IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO.2 OF 2022

(Appeal from the decision of Kibaha Resident Magistrate Court at Kibaha dated 29th June, 2021 Hon. J. Mushi, RM in Criminal Case No. 6 of 2021)

IBRAHIMM SHABAN @ PASKALI.....1ST APPELLANT

ZAWADI STEVEN MACHELA.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 28/09/2022

Date of Judgment: 24/10/2022

POMO, J

The Appellants were arraigned before Kibaha Resident Magistrate Court (the trial court) charged with a count of stealing animals contrary to section 265 and 268(1) & (2) of the Penal Code [CAP 16 R.E.2019]. It was

the particulars of the charge that, on 25th day of December, 2020 at Kola village within Kisarawe District in Coastal region, fraudulently and without claim of right did steal one (1) head of cow valued at Tanzania Shilling Nine Hundred Thousand (Tshs 900,000/-) the property of **SALMA KIDADIRU**, the charge which the appellants denied. It was a charge which was preferred against the appellants and two others who are not party to the appeal herein

In proving the charge against the appellants, the respondent republic brought four witnesses to testify (see pp.15 – 27 of the typed proceedings) while the defence side two witnesses testified (see pp.36 – 42 of the typed proceedings). In the end the trial court was satisfied with the prosecution evidence to have proved the charge beyond reasonable doubt against the appellants henceforth convicted and sentenced them to serve fifteen (15) years jail sentence.

Aggrieved with the decision of the trial court, the appellants have appealed to this court with seven (7) grounds of appeal which they lodged on dated 27/09/2021. The said grounds of appeal read as follow: -

1. *That, the learned trial RM erred in law and fact to convict the appellants based on the evidence of PW2 (witness of tender age) while PW2 did not*

promise not to tell lies though he promised to tell the truth which contravened section 127(2) of the Evidence Act [Cap 6 R.E.2002] as amended by miscellaneous amendment Act No.04 of 2016 as there is no evidence and findings on record to show that PW2 promised not to tell lies

2. *That, the learned trial RM erred in law and fact to convict the appellants relied on physical exhibits PE.1 and PE.2 while no search warrant was procured before the court to testify that the search at DW3's house was conducted hence resulted into the availability of exhibits (PE.1 and PE.2)*

3. *That, the learned trial RM erred in law and fact to convict the Appellants without resolving material contradictions in favour of PW2 and PW4 (sic) as:*

    (i) PW2 testified differently regarding the place onto the cow's skin where MARKS "I" and "O" (circle) were engraved, PW2 said mark "I" was engraved onto cow's thigh while PW4 said mark "O" (circle) was engraved on the front leg of the cow.

4. *That, the learned trial RM erred in law and fact to convict the appellants based on incredible and unreliable oral evidence of PW3 who also participated in the arresting of all appellants and seized physical exhibits (PE.1 and PE.2) while (i) Prosecution failed to lead him to identify exhibits PE.1 and PE.2 since PW3 was among the arrester*

5. *That, the learned trial RM erred in law and fact to convict the appellants based on incredible and unreliable oral evidence of PW4 (Allegedly to be owner of the cow) while:*

   (i) Prosecution failed to lead him to identify exhibits PE1 and PE.2

6. *That, the learned trial RM erred in law and fact to convict the appellants by holding that prosecution case was proved beyond speck of doubts while: -*

   (i) The case was poorly investigated and prosecuted as material witness known as HAMIS (young brother of PW4) was not called to testify before the court since HAMIS was the one who informed PW4 about the cow theft in question

   (ii) No any certificate or document tendered before the court by the prosecution to ascertain the allegedly searched house belong to appellant (DW3)

   (iii) No any cautioned statements of Appellants (DW1, DW3) were tendered before the court by the prosecution to testify whether appellants committed the crime or not

7. *That, the learned trial RM erred in law and fact to convict the Appellants without considering their defence evidence in their totality without giving reasons see in the case of SHIJA MASAWE VS R, CRIMINAL APPEAL No.158 of 2007 (unreported) pp.11 - 12*

Hearing of the appeal was on 28/9/2022. Whereas the appellants appeared in person unrepresented the respondent republic was represented by Rose Ishabakaki, learned state attorney. The Appellants allowed the Respondent republic to begin arguing the appeal while reserving their right to rejoin

In arguing the appeal, the learned state attorney, began by submitting that she supports the trial court's conviction and sentence

Advancing his argument on the **first ground of appeal**, Mr. M/S Rose submitted that **section 127(2) of the Evidence Act, [Cap .6 R.E. 2019]** was complied with before taking the evidence of PW2 JUMA SHABANI the child of 14 years. She referred the court to pp. 18 – 19 of the typed trial court proceedings where such compliance of the law is shown. M/S Rose further submitted that, the evidence of PW2 stand believed by trial court as stood so analysed and considered in its judgment at paragraph 3 of page 10. The court of appeal decision in **Wambura Kiginga Vs R, Criminal Appeal No.301 of 2018 CAT at Mwanza (unreported) p.26** was referred to this court. She prayed the ground of appeal be dismissed for want of merit

As to the ground No. 2 of appeal, the learned state attorney argued that, the circumstances of this case is that the search was done under urgency because the police who conducted the search and seized the cattle hide/skin PW1 G.6548 DC Shaban was only ordered to make follow-up of the said cattle theft. On that follow up is when he was informed of the presence of the cattle skin/hide to be in the 2nd appellant's house and took immediate action of seizing it and arresting without warrant. In support of the argument, she pointed out to pp.15 – 16 of the typed proceedings and concluded that the exhibits were lawfully seized. The exhibits are P.E.1 Seizure Certificate and P.E.2 cattle skin/hide and tail of which the appellants did not object their tendering in court neither cross-examined on the same meaning the exhibits are lawful and credible. She invited the court to go through pp.16 – 17 of the typed proceedings. To her, this ground is also without merit and it be dismissed

On ground No. 3 of appeal, which refers to the contradiction of evidence as to the identification of the cattle skin/hide in that PW2 Shaban Juma testified the skin to be of black and white in colour with an "I" mark at the thigh, PW4 Salma Kidadilu's evidence testified the skin/hide to be coloured black and white with a circle sign at the front leg. M/S Rose

discredited this assertion not to be regarded as contradiction to the evidence/testimonies. To her, it is possible the skin/hide had all the said signs, that is, "I" and the "circle". It is undisputed fact the skin had black and white colour and is so identified by the said witnesses. The skin was tendered and admitted as Exhibit P.E.1 in court but the Appellants did not cross – examine on the said contradictions. She referred this court to pp.26 – 27 of the typed proceedings. She concluded that failure to cross-examine on vital evidence implies they agreed with that piece of evidence. The decision of **Issa Hassan Uki Vs R, Criminal Appeal No.129/2017 CAT at Mtwara (unreported) P.16** was referred to this court. She concluded by submitting that this ground of appeal be found to be without merit too

On ground No. 4 of the appeal, which alleges the prosecution to have failed to lead P**W3 Kombo Makame** to identify Exhibits P.E.1 and P.E.2. It was the submission by M/S Rose that PW3 evidence is credible and reliable that is why the trial court used that piece of evidence in its judgment. She argued that PW3 testified how he seized exh. P.E.2 and how he signed exhibit P.E.1. It was her further argument that there is no law which requires that a person who witnessed the exhibits must be called in court to identify the exhibits. Prayed the ground of appeal be dismissed

As to ground No. 5 of appeal, in which the appellants are challenging their conviction on incredible evidence, the evidence of PW4 SALMA KIDIRU in particular for failure to identify exhibit P.E.2 the skin/hide. It was a brief submission by M/S Rose that the appellants' assertion is against them as the said PW4 identified the skin/hide. In support of her argument, she referred the court to paragraphs 1 and 2 of page 26 of the typed proceedings where PW4 testified to that effect. Also wanted this ground of appeal be dismissed

On ground No.6 of appeal, the ground in which the appellants are alleging the prosecution case was not proved beyond reasonable doubts. That, the case was poorly investigated and prosecuted because key witness one **Hamis** was not called in court to testify. Countering this ground of appeal, it was her submission that it is true Hamis was not called in court to testify but she argued that under **section 143 of the Evidence Act, [Cap.6 R.E.2022]** there is no number of witnesses set in proving a particular fact. Failure to call one HAMIS as a witness didn't affect the prosecution evidence. According to her, PW2 Shaban Juma; PW3 Kombo Makame and PW4 Salma Kadiru described the evidence which could have been adduced by the said HAMIS and concluded that calling HAMIS

could have been repetition of evidence. She referred the court to pp.18 – 21 of the typed proceedings.

In the appellants' sub-ground No.2 of ground No.6 of appeal concerning the absence of any document or certificate proving the searched house to belongs to the 2nd Appellant. The learned state attorney submitted that there isn't such legal requirement, PW3 who is the village chairperson gave evidence the house from which the skin was found belongs to the 2nd Appellant. The court was referred to the last paragraph of page 23 of the typed proceedings and concluded the ground to be preferred without merit and argued it be dismissed

As to sub ground No. 3 of ground No.6 of appeal, MS Rose argued that there is nowhere they gave evidence that the appellants confessed to the charge thus need for cautioned statements of the accused/appellants did not arise. To her, the evidence of PW2 Shaban Juma the person who saw the commission of the crime sufficed to prove the offence committed. She argued that this ground of appeal is without merit too.

As to ground No.7 of appeal, it was the submission by the learned state attorney that, the appellants' defence were considered. She referred

to this court on pp.10 – 12 of the typed judgment. In the alternative, she argued that should this court find the defence evidence to have not been considered, then the court be pleased to step into the shoes of the trial court and re-evaluate the evidence on record and come up with its own findings. She then marked her end of submission.

When the Appellants were asked to respond, being a lay-persons, had nothing usefully to contribute. They prayed to the court that their grounds of appeal be considered and the appeal be allowed.

Having heard the submissions, it is now time to determine the appeal. In determining the appeal, I will begin with the first ground of appeal followed by the last ground, ground No.7 of appeal for that matter, before resorting to the rest of the grounds of appeal, if need be.

The appellants complaint under their first ground of appeal is that PW 2 Shaban Juma being a witness of tender age did not comply with section 127(2) of the Evidence Act, [Cap 6 R.E.2022] before he could adduce his evidence in court. This section provides as follows: -

> '***S.27 (2):*** *- A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence,* ***promise to tell the truth to the court*** *and not to tell any lies.'* End of quote

In my view, as rightly so submitted by the learned state attorney, the said section was complied with before PW2 Shaban Juma could testify in court. As pointed out, pp. 18 – 19 of the typed trial court proceedings such compliance of the law by the trial magistrate is vivid. This is what transpired in court per the said trial court proceedings record on page 18-19; I quote: -

> *'PW2 SHABAN JUMA 13 YEARS, STUNDENT, KOLA KISARAWE,*
>
> *witness under age, I test him to know if he will testify the truth*
>
> ***Witness assessment***
>
> *I know when a person comes before the court, he/she is*
>
> *supposed to tell the truth*
>
> ***So I promise to tell the truth into my testimony***
>
> ***Court: -*** *Witness (PW2) promise to tell the truth, and therefore*
>
> *he will proceed to testify*
>
> ***Court: -*** *section 127(7) of TEA, Cap 6 R.E.2019 Complied with*
>
> ***Signed: J.L. Mushi***
>
> ***RESIDENT MAGISTRATE***
>
> ***4.3.2021"***

Under the circumstances, this ground of appeal is bound to fail. I hereby dismiss it for being unmerited

The next ground to determine, as hinted above, is ground No.7 of appeal which basically is on the allegations of non-consideration of the Appellants' defence evidence. To this, it was the state attorney's submission that this court be pleased to revisit the evidence should it find the appellants' evidence to have not been considered by the trial court. On the other hand, in supporting this ground of appeal the Appellants referred this court to the decision of the court of appeal in **SHIJA MASAWE VS R, CRIMINAL APPEAL NO. 158 OF 2007 CAT AT DAR ES SALAAM (UNREPORTED)** at p.11. where the court of appeal had this to state: -

> *'**Failure to consider a defence case is fatal and may vitiate a conviction.** This principle has been followed by the court of appeal for a long time. To mention just a few recent decisions:*
>
> 1. ***ELIAS STEVEN V R** [1982] TLR 313*
> 2. ***HUSSEIN IDDI AND ANOTHER V R** [1986] TLR 166*

3. ***LUHEMEJE BUSWELU V R***, *Criminal Appeal No. 164 of 2012 (unreported)*
4. ***VENANCE NKUBA AND ANOTHER V R,*** *Criminal Appeal No.425 of 2013 (Unreported)*
5. ***LEONARD MWANASHOKA V R,*** *Criminal Appeal No.226 of 2014 (Unreported)*

I wish to add the following decision of the superior court. In **ALFEO VALENTINO VS R, Criminal Appeal No.92 of 2006 CAT at Arusha (Unreported) at pp. 14 – 15** the court of appeal had this to state:

> *'**An appellate court can only interfere with a finding of fact by a trial court where it is "satisfied that the trial court has misapprehended the evidence in such a manner as to make it clear that its conclusions are based on incorrect premises"**: See **Salum Bugu v Mariam Kibwana,** Civil Appeal No. 29 of 1992 (unreported). **On a second appeal** this Court will not interfere **unless it is shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of a principle of law or practice:** See **Amratlal D. M. t/ a Zanzibar Silk Stores v A. H. Jariwara t/a Zanziba: Hotel** [1980] TLR 31, CAT, **D.P.P. v J. M. Kawawa** [1981] TLR 143, **Musa Mwaikunda v R,** Criminal Appeal No. 174 of 2006 (unreported), etc.*

While determining this appeal, ***we are alive to the principle that, being the first appellate Court, we are empowered to re-assess the evidence on record and draw our own inferences of facts.*** *The principle is stipulated in Rule 36 (1) (a) of the Tanzania Court of Appeal Rules 2009 as follows:*

> *"36-(I) On any appeal from a decision o f the High Court or Tribunal acting in the exercise of its original jurisdiction, the Court may-*
>
> *(a) re-appraise the evidence and draw inferences of fact"*

The dictates of the said rule has been applied in many of our cases including, ***Standard Chartered Bank of Tanzania Ltd vs National Oil Tanzania Ltd and Another,*** *Civil Appeal No. 98 of 2008 quoted in* ***The Registered Trustees of Joy in the Harvest vs Hamza K. Sungura,*** *Civil Appeal No. 149 of 2017 (both unreported) wherein we stated:*

> *"The law is well settled that* ***on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand*** *(Peters v Sunday Post,* ***1958*** *EA* ***424; William Diamonds Limited and Another v R,1970*** *EA* ***1; Okeno v R, 1972*** *EA* ***32)".***

This court being the first appellate court will be guided by the above court of appeal decisions, which empowers this court to revisit the

evidence on the trial court record and come up with its own findings where need be.

The basis of the trial court findings leading to the conviction and sentencing the appellants is the visual identification by PW2 Shaban Juma and the cattle skin/hide allegedly found in the house of the 1st Appellant admitted as exhibit PE.1 and seizure certificate Exh.PE.2 the skin/hide of the cow

As to identification of the Appellants, this is what PW2 testified in court (see pp.19 – 20 of the typed proceedings)

> *"I remember it was 25.12.2020 I was at home Kola village with my young , and our mother came at Visiga mother left at morning time, when our mother went away around 00: PM, when we were sleeping into the house, I heard dog barking, I waked up went at the door, I looked into the cow hut, I saw 2 persons, I managed to see them since there was a sharp moonlight, I saw 2 persons PASCHAEL IBRAHIM 1st accused since he was keeping our cows for one year, and NGOSHA was keeping cows at CHARLES, both NGOSHA and IBRAHIM living at Kola so I know them.*
>
> *Over that night, those persons entered into our cows' hut and took the cow. They went away, I decided to sleep."*

From the above testimonies by PW2 Shaban Juma, it is the fact that the incident allegedly committed occurred during midnight of 25.12.2020 and the only description offered by the said witness is that of presence of sharp moonlight and knowing the appellants. The immediate question to ask is, Do these descriptions offered amount to sufficient identification of the Appellants as the persons who stole the allegedly cow? To answer the question, we need guidance from the follwing case laws. In the often cited case of **Waziri Amani v. Republic [1980]** TLR 250, at pp. 251 - 252, the Court of Appeal observed:

> *"... **evidence of visual identification**, as Courts in East Africa and England have warned in a number of cases, **is of the weakest kind and most unreliable**. It follows therefore, that **no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight**."*

Again, in **Abdul Ally Chande Vs R, Criminal Appeal No. 529 of 2019 CAT at Dar es Salaam (unreported) at page 7** the court had this to state:

'We entirely agree with the learned State Attorney that the nature of identification relied on is recognition. Such evidence is considered to be more reliable than identification of a stranger, ***but we are alive that the Court has occasionally warned of the possibilities that mistakes in recognition of even close relatives and friends may sometimes be made****. In* ***Shamir John vs Republic,*** *Criminal Appeal No. 166 of 2004 (unreported) the Court observed that: -*

> *"...recognition may be more reliable than identification of a stranger,* ***but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made.****"*

Yet in **Mohamed Hussein Pagweje Vs R, Criminal Appeal No.556 of 2017 CAT at Arusha (Unreported) at pp.13 – 14** the court of appeal stated thus:-

> *"The law on visual identification is settled.* ***Courts should only act on visual identification or evidence of recognition after all the possibilities of mistaken identity are eliminated****. The evidence of visual identification is of the weakest kind and most unreliable and thus before it is acted upon as a basis of conviction, it must be watertight, his, was pronounced by this Court in the landmark case of* ***Waziri Amani v. R*** *[1980] T.L.R 250, where it was held that:-*

> *"No court should act on evidence of visual identification* ***unless, all possibilities of mistaken identity are eliminated*** *and the court is fully satisfied that the evidence is watertight.* ***The following factors have to be taken into consideration, the time the witness had the accused under observation, the distance at which he observed him****, the condition in which such observation occurred, for instance whether it was day or night (whether it was dark, if so, was there moonlight or hurricane lamp etc.) whether the witness knew or has seen the accused before or not".*

Looking into the PW2 evidence, there is no gainsaying that all the possibilities of mistaken identity as set by the above case laws were not eliminated before the trial court could act on the allegedly visual identification of the appellants. For instance, the distance from where PW2 stood in observing the incidence is not known neither mentioned, time he spent in observing the commission of the crime is not stated, just to mention a few. Such evidence creates doubt which ought to be resolved in favour of the Appellants.

As to the second piece of evidence leading to the conviction and sentencing the Appellants, which is the cattle skin/hide allegedly found in

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the house of the 1st Appellant admitted as exhibit PE.1 and seizure certificate Exh.PE.2. In resolving this, let the evidence of PW2 Shaban Juma speak for themselves as seen at page 21 of the typed proceedings when he was being cross-examined 2nd Appellant.

"When we went to find the skin into that house, we did not find the owner of the house

I don't know the owner of the house *where we found the skin.*

The above testimonies by the said PW2 Shaban Juma allegedly to be familiar with the appellants, who he mentioned the 1st Appellant to have been their livestock keeper for one year. Why then PW2 failed to testify the house in which the skin was found to be the house of the 1st Appellant. Being persons living in the same village, such failure by PW2 to state to whom the house in which the skin and tail was found brings doubt which need to be resolved in favour of the accused.

It was the argument that the search leading to obtaining exhibit PE.1 the skin and PE.2 the seizure certificate was done without search warrant due to the circumstances of this case in that the search was done under urgency because the police who conducted the search and seized the cattle

hide/skin PW1 G.6548 DC Shaban was only ordered to make follow-up of the said cattle theft. This argument is not supported by the evidence on record as the police had prior notice of the allegedly cattle theft together with the names of the suspect. This is per the evidence of PW3 KOMBO MAKAME the village chairman. The evidence of PW3 speaks thus at 1st paragraph of page 23 of the typed proceedings:

> *"After that **I asked these persons who was the suspect,** they mentioned IBRAHIM PASCHAL 1st accused and NGOSHA 4th accused, **so I reported the matter at police station, to OCCID KISARAWE,** he told me to call militia police I called and they arrested **Ibrahim 1st accused** and **NGOSHA 4th** accused".*

That piece of evidence entails they had prior notice in which search demand to be carried with search warrant. Furthermore, the appellants were under arrest and upon the allegedly interrogation is when one mentioned to have the said skin in the house (see the evidence of PW1 G.6548 D/C Shaban at paragraph 2 and 3 of page 15 of the typed proceedings). Therefore, the issue of emergency does not feature anywhere to warranty the said search without warrant.

In **REMINA OMARY ABDUL VS R, CRIMINAL APPEAL No.189 0F 2020 CAT at Dar es Salaam (Unreported) pp.37 – 38** the court of appeal had this to state: -

> *"Given that stance of the law,* ***possession of search warrants where search is not an emergence one,*** *observance of time of conducting search and need for permission from magistrate when search is conducted beyond prescribed time as stipulated by the two legislations and the Police General Orders (PGO) 226 are matters which cannot be dispensed with.* ***These provisions are there for lending credence to not only the manner search and seizure is conducted but also to the property seized."***

The Court of Appeal went further by stating thus: -

> *"Our reading of the record* ***quite obviously contradicts the learned Principal State Attorney's argument that search conducted in the appellant's house was an emergence one.*** *As was rightly argued by Mr. Nkoko, PW2, PW6 and PW8 in very clear terms stated that they were summoned by one SSP Salimin at around 20:30hrs in his office at DCEA and were told about the mission of conducting search at the appellant's residence. That they then prepared themselves by taking the firearms, search order and papers for recording witness statements.* ***Nothing***

came out from them as to what prevented them from obtaining a search warrant."

In absence of any explanations trial court record that the carried out search called for emergency the evidence which must be from the witnesses who testified in court, then the alleged search done without search warrant was an illegal one.

In view of what I have stated herein above, I am of the considered view that there was no sufficient evidence to ground the appellants' conviction. Consequently, the appeal is hereby allowed, conviction is quashed and the sentence is set aside. The appellants be released from prison forthwith unless are held therein for another justifiable cause.

It is so ordered

Right of Appeal explained

Dated at Dar es Salaam this 24th day of October, 2022

Musa K. Pomo

Judge

This Judgment is delivered on this 24th October, 2022 in presence of the Appellant and Dorothy Massawe, the learned Principal State Attorney, for the Respondent republic.

Musa K. Pomo

Judge

24/10/2022