

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CRIMINAL APPEAL NO. 210 OF 2020**

*(Originating from the Judgment of Kibaha District Court, Criminal Case No. 195 of 2019  
before F.L Kibona- RM dated 31/08/2020)*

**TUKEI MBELENYI.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*6<sup>th</sup> December, 2021 & 18<sup>th</sup> February, 2022*

**E.E. KAKOLAKI J.**

This appeal arises from the conviction and sentence meted on the appellant by the District Court of Kibaha in Criminal Case No. 195 in its judgment dated 31/08/2020. The appellant was booked with the offence of Stealing contrary to section 265 and 268 (1) of the Penal Code [Cap 16 R.E 2002.], together with his colleague one Meng'olu Katasiko. It was alleged by the prosecution that, on 30<sup>th</sup> October 2019, at Disunyura- Mlandizi area within Kibaha District in Coast Region, the appellant together with and his fellow stole 12 cows worth Tsh.20,000,000/= the property of Agustino Lyatonga Mrema. Upon completion of trial, the trial court having examined evidence of eight (8)

prosecution witnesses and five (5) exhibits and two (2) defence witnesses, found the prosecution case proved beyond reasonable doubt hence convicted the appellant and sentenced to serve five (5) years imprisonment while acquitting his fellow for want of sufficient evidence. It is from that decision the dissatisfied appellant lodged this appeal premised on three grounds of appeal going thus:

1. That, the trial magistrate erred in law and in facts by convicting and sentencing the appellant while the prosecution evidence was not sufficient to ground conviction.
2. That, the trial magistrate erred in law and in facts by convicting and sentencing the appellants here in without considering the defence evidence.
3. That the trial Magistrate erred in law and in facts as the whole proceedings were tainted by irregularities.

It is the appellant prayer that, this Court allows his appeal by quashing the conviction, set aside the sentence and acquit him.

On 15<sup>th</sup> November 2021, when the matter came for hearing, appellant appeared represented by Mr. Tumaini Mgonja learned advocate, while

respondent had representation of Ms. Elizabeth Olomi and Ms. Rachel Daniel learned State Attorneys and were heard viva voce.

Submitting in support of the appeal, appellant's counsel abandoned the third ground of appeal while consolidating the remaining two grounds and argue them together. He contended, the prosecution evidence is not sufficient enough to ground conviction of the appellant, since the same did not meet the standard required by the law in proving prosecution case which is beyond reasonable doubt. He argued that, if the prosecution case is tainted with doubt however minimal it might be, the court is enjoined to resolve the matter in favour of the accused. He placed reliance on the case of **Said Hemed v R**, (1987) TLR 117. In view of the appellant's counsel, there are several doubts in this case. He said appellant's conviction was based on the preposition that, he was seen at the scene of crime the day before the incident as the trial magistrate so found when stated in his judgment at page 2 that, the appellant person was seen at the scene of crime, while in fact in the typed proceedings there is no single statement from the prosecution witness to that effect.

The learned counsel went on to point out another doubt at page 18 of the proceedings where PW2 said "*we doubt on you because you were seen in*

*the scene of the crime*". He said, PW1 stated that, he was so told by PW4, but the evidence of PW4 at page 29 of the proceedings does not support the above allegations. And further PW2 testified to have been phoned by the appellant on 29/10/2019 who also went there before commission of the offence only to find the cattle missing on the next day of 30/10/2019. Mr. Mgonja lamented, the appellant's act of going there could not have been interpreted to be for the purpose of familiarizing himself with the place as he knew it before for being the cattle grazer before. Another doubt he raised is on the evidence of PW3 the OC-CID of Mlandizi Police Station at page 22 of the typed proceedings when testified to the effect that, upon interrogation the appellant confessed to have committed the offence and mentioned his co-perpetrators. He argued if the appellant so confessed PW3 would have tendered the said cautioned statement and sued those four others mentioned, but no cautioned statement was tendered nor the mentioned perpetrators sued something which creates doubt on his evidence and conviction of the appellant. Basing on those doubt he submitted, conviction of the appellant was wrongly entered and prayed the court to allow the appeal by quashing the conviction and set aside the sentence while setting appellant free.

On the respondent's side Ms. Olomi supported conviction and sentence of the appellant. In her view, the prosecution proved its case beyond reasonable doubt as the trial court was satisfied that the appellant stole PW1's 12 cattle. She said both PW2, the cattle care taker and PW4 the police officer testified before the court that the said cattle were stolen. She stated at page 19 and 20 of the typed proceedings PW4 stated that, a day before the incident, the appellant visited the kraal and the cattle were stolen the next day where appellant called him over a phone asking him whether the cattle were stolen or not. In her view, if it was not the appellant who committed the offence he could not ask if the cattle were stolen, hence a confirmation that he is the one who committed the said offence. The learned state attorney further referred this Court to page 22-23, and 36 -37 and submitted that, PW3 and PW5 being a police officers who arrested the appellant, extracted his orally confession when confessed to have stolen the said cattle and handed them to one Saitoti who is at large. She added that, believing and working on that information, PW3 and PW5 managed to recover the said cattle, some of which were found at Saitoti's home while others were recovered from Ruvu Ranch, where the Ruvu ranch officer (PW7) told the Court that, the said four (4) cattle were brought by one

Saitoti. She argued that, since appellant made oral confession voluntarily, the case was proved beyond reasonable doubt. She placed reliance on the case of **John Shini Vs. R**, Criminal Appeal No. 573 of 2016 at page 15 paragraph 3. Ms. Olomi concluded by submitting that, the trial court did not only rely on the evidence of appellant being sighted at the scene of crime to convict him but also the evidence of PW2 and PW4, and pressed this court to dismiss the appeal for want of prosecution.

In a short rejoinder, appellant's counsel reiterated his submission in chief, and added that, prosecution failed to prove actus reus and mens rea as none of the prosecution witness saw the appellant stealing the said cattle.

After careful considering the rival submission from both counsels for parties as well as the impugned judgment together with the evidence on record. I am of the view that, conviction of the appellant in this matter is premised on two sets of evidence, being circumstantial and confession of the appellant as there is no single prosecution evidence who witnessed the appellant stealing the said cattle nor was he found in possession of the same. The main issue therefore is *whether prosecution case was proved beyond reasonable doubt basing on that two set of evidence*. To start with the circumstantial evidence, it is trite law that in a case depending solely on

circumstantial evidence the court must be satisfied that, the inculpatory facts are inconsistent with the innocence of the accused and are incapable of any other explanation. This principle was stated in the case of **John Magula Ndongo Vs. R**, Criminal Appeal No. 18 of 2004 (CAT-unreported) when the Court of Appeal had this to observe:

*“... in a case depending entirely on circumstantial evidence before an accused person can be convicted the court must find that the inculpatory facts are inconsistent with innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilty. And it is necessary before drawing the inference of guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. Indeed, this principle is well enunciated in the case of **Ilanda Kisongo Vs. R** (1960) EA 780 at page 782.” (Emphasis supplied)*

Other authorities on circumstantial evidence notably are **Magendo Paul and Another Vs. R** (1993) 219, **Hamidu M. Timotheo and Another Vs. R** (1993) TLR 125, **Hassani Fadhili Vs. R** (1994) TLR 89 and **Abdul Muganyizi Vs. R** (1980) TLR 263.

Applying the above cited principle in this case, I find that the evidence by PW2, that they suspected the appellant to have committed the crime as he was seen at the scene of crime a day before the incident and that he called him on the next day to inquire whether cattle were stolen, to be insufficient to draw an inference of guilty of the appellant against the allegations levelled against him. As rightly submitted by Mr. Mgonja, appellant's visit to the place where he had worked before would not necessarily mean that he was racking before theft could take place and at any rate, his act of calling PW2 to ask whether there was cattle theft at his place is inconsistency to his guiltiness as no thief would steal and call to confirm execution of ill motivated act. I am therefore satisfied that it was unsafe and wrong for the trial court to rely on such circumstantial evidence which is doubtful. It is a well settled principle of law that, mere suspicion however strong it may be cannot be the basis to found a conviction. See the case of **Julist Robert Mwaipopo and Two Others v Republic**, Criminal Appeal No 33 of 2004 (CAT-unreported). Guided by that principle and given the fact I hold that the said circumstantial evidence is full of doubt the same could not safely base appellant's conviction.



Never the less, as rightly submitted by the learned state attorney, suspicion was not the only factor used by the trial magistrate to convict the appellant. Looking at page 8 of the impugned judgment the trial magistrate had the following to say;

*1<sup>st</sup> accused person was the one who interrogated by PW3 and Pw5 and told them where the cattle were handled and when they acted up on admission, they succeed to found the stolen cattle. If the 1<sup>st</sup> accused was not involved on the commission of the offence, he would not tell the police officer where they handled them.*

Next for consideration is the appellant's oral confession before the police officers PW3 and PW5, in which Ms. Olomi submits helped the police to find and recover four stolen cattle that were sold by one Saitoti who was not sued. The glaring question here is whether the same can be used to base conviction of the appellant. It is the law that, oral confession made before a reliable witness can be used to found conviction. This position of the law was categorically stated in the case of **Posolo Wilson @ Mwalyengo v Republic**, Criminal Appeal No 613 of 2015, (CAT-unreported) where the Court held that:

*"It is settled that oral confession made by a suspect before or in the presence of reliable witnesses, be they civilian or not may be sufficient by itself to found conviction against the suspect."*

In another case of **Mohamed Manguku Vs. Republic**, Criminal Appeal No 194 of 2004 (CAT-unreported) the Court stated that;

*"Oral confession would be valid as long as the suspect was a free agent when the words imputed to him were said."*

In the instant appeal, the records reveal that, appellant confessed before PW3 and PW5 to have committed the said crime. As per the case of **Mohamed Manguku** (supra) the person making such oral confession must be a free agent. In this case the record is barren on the circumstances under which the said confession was extracted. Whether the same was extracted at police station or during the time of arrest of the appellant? Whether the appellant was informed of the offence facing him before he confessed? And most importantly as submitted by Mr. Mgonja, the court was not told as to why the said confession was not reduced into writing and tendered in court as exhibit, given the fact that the same was made before the police officers capable of recording it into writing. With all left unanswered question, though not challenged by the appellant by way of cross examination during the trial

when Pw3 and PW5 were testifying in court it cannot safely be concluded that the appellant's voluntariness in giving such confession is unquestionable. That aside, I have taken into consideration evidence of both PW3 and PW5 concerning the alleged confession made by the appellant. None of them gave a detailed account on how the said theft was executed on the fateful date of 30/10/2019 as told by the appellant, so as to make the confession worth of being relied upon to base conviction of the appellant. The court was told that, the appellant when confessing issued phone numbers one of the person (co-perpetrator) who gave the information that facilitated the arrest of appellant's co-accused Meng'olu Katasiko, who disclosed to them that some of the stolen cattle were sold by Saitoti to Ruvu Ranch where four of them were recovered. The said person (co-perpetrator) was not summoned to testify and prove that he was in fact phoned by PW3 or PW5 and disclosed the name of 2<sup>nd</sup> accused to them as claimed. In absence of such important corroborative evidence, I entertain doubt that, there was no such confession made by the appellant and if any made, then it was not free to be relied upon by the court to base its conviction, on account of the doubts raised above. I therefore distance myself from Ms. Olomi's submission that, oral confession was entered freely and therefore safe enough to base appellant's

conviction, instead I agree with Mr. Mgonja's proposition that, prosecution case was full of doubts and the evidence adduced before the court could not base conviction against the appellant. The two consolidated grounds therefore have merits and I sustain them.

In the circumstances and for the fore reasons I entertain no doubt that his appeal has merit and proceed to allow it. I therefore proceed to quash his conviction and the sentence meted on him, which resultant consequence is to order for immediate release of the appellant unless otherwise lawful held.

It is so ordered.

DATED at Dar es salaam this 18<sup>th</sup> day of February, 2022.



E. E. KAKOLAKI  
**JUDGE**  
18/02/2022.

Judgment delivered at Dar es Salaam in chambers this 18<sup>th</sup> February, 2022 in the presence of the Appellant, Ms. Monica Msuya and in the absence of the Respondent.

Right of Appeal explained.



E. E. KAKOLAKI  
**JUDGE**  
18/02/2022

