they were severely beaten. On cross examination, the 1st appellant denied to have promised to show them where the cattle were kept after being stolen. The 2nd appellant stated that they had to confess at the police station following being forced to do so and being severely beaten. He as well denied receiving any cattle from PW3.

Under the law, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not to believe the said witness. The good reasons that can be considered include the fact that the witness had given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. See: ***Goodluck Kyando vs. Republic*** [2006] TLR 363; ***Mathias Bundala vs. Republic***, Criminal Appeal No. 62 of 2004 (CAT, unreported); and ***Shaban Daudi vs. Republic***, Criminal Appeal No. 28 of 2001 (unreported).

My scrutiny of the evidence on record shows that the prosecution evidence was unshaken by the defence. PW2, a very key witness, saw the incident and even asked the appellants as to why they were separating the cattle. They threatened to beat him up and continued separating the

cattle and eventually took the 11 herds of cattle. PW1 testified that the 2nd appellant confessed into stealing the cattle and pleaded not to be taken to the police when arrested. PW3 testified to have sought refuge at the 2nd appellant's place with the cattle. I find this piece of testimony from PW1, PW2, and PW3 incriminating upon the appellants. As much as the rule on fatality of failure to cross examine a witness is not absolute (See: ***Zakaria Jackson Magayo vs. The Republic***, Criminal Appeal No. 411 of 2018 (CAT at Dar es Salaam), it becomes fatal when a party fails to cross examine on a material fact that incriminates him. It entails acceptance of the fact alleged. See: ***Martin Misara v. Republic***, Criminal Appeal No. 428 of 2016 (CAT at Mbeya, unreported); ***Damian Ruhele v. Republic***, Criminal Appeal No. 501 of 2007 (unreported); ***Nyerere Nyague v. Republic***, Criminal Appeal No. 67 of 2010 (unreported); ***George Maili Kemboge v. Republic***, Criminal Appeal No. 327 of 2013 (unreported) and ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017.

In that respect, I find the prosecution assertion that the 2nd appellant had a cattle camp whereby PW3 kept the cattle; the fact that PW2 saw the appellants separating and taking the cattle and that they threatened to beat him when he questioned them about that; and the fact that the 2nd appellant confessed into stealing the cattle, being true and accepted by the appellants as they never cross examined on that. The appellants came to deny during defence case and on cross examination, which I find being an afterthought.

The appellants faulted the trial court's decision on the ground that the trial Magistrate failed to take into account that the cattle were not found with

the appellants. It is on record, and particularly testified by the appellants themselves that they were arrested on the way, at Lupa bridge, heading to Mapogoro to great their sick father. Under the circumstances, it is true that the cattle were never found with the appellants. However, I find that incapable of rendering the prosecution case unproved. It is on record that the appellants were seen by PW2 taking the cattle and they failed to refute that evidence. Besides, the law does not compel a stolen item or subject matter of court proceedings to be brought to court for the evidence of a witness to be admitted. **See**: ***Julius Bilie vs. Republic*** [1981] T.L.R. 333. This case as well concerned the offence of cattle theft and the cattle was not presented in court in evidence. The Court ruled that:

> *"As a general rule the best evidence rule has no application to the admissibility of evidence of things and that the non-production of a thing which is the subject matter of court proceedings goes only to the weight and not to the admissibility of the testimony concerning or relating to it ... that the trial magistrate did not see the head of cattle is of no legal consequence."*

The appellants as well, under the 2nd and 3rd grounds, challenged the prosecution evidence for not presenting key witnesses. According to them, the key witnesses are the police officer and one Sita Giliku who was claimed to be with PW2. As argued by Ms. James, the law does not compel a particular number of witnesses to be presented to prove a fact. What the court considers is whether the presented witnesses are credible and their evidence has proved the case. The omission to call a witness can only be fatal if a key witness is not called. See: ***Shida Lwanda Aidan @ Kaka v. The Republic***, Criminal Appeal No. 447 of 2015 and **Section 143 of**

the Tanzania Evidence Act, Cap 6 R.E. 2022 which allows a party to bring the number of witnesses it sees important for proving the facts of the case. It does not put a specific limit. The provision specifically states that:

> *"...no particular number of witnesses shall in any case be required for the proof of any fact."*

The CAT also underscored this issue in the case of ***Tumaini Mtayomba vs. The Republic, Criminal Appeal No. 217 of 2012*** whereby it stated:

> *"As for the complaint by the appellant that there was omission by the prosecution to call some of the witnesses, we agree with the learned State Attorney that the prosecution had the duty to prove the case against the appellant and the discretion was on them to call the witnesses they considered relevant for proving the case against the appellant. The choice was not that of the appellant but the prosecution. In any event the role of the appellant in his defence was to cast doubt on the prosecution case."*

See also: ***Daffa Mbwana Kedi v. The Republic***, Criminal Appeal No. 65 of 2017 (CAT at Tanga, unreported); ***Hassan Juma Kanenyera v. Republic*** [1992] TLR 100; ***Yohanis Msigwa v. Republic*** [1990] TLR 148; and ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017. In the matter at hand, the appellants did not explain how these witnesses were key. With regard to the police officer, I agree with Ms. James that the same was not a key witness given the fact that the appellants also testified to have been arrested and taken to the police station. With

respect to Sita Giliku, I agree with Ms. James that since he was with PW2 his testimony would have resembled that of PW2 thus no necessity of calling him to reiterate the same facts. The appellant ought to have refuted the testimony of PW2, but failed to do that.

Lastly, under the 4th ground, the appellants claimed that the case was framed by PW1 with intention to take their cattle. I shall not allow this ground to detain me much. Going through the record, particularly the defence case, I found the allegation not raised and canvassed at trial. It is therefore a new fact and cannot be entertained at this appeal stage. The law is clear to the effect that facts not raised and determined on trial cannot be raised and determined on appeal stage. See: ***Festo Domician v. The Republic***, Criminal Appeal No. 447 of 2016 (CAT, unreported). Besides, the appellants testified to have met PW1 for the first time on the date they were apprehended. In the premises, PW1 could not know their status in life and if they had cattle for him to take. The ground is thus implausible and baseless.

To this point I find the entire appeal devoid of merits and dismiss it. The conviction and sentence by the trial court are hereby upheld.

Dated at Mbeya on this 12th day of September 2022.

L. M. MONGELLA

JUDGE

Court: Judgement delivered at Mbeya in chambers on this 12th day of September 2022 in the presence of the appellants appearing in

person and Ms. Agnes Ndanzi, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE

Court: Right of appeal to the Court of Appeal duly explained.

L. M. MONGELLA

JUDGE

12/09/2022