

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 22 OF 2022

(Originating from Criminal Case No. 82 of 2021 of Same District Court)

SAID NGEREZA MAOSHA.....1ST APPELLANT

SAID SEMUYE MASHUWA.....2ND APPELLANT

ATHUMAN SEMUYE MASHUWA.....3RD APPELLANT

VERSUS

REPUBLIC..... RESPONDENT


JUDGMENT

22/8/2022 & 22/9/2022

SIMFUKWE, J.

The three appellants herein were charged before the District Court of Same with the offence of Cattle Theft contrary to **section 268 (1)(3) of the Penal Code, Cap 16 R.E 2019**. They were convicted and sentenced to five (5) years imprisonment. Being aggrieved with the said conviction and sentence, they appealed to this court on the following grounds:

- 1. That, the trial Hon. Magistrate had erred in law and in fact for convicting Appellants by relying on exhibit P2 (the*


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certificate of search and seizure) while the search and seizure was not witnessed by an independent witness.

- 2. That, the trial Hon. Magistrate had erred in law and in fact by relying on the testimony of PW3 on regard of exhibit P4 and P5 which are caution statements (sic) of the appellants, while he failed to testify on the starting and finishing time of the interrogation of the appellants.*
- 3. That, the trial Hon. Magistrate had erred in law and in fact for convicting Appellants by relying on exhibit P4 and P5 the caution (sic) statements of the Appellants, while the interrogation was taken without considering voluntary of the appellants. (sic)*
- 4. That the trial Hon. Magistrate had erred in law and in fact by relying and admitting exhibit P3 the handover form which was listed as one of the exhibits during the preliminary hearing.*
- 5. That, the trial Hon. Magistrate had erred in law and in fact by convicting the second appellant by relying the confession (sic) of the co-accused without any corroborative evidence.*
- 6. That, the trial court had erred in law and in fact for convicting the appellants by relying on the testimonies of the witnesses of the prosecution side which were contradicting.*
- 7. That, the prosecution side had failed to prove their case beyond reasonable doubt.*



Before the trial court, it was alleged that on 11th day of July, 2021 at 06:00 hrs at Kadando village within the District of Same in Kilimanjaro Region, the appellants jointly did steal one head of cow valued at Tshs 900,000/ the property of Rajabu s/o Juma.

Briefly, the facts of the case are to the effect that on 11/7/2021 around 06:00hrs at Kadando village all accused persons were found to have stolen one head of cattle. That, the accused had hidden themselves in the bushes. They were arrested and taken to Gonja police post. Upon interrogation, the 1st and 3rd accused persons admitted to have committed the offence, while the 2nd accused denied.

The hearing of the appeal was conducted by way of written submissions because the appellants were unrepresented while Mr. Rweyemamu, learned State Attorney appeared for the Respondent Republic.

Submitting jointly on the 1st ground of appeal which faults reliance on exhibit P2 (certificate of search and seizure) by the trial court; the appellants submitted that the law requires that, search and seizure be witnessed by an independent witness while in exhibit P2 there was no independent witness who witnessed that the said cow was indeed found with the 3rd appellant. It was contended that PW3 F1101 Cpl Evans had stated that, the search and seizure was witnessed and signed by the complainant one Rajabu Juma as an independent witness. It was averred that, just as the name 'independent witness' itself entails, the appellants are of the view that the complainant cannot be an independent witness as he has interest in the case. PW3 had the duty to find another person who is not interested in the case to stand as independent witness to witness the search and seizure and sign the search and seizure form.

That, putting the complainant as an independent witness is allowing him to be the judge of his own case, which is against the rule of law.

It was alleged further for the appellants that one of the witnesses mentioned in the certificate of search and seizure PW2 one Zacharia Mohamed was not present during the search and seizure process. In his testimony at page 12 of the proceedings of the case, PW2 stated that, after he took the first and third appellants to the police station, he returned to his house and then later after he had returned to the police station, he was told that the suspects had confessed, and showed him the cow at the police station, which means he found the cow at the police station. So, PW2 was not supposed to sign the certificate of search and seizure as a witness of search and seizure. It was added that, the same proves that the cow was brought to the police station and the appellants were forced to take picture with it without knowing where it came from. In support of their argument, the appellants referred to the case of **Selemani Abdallah and Others v. R, Criminal Appeal No. 384 of 2008** (unreported) in which Hon. Kitusi J.A held that:

"The whole purpose of issuing receipt to the seized items and obtaining signature of the witnesses is to make sure that the property seized come from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that the evidence arising from such search is fabricated, will be (sic) great extent be minimized."

It was stated further that by allowing the complainant to act as an independent witness and PW2 as a witness while he was not present during the search and seizure of the appellants, leave doubts to the

prosecution's case and hence failure to prove their case beyond reasonable doubts as required.

The second ground of appeal which is to the effect that the trial Magistrate had erred in law and in fact by relying on the testimony of PW3 in regard to exhibit P4 and P5 which are cautioned statements of the appellants, while he failed to testify on the starting and finishing time of interrogation of the appellants; it was submitted that the law requires the police officer who is responsible for taking cautioned statement of the accused person to state the time he started taking the statements and the time he finished taking the statements so as to be clear as to how long the interrogation were taken. The appellants cited **section 50 (1) (a) of the Criminal Procedure Act, Cap 20 R.E 2019** which provides that:

"Subject to paragraph 'b, the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence."

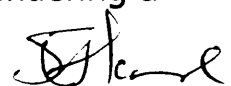
On the strength of the above noted section, the appellants concluded that exhibit P4 and P5 were improperly admitted in evidence. They cited the case of **Ester Jofrey Lyimo v. R, Criminal Appeal No. 123 of 2020**, Court of Appeal at Dar es Salaam (unreported), in which it was held that:

"Where there is no exact time of arrest of the appellant, it is doubtful to conclude as to whether she was interviewed within the time prescribed by law. This doubt in our view, ought to be resolved in favour of the Appellant. This Court has stated in a number of its decisions that statement recorded in contravention of section 50 of the CPA is inadmissible."

On the third ground of appeal; the appellants submitted that the cautioned statements of the first and third appellants were recorded without complying to the requirements of the law. That, the statements were taken by PW3 in the presence of PW1 the complainant and PW2. They referred to the evidence of PW1 at page 11 of the proceedings of the trial court where PW1 stated that he was present when the statements of the first and third appellants were taken, together with Zakaria Mohamed (PW2) and the OCS. Thus, the appellants were not free. The appellants subscribed to the case of **Bakari Ahmad @ Nakamo and Another v. R, Criminal Appeal No. 74 of 2019**, Court of Appeal at Dar es Salaam (unreported) in which Hon. Kairo J. A held that:

"Indeed, PW1 and PW2 who recorded the statement of the 1st and 2nd appellant did so, while other police officers were also present in the same room. The action of recording the appellants' statements in the presence of other police officers has prejudiced the appellants in two ways; first it cannot be ruled out that the appellants were not free agents when recording their statements. Second, the appellants' right to privacy was infringed."

On the fourth ground of appeal, which is in respect of the hand over form (exhibit P3) which was not listed as one of the exhibits during the preliminary hearing; it was averred that the appellants were convicted basing on exhibit P3, meaning that the appellants were taken by surprise and were not given time to prepare on such exhibit which prejudiced their case. The appellants submitted further that the trial magistrate had misdirected herself by allowing the witness to tender the document without first asking the appellants so as to give the appellants time to prepare themselves for defense. They were of the view that tendering a



document which was not listed in the list of exhibits during preliminary hearing proves that the prosecution's case was fabricated. They cemented their argument by referring to the case of **Remina Omary Abdul v. Republic, Criminal Appeal No. 189 of 2020**, Court of Appeal at Dar es Salaam (unreported) in which it was held that:

"No witness whose statement or document the contents of which is not made known to the accused during committal will be allowed to testify or be received in evidence during trial."

On the fifth ground of appeal, it was submitted that the conviction of the second appellant had based only on the statements of the first and third appellants at the police station. That, there was no other evidence which was presented during the trial to corroborate the statements of the first and third appellants on the involvement of the second appellant in the crime. The appellants cited the case of **R. v. Konsenta Chaligia and Another [1978] LRT No. 11** in which it was held that:

"If there is more than one accused person, the testimony of one accused person cannot led to conviction of the other unless there is another evidence which is related."

Also, it was stated that it was the testimony of PW1 and PW2 that they heard the first and third appellants when they testified at the police station on the involvement of the second appellant. It was opined that the same remain as hearsay evidence and there was no other evidence to corroborate the testimonies of PW1 and PW2.

On the sixth ground of appeal, which concerns contradictory evidence of the prosecution, it was submitted that the testimonies of PW1, PW2 and PW3 are contradicting each other. PW1 had stated that he heard the appellants confessing to have stolen the cow while PW2 alleged that when

he went to the police station for the second time, he was told that the first and the third appellants had confessed to had committed the crime and he was shown the cow which was stolen. PW2 was also told that Said Semuye Mashuwa the second appellant was involved in the said theft.

It was submitted further that, PW3 the police officer's evidence contradicts the testimony of PW2 in that PW3 stated that while they were going to seize the alleged cow, he was with PW1 and PW2 who signed the said search and seizure certificate while PW2 stated that he found the cow at the police station and he was told that the cow was found after the confession of the 1st and 3rd appellants.

Emphasizing on the issue of contradiction, the appellants stated that the contradictions on the testimonies of witnesses lead to failure to prove the case beyond reasonable doubts. They referred to the case of **Shaban Haruna @ Dr Mwagilo vs R, Criminal Appeal No. 396 of 2017** (CAT) to cement the point of contradictions and argued that the noted contradictions from the prosecution's witnesses go to the root of the case since it was important to prove whether they were found with the cow and whether the witnesses had witnessed the appellants' interrogation.

In respect of the last ground of appeal that the prosecution had failed to prove their case beyond reasonable doubts, the appellant referred to **section 110 of the Law of Evidence Act Cap 6 R.E 2019** and argued that the same requires the prosecution to prove their case beyond reasonable doubts for the accused to be convicted. In this case, the appellants faulted the prosecution case for leaving the following doubts; first, they were convicted for the crime of cattle theft contrary to **section 268(1)(3) of the Penal Code** (supra). The prosecution had to prove

the concept of asportation and animus furandi as it was stated in the case of **Christian Mbunda vs R [1993] TLR 340**. However, there was no person who saw the appellants stealing the cow and the alleged cow was not brought before the court instead the prosecution tendered exhibit P3 the handover form which was never listed as one of the exhibits during preliminary hearing. Also, PW3 who is said to have prepared exhibit P4 and P5 had failed to testify as to when the interrogation had started and at what time the interrogation ended. Also, the interrogation of the 1st and the 3rd respondent did not comply with the requirement of the law as to privacy since there were other people while interrogation was taking place. Thus, denied the appellants' right to privacy, intimidated and coerced the appellants to testify against their will since PW2 Zakaria Mohamed and the OCS were present.

In conclusion, the appellants implored the court to quash the conviction and set aside the sentence against them.

The learned State Attorney did not support the appeal. He replied to the grounds of appeal generally basing on the appellants' grievances that the prosecution side failed to prove their case beyond reasonable doubts.

The learned State Attorney submitted that in proving the case beyond reasonable doubts, the prosecution through its three witnesses proved all elements of cattle theft which are asportation and animus furandi that the said three appellants stole the cattle of the victim. That, in the instant case the owner of the said cattle witnessed his cattle being taken out of his custody/ grazing area.



Mr. Rweyemamu continued to state that it is a cardinal principle of law that in criminal jurisprudence a case is said to have been proved beyond reasonable doubts if the prosecution tendered or presented evidence which is strong enough against the accused to leave only a remote responsibility in their favor which can easily be dismissed as stated in the case of **Magendo Paulo vs Republic [1993] TLR 219**.

The learned State Attorney argued that the appellants had not shown how and where the prosecution side failed to prove their case beyond reasonable doubts basing on their last ground. He prayed the court to dismiss the appeal for lack of merit.

Replying to the 7th ground of appeal that the prosecution has failed to prove their case beyond reasonable doubts, Mr. Rweyemamu referred to the cases **Josephat Marwa @ Mwita vs Republic, Criminal Appeal No. 50 of 2021** in which this Court emphasized that the grounds of appeal were mere grounds and act as a wide ground of complainant, which encompasses all grounds of appeal. Also, the Court of Appeal discourages the practice of raising general grounds of appeal together with the specific ones. In those circumstances, it was stated that it is proper for the appellate court to consider the general ground of appeal only to determine the appeal. He referred to the case of **Rutoyo Richard vs Republic, Criminal Appeal No. 114 of 2017** (unreported) which held that:

"Although we find it not to be a good practice for an appellant who has come up with specific grounds of appeal to again include such a general ground, but where it is raised as was the case in the present case, it should be

considered and taken to have embraced several grounds of grievances."

On the 5th ground of appeal, the learned State Attorney condemned the appellants for failure to show how the trial magistrate had erred in law and fact in convicting the 2nd appellant by relying on the confession of the co-accused without any collaborative evidence. That, from page 2 of the judgment, PW2 who was the village chairman of Kadando said that due to an increase of cattle theft in their village, they held the meeting on 18/6/2021 where secret ballots were casted and the common thieves which were mentioned were the three accused persons. That, the minutes were tendered and admitted as Exhibit P1 with no objection from any of three appellants. Thus, such fact showed that the three appellants are common habitual offenders. The learned State Attorney opined that this is another reason to show and prove that this appeal has no merits and the same should not be entertained for being baseless hence be dismissed.

Concerning the 1st, 2nd, 3rd, 4th, and 6th grounds of appeal, the learned State Attorney submitted that once a party to the case fails to raise objection either during pleadings or at hearing of the case hence results the documents to be tendered and admitted with no objections then it is impossible for the same party to make it as a ground of appeal in the higher court later on. Reference was made to the case of **Nyerere Nyauge vs Republic, Criminal Appeal No. 67 of 2010** CAT (Unreported) which held that:

"As a matter of general principle, an appellate court cannot allow matters not taken or pleaded and decided in the court (s) below to be raised on appeal."

Mr. Rweyemamu stated further that the same position was adopted in the case of **Kennedy Owino Onyango & Others vs R, Criminal Appeal No. 48 of 2006** (Unreported). He argued that, in the instant matter since the appellants did not raise the objections during the hearing of the case thus, their grounds cannot be accepted at the appellate stage.


The learned State attorney prayed the court to dismiss the appeal for lack of merit.

That marked the end of submissions of both parties.

I have carefully considered the parties' submissions in relation to the trial court's records and grounds of appeal. The issue which covers all the grounds of appeal is *whether evidence adduced by the prosecution before the trial court proves the offence charged beyond reasonable doubts.*

In scrutinizing this issue, I will determine all the raised grievances although not in a chronology adopted by the learned counsels having in mind that this being the first appellate court, the court is obliged to re-evaluate evidence on the record in case the trial court did not evaluate evidence properly.

On the 1st ground of appeal, the appellants condemned the trial magistrate for relying on a certificate of search and seizure which was not witnessed by an independent witness. That, the same was witnessed by the Complainant one Rajabu Juma who was not an independent witness. On the other hand, Mr. Rweyemamu for the respondent had different


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views. He stated that considering that the said certificate was admitted in court without objection, then the appellants cannot question it at appellate stage.

With due respect to the learned State Attorney, it is trite law that during search and seizure there should be an independent witness. Thus, the court cannot be blind in respect of this issue simply because the said certificate of seizure was admitted without objection from the appellants considering the fact that during trial, the appellants were unrepresented.

The law provides that, during search and seizure, there should be independent witness. The rationale behind having an independent witness is to provide independent evidence, as it was emphasized in the case of **Jibril Okash Ahmed Vs. Republic, Criminal Appeal No. 331 of 2017**; CAT (unreported). In the case of **Shaban Said Kindamba vs Republic, Criminal Appeal No. 390 of 2019** at page 18 the Court of Appeal also emphasized that:

"...We are inclined to take it as logical that an independent witness to a search must be credible, or the whole exercise would be rendered suspect..."

In the instant matter, the certificate of search and seizure was signed by Rajabu Semuye, who was the complainant. I am of considered opinion that the complainant could not be an independent witness. Therefore, since the said certificate of seizure was not signed by an independent witness, then the trial magistrate erred in law in relying on it in convicting the appellants.

The said certificate was also signed by PW2 whom could be hold that was an independent witness. However, his evidence was contradicting the evidence of other prosecution witnesses. This takes me to 6th ground of appeal where the appellants claimed that there were discrepancies on the prosecution evidence. The first discrepancy was in respect of the evidence of PW1 and PW2, that is; PW1 testified that he was with PW2 when the appellants were confessing while PW2 said that he was informed that the appellants confessed. Another discrepancy was that PW3 said that he was with PW1 na PW2 while going to seize the alleged cow while PW2 said he found the cow at the police station.

It is an established principle of law that there are normal discrepancies and material discrepancies. Normal discrepancies are not fatal while material discrepancies are fatal since the same touches the root of the case. This position was observed by the Court of appeal in the case of **Alex Ndendya vs R, Criminal Appeal No. 207 of 2018**, in which the Court cited with approval the case of **Dickson Elia Nsamba Shapwata v. Republic, Criminal Appeal No. 92 of 2007** which cited page 48 of **Sarkar, the Law of Evidence, 16th Edition**, which provides that:

"Normal discrepancies in evidence are those which are due to normal errors of observation normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While

normal discrepancies do not corrode the credibility of a party's case material discrepancies do."

In the instant matter, the issue for determination is whether the noted discrepancies go to the root of the case. I hasten to conclude that the noted discrepancies touch the root of the case especially on the credibility of the prosecution witnesses. The credibility of prosecution witnesses when assessed in its totality is shaken since they had different stories as demonstrated by the appellants. This doubt also distracts the prosecution case since it was important to prove whether the appellants were found with the alleged cow and whether the witnesses had witnessed the appellants' interrogation.

Moreover, as contended by the appellants on the 7th ground of appeal, the prosecution case was coupled with discrepancies. That, no witness testified that he saw the appellants stealing the said cow. Since the certificate of seizure had defect, the only evidence which could save the prosecution case was the evidence from the witness who testified to have seen the accused stealing the said cattle. However, in the instant matter, no witness testified to have seen the appellants stealing the said cow. In other words, the key element of theft of asportation was not proved.

From the foregoing analysis, I am satisfied that this appeal has merit. It is on the basis of the above reasons that I allow this appeal. Therefore, conviction against the appellants is hereby quashed and sentence set aside. I hereby order the release of the appellants from custody immediately, unless held for other lawful reasons.

It is so ordered.



Dated and delivered at Moshi this 22nd day of September, 2022.



S. H. SIMFUKWE

JUDGE

