

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

(PC) CRIMINAL APPEAL NO 13 OF 2021

(Arising from the Land Appeal No 3 of 2021, originating from Ngoreme Primary

Court in Criminal Case No 07 of 2021 Serengeti District of Mara region)

HAMISI S/O NYANGERE APPELLANT

VERSUS

ELISHA S/O NASHONI @ SINDA RESPONDENT

JUDGMENT

2nd & 11th March 2022

F. H. MAHIMBALI, J.:

The appellant Hamis Nyangere (a minor of 15 years), together with his sister Komboka Nyangere were charged of one offence of cattle theft contrary to section 268(1) and (3) of the Penal Code, Cap 16. It has been alleged by the respondent that both appellants on 13th January 2021 at Gantamome village within Serengeti District did steal a total of four cows all belonging to the respondent. The appellant and his co-accused denied the charges.

Upon hearing of the case, the trial court convicted the appellant while acquitting the co-accused Komboka Nyangere. He being a minor,

was thus sentenced to community service for a period of twelve months. Aggrieved by both conviction and sentence, the appellant unsuccessfully lodged his first appeal at the District Court of Serengeti. This is his second appeal in contest of his innocence.

The background facts leading to this case can be summarized this way. The appellant and the co-accused (not party to this appeal), are alleged to have stolen four cattle belonging to the respondent. That the appellant is a grazing boy together with PW2 – Nyakaho Mtatiro. That in the course of their grazing, it is alleged that one cow belonging to the respondent entered into the cow shed of PW2. Then the appellant took it and is alleged to have sent it to his sister (co – accused person) and later to Iramba. The only eye witness of the whole transaction is PW2.

Being satisfied by the prosecution evidence, the trial court convicted the appellant while acquitting the co-accused. He was sentenced as stated above. The appellant unsuccessfully challenged his innocence before Serengeti District Court. Still dissatisfied, he has come to this Court as second appeal. He is armed with a total of ten grounds of appeal, namely:-

- 1. That, the learned appellant Resident magistrate erred in law in upholding the convicting and sentencing of the appellant*

to serve the one year out of prison whereas the evidence was wanting and his case was never proved beyond reasonable doubt. The copy of the appellant judgment and order and is appended herein as annexure "A" and the appellant craves leave of this honourable court to form part of this petition of appeal.

- 2. That, the learned appellant Resident Magistrate erred in law in pronouncing judgment against the weight of evidence on records henceforth the judgment and decree pronounced is unfounded.*
- 3. That, the learned appellant Resident Magistrate erred in law ordering the appellant to serve a one year sentence out of prison on the ground that the evidence of PW1 was fabricated purposefully to prejudice the appellant as the purported stolen cattle was never tendered in the trial court as exhibit to prove the commission of an offence of theft henceforth the judgment. conviction and sentence are legally unfounded.*
- 4. That, the learned appellate Resident Magistrate erred in law in convicting the appellant as the evidence of prosecution filed total to prove the offence the appellant stood charged as records at the trial clearly shows.*
- 5. That, the learned appellate Resident Magistrate erred in law in disregarding the evidenced of the appellant at the trial who successful rebutted all the evidence of PW1 at the trial.*
- 6. That, learned appellate Resident Magistrate erred in law in pronouncing judgment at the appellant court in the*

appellant's absentia although he write that the appellant was present something which is false.

- 7. That, the learned appellate Resident Magistrate erred in law in denying the appellant's his right to be heard as the appellant was not allowed to argue his appeal.*
- 8. That, the learned appellate resident magistrate erred in law to uphold the trial court judgment in punishing the appellant's mother to pay compensation of Tshs 2,000,000/= for loss of cattle which were never brought in court and tendered as exhibits as if the appellant's mother was an caused in PC Criminal case No 7 of 2021 at the trial court henceforth the judgment and order reached are legally unfounded.*
- 9. That, learned appellate t Resident Magistrate erred in law and misdirected himself in fact by pronouncing judgment against the appellant on mere assumption and not on evidence tendered before him.*
- 10. That, learned appellant resident magistrate erred in law in pronouncing judgment against the weight of evidence on records.*

During the hearing of the appeal, both the appellant and the respondent appeared in person and unrepresented.

Submitting for his appeal, the appellant prayed to adopt his grounds of appeal and made a brief submission that he was wrongly convicted by the trial court which sentence and conviction have been

confirmed by the 1st appellate court. In consideration of the evidence in record, there is no credible evidence that he stole the said cattle as alleged. All this stated by PW2 is falsity. There is no any element of truth.

The respondent on the other hand who had made a written reply, prayed that his written reply be adopted by this Court and insisted that as per evidence in record, it is undisputed that this appellant is the thief of the said cattle. The one who witnessed all this is PW2, who on his testimony, this appellant didn't cross examine any. This suggests the truth of the story. He thus prayed that this appeal be dismissed.

In his rejoinder submission the appellant replied that what PW2 testified was not true as he tried to shoot him some questions, but they were denied by the trial magistrate. In essence, he insisted that he was not responsible with this theft case.

Having heard submissions from both sides, it is now this Court to determine whether the appeal is meritorious. In reaching this end, the important questions to guide are two, firstly whether considering the evidence on record the respondent's case had been proved beyond reasonable doubt as per law. Secondly, whether the trial court reached a proper verdict as per law.

The relevant evidence in the trial court record, appears to come from SM2 who is Nyakaho Mtatiro (20 years) who after being sworn, stated the following:

"Mnamo tarehe 13/01/2021 majira ya saa 5.00 asubuhi tulienda kuchunga na mshtakiwa Na. 2 Hamis Nyangere na kisha kupata ngómbe mmoja akiwa anakunywa maji bonde la mto Mara. Ngómbe huyo alikua dume mweupe mwenye chapa "RSM" na "ÖSM" ubavuni huku akiwa amechanwa masikio. Aliingia kwenye makundi ya ngómbe na kisha kulala kwangu. Mnamo tarehe 14/01/2021 tulienda kuchunga makundi ya mifugo tukiwa na mshatakiwa na.2 huku ngómbe huyu akiwa kundini. Manamo tarehe 15/01/2021 mshatakiwa Na.2 alimbagua ngómbe huyo na kisha kumpeleka Iramba. Nilimhoji mshtakiwa na.2 kwanini anamchukua ngómbe huyo na kisha kujibu ni wa kwao baada ya kununuliwa na dada yake Komboka Nyangere ambae ndiyo mshtakiwa na.1 katika shauri hili. Niliendelea kumhoji na kudai kuwa anampeleka ngómbe huyo Iramba kwa mama yake Nyangere Mabweiga. Kisha mshtakiwa na.2 aliondoka na ngómbe huyo."

When this witness was cross-examined by the first accused, he replied as follows:

"Mshatkiwa na.2 alipita na ngómbe wanne akiwemo dume mweupe mwenye alama "RSM" na "OSN" akiwapeleka Iramba. Ngómbe hizi zilikuwa zinasagwa na mshtakiwa

Na.2. sikupiga yowe kwasababu mshtakiwa Na.2 alikiri ngómbe huyo kuwa mali ya mshtakiwa Na.1”

In my assessment to the respondent's accusations against the appellant, I am totally not convinced that there has been proof beyond reasonable doubt that the said accusations or claims against the appellant were true. Assuming that the SM2's evidence is truthful, the doubts are, if the said cow slept into his cow shed, why did he allow it to be taken by the appellant? On what basis? What measures did he take in respect of that taking? Secondly, how the remaining three cows came into possession by the appellant if the first cow was spotted by SM2 being into his group of cattle. Otherwise, the story by SM2 is not backed up by anyone. There is no connecting evidence between the SM2's evidence and the charges levelled against the appellant. The law is, the proof in criminal charges must be proof beyond reasonable doubt. If it is true that the said cattle were taken by the appellant and sent to Iramba, I wonder why there is no evidence of their transportation/migration from Nyagasenge Village (Serengeti) to Iramba. Suspicion however strong, cannot ground conviction in criminal charges. Yes, the law is there must be credence to every witness, however in the current matter the credence of SM2 is insufficient to ground conviction. There ought to be corroborating evidence by the claimant that it is the appellant who took

the said cattle as alleged. Where the witness' evidence is insufficient, there cannot be credence to the witness.

That said, the appeal is meritorious. Conviction is quashed, sentence meted out is hereby set aside. Consequently, all orders issued by the trial court and upheld by the first appellate court pursuant to this case are hereby quashed and set aside.

It is so ordered.

DATED at MUSOMA this 11th day of March, 2022.




F.H. Mahimbali

Judge

Court: Judgment delivered this 11th day of March, 2022 in the presence of both parties and Mr. Gidion Mugo – RMA.

Right of appeal is explained.


F. H. Mahimbali

Judge

11/3/2022