

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA – SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 38 OF 2021

(Arising from the decision of the District Court at Serengeti

at Mugumu in Criminal Case No. 175 of 2019)

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

VERSUS

DEKI S/O SAI MAHAHIRA 1ST RESPONDENT

MASANA S/O MASANA @ SIMANGO 2ND RESPONDENT

WEGESA S/O BARARE @ MAKORI 3RD RESPONDENT

PAUL S/O SOJA @ MKAMI 4TH RESPONDENT

JUDGMENT

22nd September & 28th October 2022

F. H. Mahimbali, J.

The respondents in this case were acquitted by the trial court in a charge of animal stealing contrary to section 265 and 258 (1) of the Penal Code, Cap 16 R. E. 2019.

Earlier, it was alleged by the prosecution that on 28th October, 2019 at Makundusi village within Serengeti District in Mara Region

In their defense, the respondents denied involvement in the said stealing as alleged. The first respondent in his testimony stated that in his recollection, on 10/11/2018 he sold his one cow at Kenyamonta auction which had no mark. Surprisingly, on 20/11/2019 (a year later) was arrested and sent to police station.

The second respondent testifying as DW2 stated in her testimony that on 11/09/2019, she had received one cow which had equal sign mark (=) and a "V" torn on ears from the third respondent as dowry payment. Later, she sold it to the fourth respondent. She wondered to be connected with this charge as she is not responsible.

The third respondent in his testimony tried to link with the testimony of the first respondent as he bought one cattle from the first respondent at Kenyamonta but on 10/11/2018. Whereas the first respondent says he sold his one cattle on 10/11/2018 which had no mark, the 3rd respondent on his testimony says he had bought it from the first respondent but on 10/11/2018.

The fourth respondent on his part adduced evidence that he bought the said cattle from the 2nd respondent and later took it to the

During the hearing of the appeal, the appellant was represented by Mr. Frank Nchanila learned state attorney and for the respondents was Mr. Mahemba learned advocate.

In arguing the appeal, Mr. Frank Nchanila for the first ground of appeal, submitted that as per testimony of PW1 and PW2 it is clear that the stolen cattle had an equal sign (=) on their thigh and a torn "V" shape on their ears. This mark is almost similar to the marks to the cow recovered from the 4th respondent. This assertion is supported with the testimony of PW4 police officer. He argued further that, considering the testimony of the first respondent that he had his one cattle sold on 10th November, 2018 which had no mark, the one recovered from the 4th respondent was not similar to the cattle he had sold. He conclude that the defense of the 2nd, 3rd and 4th respondents did not tally with that of the first respondent from whom they purport etymology of it.

Relying on the doctrine of recent possession, he was of the firm view that all the four ingredients supported the said cow was recently stolen from PW2 and that the respondents are responsible only that the trial magistrate failed to invoke the doctrine of recent possession properly as per law.

connecting that transaction with theft of 28/10/2019, is legally improper. The principle of doctrine of recent possession then comes into negation.

As regards to the animal special marks, he challenged it that the PW2 had no copy right of the said marks. Thus anybody between 2nd and 4th respondents were not precluded from applying similar marks to their animal for identity.

On these challenges and doubts, Mr. Mahemba was of the firm view that the prosecution had failed to establish the case as per law. It being a criminal case, the standard of proof is that of beyond reasonable doubt and that the prosecution was duty bound to establish, it was no other but the respondents who were responsible. In the circumstance of the current case, the evidence is short of sufficient material.

In this rejoinder submission, Mr. Frank Nchanila argued that in his digest to what Mr. Mahemba submitted, he is of the view that he has not rebutted the appellant's submission sufficiently. He pointed out that, the learned counsel failed to establish how the doctrine of recent possession was rightly applied by the trial magistrate in connection to this case. That the said cow is a stolen property has not been rebutted. He clarified that, the similarity of facts (evidence) between the 1st

The vital question to answer as far as the submissions of the learned state attorney and respondent's counsel are concerned is whether the prosecution's case at trial basing on the doctrine of recent possession was sufficiently established as per law.

I shake hands with Mr. Frank Nchanila that for the doctrine of recent possession to apply, four necessary ingredients have to be fully established:

1. The property was found with the suspect i.e there must be nexus between the stolen property and accused person.
2. The property is positively the property of the complainant.
3. That the property was recently stolen from the complainant.
4. The stolen property must have a reference to the charged offence.

The trial magistrate in her findings recognized that the prosecution's evidence suggested the said theft being in connection with the doctrine of recent possession.

I entirely agree that the determination of this case depends much on the doctrine of recent possession. I also go along with the learned trial magistrate's appreciation of the key factors of the doctrine,

I think the trial magistrate misdirected her mind in making such reasoning in relation to the facts and evidence of this case. So long as the doctrine of recent possession is concerned, if established beyond reasonable doubt, then by itself is sufficient proof and capable of making conviction.

It is settled law that in criminal cases in which the evidence is based on the doctrine of recent possession, in order for a court to find a conviction on such evidence, it must be conveniently proved that;

- i. That the property was found with the accused person.
- ii. That the property is positively identified to be of the complainant.
- iii. That the property was recently stolen from the complainant.
- iv. That the property must relate to the one in the charge sheet.

This legal position was well restated in the case of **AMITABACHAN S/O MACHAGA @ GORONG'ONDO VERSUS THE**

On the other hand, the 2nd respondent in his testimony admitted to have been given as part of dowry payment a total of 4 cattle by the 3rd respondent (Wegesa Barare) but on 11th September 2019. She described the said cattle as having marks = sign on right thigh to back, black to white colour also right ear torn in a "V" shape. Having been paid as dowry, on 7th November, 2019, she sold her one cattle to the 4th respondent who then took it to the auction on 10th November, 2019. The transaction between the 2nd respondent to third respondent breaks chain on its way. Thus, the explanations by the 2nd and 4th respondents suffer reasonable explanations. The same are not accorded any weight as they are unreasonable.

The first respondent though didn't admit in his testimony to have sold his cattle to the third respondent, but he stated that he had his one cattle sold at Kenyamonto Auction. He was then arrested in connection with this charge on 20th November 2019. Was it then sufficient to implicate any of these respondents with this charge?

Having stated that much on the facts and evidence of the case, is the doctrine of recent possession invocable in a situation at hand? In the case of **Chiganga Mapesa v. Republic**, Criminal Appeal No. 252 of 2007 (unreported), citing the Canadian Supreme Court in, **R v Kowlyk**

A careful scanning of the available evidence in record, it is hard to connect the first and the third appellants with the alleged offence. However, the explanations offered by the 2nd and 4th respondents suggest unexplained possession of the said cattle which then, they are rightly connected with the doctrine of recent possession. That said, appeal is partly allowed in respect of the 2nd and 4th respondents but is dismissed in respect of the 1st and 3rd respondents. That said, the finding of not guilty and acquittal in respect of the 2nd and 4th respondents is hereby quashed and set aside. In its place, the duo respondents are hereby found guilty. Consequently, conviction is hereby entered in respect of the 2nd and 4th respondents.

It is so ordered.

DATED at MUSOMA this 28th day of October, 2022.

F. H. Mahimbali

Judge

Mr. Frank Nchanila S/A: Your Lordship, with respect to the 2nd and 4th respondents, I have no previous conviction record against these convicts. However, I pray for a stiff penalty against them. Your Lordship, these convicts be punitively punished as to be a lesson to themselves

they have just been implicated with only one cow, it does not necessarily mean that they are responsible with all cows as per circumstances of this case.

On that basis I hereby sentence each convicted respondent to a custodial sentence of six months from today or pay a fine of 100,000/= @. I hereby further order that exhibit PE1 be returned to the owner PW2. The Republic is directed to intensify investigation to find out the whereabouts of the remaining cows.

I so order and direct.



F. H. Mahimbali

Judge

Court: Judgment delivered this 28th day of October, 2022 in the presence of the Mr. Frank Nchanila, state attorney for the appellant, Mr. Daudi Mahemba, advocate, 2nd respondent, 3rd respondent 4th respondent and Mr. Gidion Mugo , RMA.

F. H. Mahimbali

Judge