IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL NO. 43 OF 2022

(Originating from Criminal Case No. 172 of 2021, Tunduru District Court)

MOHAMED MOHAMED SENJELE ....1ST APPELLANT
MUSTAFA RIDHIWANI KWAYA ....2ND APPELLANT
RASHID SANDALI LAKUU ....3RD APPELLANT
MUSTAFA MOHAMED MINYANDE...4TH APPELLANT
HALIFA ANTHONY SUZEE ....5TH APPELLANT

VERSUS

THE REPUBLIC ....RESPONDENT

JUDGMENT

16/02/2023 & 07/03/2023

E. B. LUVANDA, J.

The Appellants herein were arraigned before Tunduru District Court for the offence of gang robbery contrary to sections 285 (2) and 287 (c) of the Penal Code [Cap 16 Revised Edition 2019].

The trial ended with the Appellants being convicted and sentenced to serve thirty years imprisonment. Being aggrieved with both the conviction and the sentence, the Appellants lodged their petition of appeal embraced six grounds of appeal, thus;

(i) That the trial court erred in law and in fact by failure to evaluate the evidence adduced before it by the prosecution.

(ii) That the trial court erred in law and in fact by convicting the Appellants herein based on the weakness of defence and not the strength of prosecution.

(iii) That the trial court erred in law and in fact by failure to accord the appellant right to cross examine the prosecution witness.

(iv) That the trial court erred in law and in fact by convicted the Appellants herein while the prosecution failed to prove their case beyond reasonable doubt.

(v) That the trial court erred in law and in facts when it convicted the Appellants herein while there is variation between the charge sheet and evidence brought before it.

(vi) That the trial court erred in law and in fact by passing its judgement and sentence contrary to the law.

At the date scheduled for the hearing, the Appellants were jointly represented by Mr. Kaizilege Prosper learned advocate while the respondent (the Republic) was represented by Mr. Frank Chonja learned State Attorney. This appeal was argued orally.

The Counsel for the Appellants abandoned grounds number three and six of the appeal, and continue to submit the rest grounds one after another. Ground number one, the Counsel for the appellant submitted that to prove gang robbery the prosecution must prove the following: stealing, but from the inception to the end, nowhere the prosecution proved stealing. He cited the case of **Samwel Marwa Rose Masata vs. Republic,** Cr. Appeal No. 220/2014 CAT at Mtwara, page 9, to support his argument.

The Counsel of the Appellants believed that it was a duty of the court to evaluate the evidence. He averred further that; the accused persons were arraigned for stealing 80 cattle valued TZs 64 million of Kulwa Dani Tonwa. The Counsel for the Appellants submitted that, the victim ought to be summoned to prove his complaint that those cattle belong to him. Kulwa Dani Toni was not summoned to prove, instead Ndani Tono Zengo was summoned as per page 13 of the typed trial court proceedings. The Counsel for the Appellants mentioned the purpose of summoning the owner, that was to prove that the cattle belongs to him, then describe the stolen cattle, instead a different person one Dani Tono Zengo was summoned, but he failed to prove if those cattle were stolen.

The Counsel for the Appellants submitted that, it is not known how 20 cattle were recovered or returned to the owner. The requirement to summon Kulwa Dani Tono is a legal requirement, to support his argument

the Counsel for the appellant mentioned the case of **Yohana Paulo vs Republic** Cr. Appeal No. 281/2012, CAT, DSM, page 10 & 13. The Counsel for the Appellants averred that, this requirement was not complied. He also submitted that; the trial court failed to evaluate evidence of threatening alleged done by the accused persons. In a charge sheet show the Accused Persons used weapons to threaten one Machia Dani Tono.

The Counsel for the Appellants submitted that, Machia Dani Tono did not say anywhere that he was threatened by the accused person, neither said types of weapons used to threaten him. On preliminary hearing, prosecution indicated that Machia Dani Toni and Manda Dani Tono, page 9 of proceedings, the two nowhere showed that they were threatened. The Counsel for the Appellants believes that, this made the accused persons to fail to understand the accusation against them at Tunduru.

The evidence of PW2 at page 14 indicated that these stollen cattle belong to his father Ndani and not Kulwa Dani Tono, as indicated in the charge sheet. At page 15, reveal they owned 100 cattle and later got 20 cattle injured. He said 50 cattle were not recovered, he said that, this contradict a charge sheet. PW3 Mechia Ndani Zengo, also explained that those cattle are owned by his father Ndani Zengo and that 100 cattle were

stolen, 20 cattle were recorded, 5 cattle were injured and 50 cattle were not recovered. PW4 G 3959 DCPL Swalehe at page 20, explained there was 100 cattle, 5 were returned at the police, the police who handed over to the complaint was not summoned. The Counsel for the Appellants believes as such the evidence was contradicting. Therefore, the Counsel for the Appellant believes that, the trial court had a duty to evaluate it instead of convicting his client.

The Counsel for the Appellants reminded this court that, in criminal cases strength of prosecution case can warrant conviction and not weakness of defence. He submitted that the accused persons who are lay person made efforts to defend on how they did not participate in gang robbery. The first Appellant at page 23, showed that he did not participate. The second Appellant showed that he don't know and did not participate including the 3rd, 4th and 5th accused persons. The trial court based on weak defence of the Appellants who were lay person, and convicted them.

As for the ground number four, the Counsel for the Appellants submitted that, the prosecution failed to prove beyond reasonable doubt the offence of gang robbery against the Appellants. The Counsel for the Appellants added that, the main element was to prove stealing of the alleged stolen cattle, which the prosecution failed to prove. At page 15,

PW2 said stolen cattle and remained are 50 cattle, 5 cattle were injured. Nowhere he shows 80 cattle were stolen as alleged in a charge. Also, PW3 failed to prove stealing of 80 cattle.

Furthermore, the Counsel for the Appellants submitted that, the Prosecution ought to prove ownership beyond double, they ought to summon Kulwa Dani Tono, instead summoned Ndani Tono Zengo who failed to prove ownership, page 13 of proceedings. The Counsel for the Appellants contended that, PW2 Ndani, failed to explain the owner of a cattle, rather said the owner is Ndani. All witnesses failed to reveal special mark or dot(s) on the alleged stolen cattle, as in **Yohana Paulo** (supra). No evidence from police officer to show that PW1 described the stolen cattle. The Counsel for the appellant referred this court at page 9, where it was revealed that, threats were made to Machia Dani Toni and Amanda Dani Toni, which contradict a charge and neither of them said he was threatened.

Coming to the ground number five, the Counsel for Appellants asserted that, there is a variation between a charge and evidence adduced. In a charge, indicate those 80 cattle were owned by Kulwa Dani Tono, but the evidence contradict, because the evidence show the owner on complainant was PW1 page 13, PW1 said belong to Ndani Tono Zengo, PW2 said belong to his father called Ndani. Kulwa Dani Tono and Ndani

Tono Zengo are two different people. It is the Counsel for the Appellants that, the charge sheet and evidence contradict each other.

The Appellants Counsel added that, a charge sheet indicate 80 cattle, evidence of PW1, 2,3 and 4 contradict with a charge. The Counsel cited the case of **Mashaka Bashiri vs. Republic,** Cr. Appeal No. 242/2017 CAT Arusha, pages 12 & 13, in which the court explained the effects of evidence contradicting a charge and what to be done. He thinks that, the prosecution ought to ask for amendment, which was not done. In view of contradiction between a charge and evidence is fatal, and was not cured by prosecution. The Counsel for the Appellants cited also the case of **Thabit Bakari vs. Republic**, Cr. Appeal no. 73/2019, CAT DASM, page 12, to suport his submission.

In response, the learned State Attorney supported the appeal and he submitted that, according to a charge, the five accused persons were charged for gang robbery, c/s 285 (2) and 287 [Cap 16 R.E. 2019]. According to these provisions, the prosecution ought to prove two main things; One, to prove stealing; Two, use of violence. According to the witnesses summoned there were two key witnesses, PW2 and PW3 who were in possession of cattle and who were at the scene on the commission of offence.

It is the learned State Attorney view that, the evidence of PW2 and 3, failed to show how the accused persons used violence. Absence of violence a charge of gang robbery cannot be proved and the only remained offence is stealing. He supported his argument with the case of **Brighton Joseph @ Brai @ Maro & Another vs Republic**, HC, Cr. Appeal No. 178/2019.

The learned State Attorney referred this court to the record of the trial court where shows that the cattle which were stolen were 80 cattle, property of Kulwa Dani Tono. But the evidence of all witnesses, in particular PW2, 3 and 4 contradict on the number of cattle stolen. These witnesses said 100 cattle were stolen, and procured injured 20 cattle and 50 cattle were lost. The learned State Attorney join hands with the Counsel for the Appellants that, this evidence created doubts on actual cattle which were stolen.

The learned State Attorney submitted further that, PW4, explained that those 20 cattle recovered were taken to Lukumbule Out Post. There was a contradiction of these cattle on how arrived at police, and procedure for receiving exhibit and the availability of those cattle to date. According to these witnesses, show that these cattle belong to Ndani Tono Zengo and not Kulwa Dani Tono as indicated in the charge sheet. PW1 Ndani

Tono Zengo said these cattle belong to him, meaning that is not a property of Kulwa Dani Tono, as in a charge sheet.

It is the learned State Attorneys view that, these contradictions in the evidence and charge sheet, create huge doubt. He supported his argument with the case of **Frank Kasubiri vs Republic,** HC Morogoro, Criminal Appeal No. 83/2022, where it was established that in case of contradiction, is to be ruled in favour of the accused person.

As for the visual identification, the learned State Attorney submitted that, it was ruled in various cases that is a weak identification, except only where the witness will show features which enabled him to identify the accused and no likelihood to confuse with another person. In the case at hand PW2 & 3, failed to explain identity of these accused persons, how they appeared in the material date, and he insisted the court to evaluate circumstances under which witnesses identified the accused. He cited the case of **Abdul Farijalah & Others vs Republic,** Cr. Appeal No. 99/2008 CAT Mbeya, to support his reasoning.

In his brief rejoinder, the Counsel for the appellant had nothing valuable to add but he insisted the court to allow the appeal, set aside the conviction, sentence and acquit the Appellants.

As it transpired above, the learned State Attorney supported this appeal, arguing that the offence of gang robbery was not proved as required.

I share the same view that the evidence available cannot said to have proved the offence of gang robbery or any, or at all. For one thing eye witness to wit Machiya Ndani 24 years old (PW2) and Machiya Ndani Zengo 25 years old (PW3), neither of them asserted that there occurred violence at the commission of the offence. The question of violence was introduced by Ndani Tono Zengo (PW1), who was away from the scene, that he was dialled phone by a strange tone informing him that they were attacked. PW1 was not particular if the one attacked were PW2 and PW3 or someone else.

PW2 said the First Appellant phoned call and stood aside, then other people appeared and attacked them. PW2 did not point a finger to any of the accused person (Appellant herein) as among of the alleged other people who attacked him.

In absence of tangible evidence revealing that actual violence was deployed, it is hardly to say that the offence of gang robbery was committed and proved. For a second element of stealing as an ingredient of gang robbery.

A fact of how many cattle were stolen and to whom it belong ensured another 9 contradiction among witnesses also the evidence was in variance with the charge.

PW2 said 100 cattle were taken away; they recovered 20 injured cattle and 50 went missing todate. But if PW2 was deprived 100 cattle, how come he accounted less heard of cattle 20 recovered plus 50 making a total of seventy only, where are remained 30 cattle?

PW3 who was in company of PW2 introduced a somehow different version of story that they had a total of 200 cattle, 100 cattle were taken away, 20 cattle were recovered, 5 were injured and 50 cattle went missing. PW3 did not clarify if the alleged 5 injured cows are among the 20 recovered, or else he meant they recovered 20 cows, plus 5 injured cattle, making a total of 25 recovered cattle, meaning 20 + 5 + 50 = 75.

Like PW2, PW3 also did not account for the rest 30 or 25 cattle in this calculation of 100 cattle alleged taken away. PW3 said they had a total of 200 cattle, 100 were taken away, as aforesaid, but said nothing regarding the other 100 cattle as to where remained. This is because PW2 stated that both (PW2 and PW3) run away. This create confusion. Again it was not established properly on how those 20 cattle were recovered. PW2 said they recovered; PW3 on cross examination by the First Accused, said 20 cattle were returned back. D/CPL Swalehe PW4 said the 20 cattle were returned to Lukumbule Out Post. But all three PW2, PW3 and PW4 were silence as to who returned it or how were recovered or surrendered. As

also submitted by the learned State Attorney, the custody and handing over of the 20 cattle was not established. Again the alleged 50 missing cattle, vary with a charge which indicate 80 cattle were stolen.

On the other hand, Ndani Tono Zengo (PW1) who bragged to be the owner of cattle, did not plead the actual number of cattle he own, neither asserted any specific number of stolen cattle, recovered or unrecovered.

Another anomaly, PW1 did not mention the names of the alleged children who phoned him call. Neither stated specifically that PW2 and 3 were his children grazing his cattle.

It is to be noted that the name of the owner of stolen 80 cattle indicated in a charge sheet is a different person whith PW1. A charge sheet depict the owner is one Kulwa Dani Tono. As submitted by the learned Counsel for Appellants also supported by the learned Stated Attorney, that Kulwa Dani Tono reflected in a charge is different with Ndani Tono Zengo who testified as PW1 and claimed to be the owner. However his (PW1) evidence did not prove any fact, as depicted above.

It is now a settled position of the law that when the evidence presented by the prosecution is at variance with a charge and where the same is not cured by way of amending the charge at a proper opportunity, for a

charge to suit the prevailing situation, the prosecution case is deemed unproven.

In **Issa Mwanjiku @ Whilte vs Republic**, Criminal Appeal No. 175 of 2018, C.A.T the Court ruled, I quote,

> *"We note that, other items mentioned by PW1 to be among those stolen like ignition switches of tractor and Pajero were not indicated in the charge sheet.*
> *In the prevailing circumstances of this case, we found that the prosecution evidence is not compatible with the particulars in the charge sheet to prove the charge to the required standard."*

The same position was taken in a case of **Mashaka Bashiri vs. Republic**, Criminal Appeal No. 242/2017 CAT at Arusha at page 14, I quote,

> *"We entertain no doubt that in this case there was variance between the charge and the evidence on the items alleged to have been stolen from PW2. The prosecution case ....was not proved to the required standard."*

In view of the above adumbration, I nod with the submission of the learned State Attorney that the offence of gang robbery cannot stand; rather the only remained offence is that of stealing. However, the above contradictions and discrepancies regarding the actual number of stolen cattle, how the 20 cattle were recovered and it is problematic chain of custody and handing over proceedings, coupled by a fact that the owner

posed another challenge, it cannot be said that it warrant this court to apply it is revisionary powers and proceed to convict the Appellants for stealing, in line with the pronouncement of this court speaking through Honarable Dr. Mambi, J in **Brighton Joseph @ Brai @ Maro & Another vs Republic,** Criminal Appeal No. 178/2019, High Court Mbeya District Registry.

For another thing, in this case the Appellants were identified by PW2 and PW3 through visual identification. As per the submission of the leaned State Attorney, that visual identification have been ruled in unbroken chain of authority that, it is a weak identification, except in the circumstances where the witness will show features which enabled him to identify the accused.

Herein, PW2 and PW3 stated that the culprits or assailants which was a crowded group of people were smeared with and camouflaged by a used dirty oil. PW2 and PW3 were alleged to be passer-by there at Mrusha on transit migrating to Makonde.

PW2 and 3 did not explain any peculiar mark which assisted to identify the Appellants. Indeed PW3 stated that he identified the chairperson (1st Accused) alone. In **Abdul Iarijalah** (supra), the apex Court held,

> *"All examined, we are of the considered view that had the learned judge on first appeal taken into account the weakness*

in the identification evidence and process, he would no doubt have come to the conclusion, as we have, that the 2nd appellant was not positively identified. There was room for mistaken identification."

Herein, the assailants appeared with painted faces, culprits were strangers to PW2 and PW3 the later were mere passerby, PW2 and PW3 did not explain any special mark which enabled them to identify all the Appellants among the alleged crowded group of people. Therefore the circumstances were not favourable for positive identification, in other words likelihood of mistaken identification is highly probable.

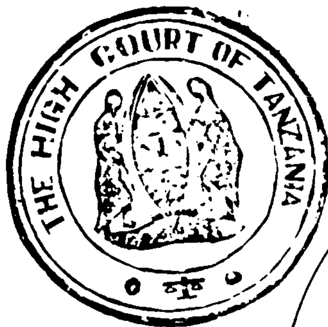
Another anomaly, a ruling of a case to answer is completely missing in the records of the trial court both typed proceedings and hand written version. The records only reflect ruling was delivered on 30/05/2022, but a verdict is unknown and a ruling is nowhere to be found in the file. In the case of Samwel Gitau Saitoti @ Saimoo & Another vs Republic, Criminal Appeal No. 5 of 2016, C.A.T. at Arusha, pages 24 and 26, the Court ruled,

> *'As to non-compliance with section 231(1) of the CPA, we need only repeat what we said in* ***Alex John vs R.*** *case (supra) that compliance with sections 230 and 231 is mandatory. This Court found merit in the complaint*

regarding non-compliance with section 231(1) and quash the appellant's trial for being a nullity'

I hold the view therefore that, the offence was not proved against the Appellants on the required standard.

The lower court conviction is quashed, sentence of 30 years imprisonment is set aside. The Appellants are to be released forthwith rules otherwise lawfully held.



E.B. LUVANDA

JUDGE

07/03/2023