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**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TANGA DISTRICT REGISTRY
AT TANGA**

CRIMINAL APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 52 OF 2017

*(Originating from the District Court of HANDENI at HANDENI
Criminal Case No. 69 of 2022, MWAKYOLO PRM)*

HALFANI ABDALLAH MSAMBAA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Mansoor, J:

26TH OCTOBER, 2022

The appellant herein was charged with the offence of Robbery c/s 287A of the Penal Code, Cap 16 R: E 2019. The Trial Court found the appellant guilty of the offence charged; he was convicted and sentenced to serve a jail term of Thirty (30) years. He was also ordered to compensate one Komesha Saidi



Four Cows. The Appellant was dissatisfied with the conviction; he filed an appeal raising six grounds of appeal as follows:

1. That the Trial Magistrate erred in convicting the appellant based on the evidence of PW4 who said he has seen the appellant with the cows and a local gun in the bush, while PW4 did not see the appellant committing the crime of armed robbery; PW4 did not know the appellant before the incident and the identification without the identification parade was poor and unreliable.
2. The Trial Magistrate erred in convicting the appellant based on hearsay evidence of PW5, the investigator.
3. That the Trial Magistrate erred in convicting the appellant relying on identification made by PW2.
4. The Magistrate erred to rely on the evidence of PW3 who had interest in the outcome of the case whose evidence was corroborated with the evidence of PW4. PW4 evidence could not be used to corroborate the evidence of PW3 as the evidence required corroboration.

5. The Magistrate erred for not recording the evidence of the appellant who was a lay person and unrepresented, for shifting the balance of proof on defence, failure to order the statement of the appellant to be supplied to the appellant, and failure to consider the evidence of the defence.
6. That the prosecution failed to prove the offence beyond reasonable doubt.

At the hearing, the State was represented by Mr Mangowi, the State Attorney while the Appellant was represented by Advocate Moses John Basila. The appeal was determined by written submissions.

Brief facts of the case are as stated by PW1 and PW3, the herdsmen. They stated that on 2nd April 2022 at daytime, the two herdsmen namely Joshua Diamon (PW1), and Silas Komesha (PW3) were herding 100 cows at Mzeri Village in Handeni District in Tanga Region. PW1 and PW3 were confronted by Four armed men who robbed them the four

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cows out of one hundred cows. The Four men were in a motorcycle, and one of them allegedly had a gun “gobole”, and the other one was armed with a machete and sticks. PW1 and PW3 claims it was the appellant herein who was holding the gobole and had threatened them by words that “wewe mtakufa kumanyoko” meaning that “you will die”. The two herdsmen ran from the scene but went to hide nearby where they saw the appellant and his companions picking the four cows, and they left with the four cows. PW1 and PW3 reported the theft to PW2 Komesha Said who is the owner of the cows. Komesha Said and the two herdsmen started to search for the cows, and PW4 had told them that he had seen the appellant and his companions with the cows. Police say no one was hurt in the robbery. The motorcycle, the gobole, the machete and the cows were never recovered and never exhibited in court. PW1 and PW3 were robbed the cows and they were able to identify the robber since they knew him before the incident as they reside in the same village. They

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did not however say if they also recognized the three other bandits who were together with the appellant at the incident.

To prove the case, the prosecution lined up five witnesses but no exhibit.

PW1 and PW3 were the herdsman, they were at the scene, and they saw the appellant and three other people robbing or stealing the cows from PW1 and PW3. They said, these four people went to the scene in one bodaboda. PW1 and PW3 got scared since they were threatened to be killed by a gobole but went to hide in a nearby place and they were able to see the appellant and his allies picking the four cows and left. PW4, was doing his errands, and saw the appellant and his allies with the four cows. PW4 said he saw the appellant holding a gobole. Nothing was recovered from the appellant or from his allies, in fact his allies were never apprehended or even mentioned.

The Appellant was charged under Section 287A of the Penal Code, Cap 16 R: E 2002; since he had used the gobole to

threaten PW1 and PW3 at the time of committing robbery. The appellant having pleaded not guilty, as many as 5 witnesses were examined by the prosecution. Five witnesses were examined in defense.

The complainant – Komesha Saidi came in the witness box as PW2 and only gave hearsay evidence that he was told by his workers PW1 and PW3 that the appellant and other three people have robbed PW1 and PW3 the four cows, and that PW4 corroborated the story of PW1 and PW3.

PW5 –Police Officer stated that, investigation of this case was assigned to him, and he interrogated the accused/appellant. He did not recover anything from the appellant, and he did not apprehend the rest of the suspects.

In his defense under Section 293 (2) of the Criminal Procedure Act, the appellant denied the allegations against him and claimed to be innocent. He stated that he was arrested on 17th April 2022 at his home only on suspicions. Rests of the

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defense witnesses supported the case of the appellant, they all claimed that the appellant was framed.

The grounds 1, 2 and 3 are on identification that these witnesses were not able to identify the appellant and the fact that neither gobole or machete or even the cows were not recovered from the accused person considering that according to the witnesses the person who committed robbery was not apprehended on the spot. It is therefore obvious that the identification parade was not done in identification of the appellant. The question therefore remains on how he was identified. Did PW1 and PW2 knew the appellant and pointed his names to PW2, the owner? Or to the police or what happened until he got apprehended on 17^h April 2022 while the crime was committed on 2nd April 2022.

To find out on how this appellant was identified since the evidence of identification parade was not used by the Trial Magistrate, I needed to see the statement and the testimonies of the PW1 and PW3, and PW4, since these are the witnesses

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who identified the appellant not during the identification parade but by his appearance during the commission of the crime. On record, I have not seen these statements of the victims or the person who saw the appellant with the cows and a gobole. The story of the prosecution was halfway, it did not have an end, there were gaps in between the story, making the prosecution 's case weak and with discrepancies, the discrepancies which affected the root of the prosecution case. PW1 and PW3 did not say what they did after the appellant left the scene with the cows, how did they leave while they were in a motorcycle. How did they carry the four cows, and how long it took them to report the incident to the owner and to the police.

The evidence of complainants, the two herdsmen must be appreciated and investigated with greatest care, and I did evaluate their evidence with care. They said they were able to identify the appellant since they knew him, they reside from the same village, but they said nothing regarding the other three people who were together with the appellant. They

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could not identify the other people either by their names nor their physical descriptions. The whole prosecution is required to be viewed from the angle as to whether PW1 and PW3 knew the appellant before the incident, no witness came forward to corroborate the evidence of PW1 and PW3 to state that indeed PW1 and PW3 and the appellant were residing in the same village. There was no description of the appellant physique and there was no identification parade. Indeed, the appellant was not apprehended at the spot, he was apprehended on ^{17th} April 2022, there was nothing explained to the satisfaction of Court that enabled the police to trace the assailant. The visual identification was not proper, and the court was incorrect to rely on dock identification since it was not preceded by a proper visual identification before the dock identification.

The main question for decision in this appeal is whether the testimony of PW1 and PW-2, the herdsmen on which the prosecution story almost rested, and which testimony was accepted by the trial Court, was worthy of credence in their

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evidence before the Court. As for the offence of armed robbery, it is the victim who said, at the scene the accused or appellant and his allies were armed with a gobole and a machete. It is not known who among the 4 men was carrying a gobole and which one was carrying a machete. The witnesses said the four men in bodaboda were armed with gobole and machete. They did not say how they were threatened with a machete or a gobole, but they said they were told that “you will die.”, they did not say who told them these words that “you will die”. They did not explain how the threats were physically carried out by the appellant either singly or in association with the rests of the bandits.

The prosecution story is that the appellant has committed theft; he robbed PW1 and PW3 four cows. I have heard the submissions by the State Attorney, and I have re-evaluated the evidence presented in court, and I would say that it was only the victims PW1 and PW3 who said they were herding 100 cows. The prosecution has failed to bring/prove the testimony on behalf of the victims who has alleged that on

that day they had 100 cows and that four cows have been stolen from them. Therefore, no other person except the victims had seen the accused person or appellant committing theft or armed robbery. There is no direct evidence in respect of committing armed robbery. It is the settled rule of evidence that best evidence should be brought, if available.

To bring home the charge of armed robbery, it is the duty of the prosecution to prove that there were in existence four cows, and the four cows belonged to either the herdsmen or PW2 and these cows were stolen. In the present case there is no reliable evidence to prove this fact. Whether or not the offence of armed robbery has been committed since the offenders were armed with a deadly weapon (a gobole and a machete and sticks) and the offender has used that deadly weapon in the commission of the robbery was not proved. There was no proof that the appellant had threatened the victims with either the machete or gobole or even the sticks, the evidence was not available.

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The prosecution was not able to prove that at the time of committing the offence of theft of four cows or before that the appellant was armed with a gobole, machete and sticks. The said gobble or machete was not recovered. To bring home a charge under S.287A, the prosecution must produce convincing evidence that the Four bandits were having or holding a gobole and machetes carried by the appellant and the gobole and machetes carried were deadly weapons. It is, therefore, a question of fact to be proved by the prosecution that the appellant was armed with gobole, and machetes and these weapons were deadly. In the absence of such evidence and particularly, the non-recovery of the weapon would certainly bring the case out of the ambit of S.287A of the Penal Code. The appellant was wrongly convicted and sentenced for the offence of armed robbery.

Consequently, and based on the above, the appeal is allowed, the conviction and sentence passed by the Trial Court is quashed and set aside. The appellant is discharged of the

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offence of Armed Robbery and shall be released from imprisonment unless held for any other lawful cause.




L. MANSOOR

JUDGE,

26th October 2022

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Judgement delivered in Court today in the presence of the Appellant who was represented by Advocate Basila, and in the presence of Mangowi, the State Attorney for the Respondent/ Republic and Abubakar, the Court Clerk.

L. MANSOOR

JUDGE

26th October 2022