

IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY
AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 41 OF 2021

*(Originating from Nkasi District Court at Namanyere Criminal Case No. 137
of 2020)*

NDULU S/O MADIRISHA APPELLANT
VERSUS
THE REPUBLIC RESPONDENT

JUDGEMENT

Date of last Order: 30/11/2021
Date of Judgment: 04/03/2022

NDUNGURU, J.

The appellant, Ndulu Madirisha was convicted and sentence to serve five years imprisonment for cattle theft Contrary to **Section 258(1) and 268(1) and (3) both of the Penal Code Cap 16 R.E 2019** respective. He was dissatisfied with the decision of the trial court [Nkasi District Court, before Hon. Mwakibibi RM] and filed appeal to this court in four grounds on hereunder.

***(1) That there was no any documentary evidence to
prove how the said cow was marked and kept.***

(2) That analysis and evaluations of evidence was purely done by the trial court Magistrate.

(3) That, the case was not proved to the required standard in Criminal cases.

(4) That, there was no cogent evidence to join the appellant with cattle theft. He prays appeal be allowed, convictions and sentence be quashed, appellant be set at liberty.

During the appeal hearing, appellant was unrepresented, Republic was represented by Ms. Mwabeza State Attorney. In his argument, the appellant told the court that, his grounds of appeal be adopted and has nothing to add.

Ms. Mwabeza State Attorney for Republic submitted that the conviction and sentence imposed by the trial court was proper. Responding to the 1st ground of Appeal Ms. Mwabeza State Attorney for Republic submitted that the signs explained by the witnesses are those marked on the cattle which the applicant was found with. The said cattle was tendered in court as exhibit, thus the 1st ground has no merits.

In 2nd ground, Ms. Mwabeza State Attorney for Republic submitted that, the trial court evaluated the evidence of both, the prosecution and the defense sides as a result of which appellant was found guilty of the

offence he stands charged and was accordingly convicted and sentenced to serve five years imprisonment.

In the 3rd ground the learned State Attorney for the republic was of the position that, the evidence of six witnesses and three exhibits which are admitted in court are part of evidence, the witnesses have testified how the appellant was found with the cattle, the certificate of seizure was prepared signed by the appellant. The learned State Attorney referred this court to the decision of the court of Appeal of Tanzania in the case of **Gomela V. Republic Criminal Appeal No. 271 of 2018 (CAT) Unreported** the case of **Nassoro Mohamed V. Republic 1967 HCD No. 446,** where the applicability of doctrine of recent possession are applied and well discussed. The learned State Attorney further submitted that PW² proved that, the cattle are his property and are recently stolen, the event took place on 11/09/2020 while the accused was arrested with the said cattle on 13/9/2021; therefore the case was proved beyond reasonable doubt.

Rejoining his argument, the appellant told the court that, he never stolen the cattle he prays appeal be allowed.

Having consolidated the argument of both, the prosecution and the defense side (appellant and the respondent), let me narrates the facts of the case and the chain of evidence in the appeal at hand.

On 17th day of September 2020 the appellant was charged before Nkasi District Court of cattle theft contrary to **Section 258(1) and 268 of the Cap 16 RE 2019**, he denied the charge of cattle theft, at the preliminary hearing the appellant only admitted his personal particulars, that he was arrested on 12/9/2020 and interrogated by the police on 14/9/2020.

Four witnesses are called by the prosecution to prove the charge of cattle theft against the appellants. On 11/9/2020, PW1 Mayunga Masanja get out at 06.00 hours, he found one cow (female) was missing. PW¹ informed his father PW² one Masanja Sikilu that one cow was stolen, and on 13/9/2020 PW² called PW¹ as the stolen cow was found at Kakoma area. The stolen cow was identified by PW¹ with signs of elongated horns with makes "K" on the right near leg. The cow was redish in color. The same identification was also done by PW², the father of PW¹. The appellant was arrested by PW³ selling the stolen cow at Mtikuma area. He was taken to police with assistance of PW4 together with the stolen cattle. PW⁵ was the neighbor of PW2 he identified the stolen cattle as the property of PW2. The appellant was already arrested, PW6 prepared a certificate of seizure (Exhibit P1), tendered together with the stole cow (Exhibit PE2) which was arrested with the accused.

Accused was found with a case to answer and the appellant in his defense only admitted to have been arrested and denied the offence. From the above chain of evidence, the only available issues are

- (1) ***Whether the stolen property was properly identified by the owner.***
- (2) ***Whether the analysis of evidence of both, the prosecution and the defense side are properly done by the trial court and,***
- (3) ***Whether the case was proved to the required standard.***

To start with the 3rd issue on whether the prosecution case was proved beyond reasonable doubt.

As the position of law stands in our country. In criminal case burden to prove a criminal charge lies to the prosecution, and it never shift to the accused.

In the case of **Maliki George Ngendakumana V. Republic Criminal Appeal No. 353 of 2014 (CAT) Bukoba (Unreported)**. The court had their words:

"It is a principle of law that, in criminal cases the duty is two folds, one to prove that the offence was committed

and two, that, it is the accused person who committed the offence it...”

However, the standard of prove in criminal case is beyond the shadow of doubt. Section 3(2)(a) of the Evidence Act Cap 6 RE 2019 Provides

"A fact is said to be proved in criminal matters except where any statute or any law provides otherwise the court is satisfied by the prosecution beyond reasonable doubt that the fact exist."

S. 114 (1) of the Evidence Act Cap 6.E 2019 Provides

When a person is accused of an offence, the burden of proving the existence of the circumstance brings the case within any exceptional from or qualification to the operation of the law creating the offence within which he as charged and the burden of proving any facts especially within his knowledge is upon him....."

In the present appeal the evidence of **PW1, PW2, PW3, PW4, PW5 & PW6** the chain of evidence was to the effect that nothing is behind the shadow of doubt that the offence was committed and it was committed by the accused and nonelse. The court has satisfied that the

prosecution case was proved to the required standard in criminal cases, the first ground fails and is accordingly dismissed for lack of merit.

In 2nd issue whether analysis of evidence of both, the prosecution and the defense are done properly. The analysis of evidence is always done by the trial court in order to determine the credibility of the witness. In the case of **Shabani Davisi V. Republic Criminal Appeal No. 28 of 2000 (Unreported)** it was held;

"The credibility of witness can also be determined in two ways one, when assessing the coherence of the testimony of the witness two, when the testimony of the witness is considered in relation with the evidence of other witness, including that of accused person. In these two occasions the credibility of a witness can be determined by the 1st Appellate court and make its own finding"

See also the case of **Salim Ally V. Republic Criminal Appeal No. 106 of 2013 (Unreported)**.

In the appeal at hand, the evidence in the records of the trial court was all considered in the analysis of evidence by the trial court:

The last issue is mainly on whether the stolen cow was properly identified. According to the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 the identification of the stolen cow was properly done using sign or

it. The description of the cow was well done by the witness. In the case of **Mustafa Darajani VS. Republic Cr. Appeal** No. 242 of 2008 CAT (Unreported), the court had these word, for the doctrine of recent possession to apply, it must be established; *(a) That the property was found with the suspect, or and the person found in possession of the property there should be a nexus between the property stolen. (b) the property is positively the property of the complainant. (d) That the stolen property is in possession of the accused must have a reference to the charge.* See also the case of **Nassoro Mohamoed V. Republic (1967) HCD no 446, Hamed Athuman Silaju Vs Republic, Criminal Appeal No. 120 of 2006 (Unreported)** in the final finding the four grounds of Appeal lack merits, the same are dismissed for being devoid of merits. Appeal fails decision of trial court upheld. Further appeal explained.

It is so ordered.



D Ndunguru

D.B NDUNGURU

JUDGE

04/03/2022

Date - 04.03.2022
Coram - Hon M.S. Kasonde – DR
Applicant - Absent
Respondent - Ms. Irene Mwabeza - SA
B/C - Zuhura

Ms. Irene Mwabeza – State Attorney: This matter comes for judgment today and we are ready. The appellant is a prisoner currently serving his imprisonment term at Mollo Prison.

Court: Judgment delivered this 04th day of March, 2022 in the presence of Ms. Irene Mwabeza State Attorney for the Respondent (Republic) but in absence of the appellant.

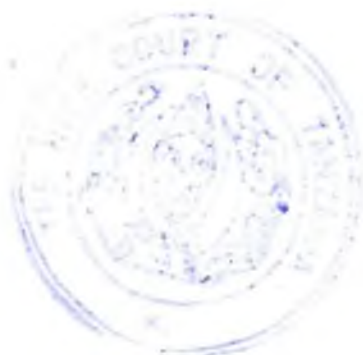


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M.S. Kasonde
Deputy Registrar
04/03/2022

Right of appeal fully explained.

The appellant be supplied with a copy of this judgment.



A handwritten signature in blue ink, appearing to read 'M.S. Kasonde'.

M.S. Kasonde
Deputy Registrar
04/03/2022