

**"ORIGINAL"**

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**TANGA DISTRICT REGISTRY**

**AT TANGA**

**CRIMINAL APPELLATE JURISDICTION**

**DC CRIMINAL APPEAL NO. 53 OF 2022**

*(Originating from the District Court of HANDENI Criminal Case No. 117 of 2021,  
Hon. MWAKYOLO, SRM (as she then was)*

**ABEID S/O MOHAMED-----APPELLANT**

***VERSUS***

**THE REPUBLIC-----RESPONDENT**

**JUDGEMENT**

**Mansoor, J:**

**15<sup>TH</sup> MARCH 2023**

This appeal arise out of the judgment dated 10<sup>th</sup> June 2022, passed by the District Court of Handeni in Criminal Case No. 117 of 2021, by which, the Appellant was convicted of the offence charged of Robbery with violence c/s 285 and 286 of the Penal code, Cap 16 R:E 2019 . He was convicted of the charge and sentenced to 15 years



imprisonment, and he was ordered to compensate Meja s/o Laizer, the six cows.

Prosecution alleged that on 13<sup>th</sup> April 2018 at Kigoda Ranch in Mzeri village within the District of Handeni in Tanga Region, the Appellant together with Hassan Bakari did steal Six Cows valued at THz 3,500,000 the property of Meja s/o Laizer and immediately before such stealing he used actual violence to Amani Meja in order to obtain or retain the property stated.

It was the testimony of PW1, Meja Laizer who is the owner of the stolen cows that his son Amani Meja was in the bush at the Ranch herding 100 cows. PW3 namely Amani Meja was herding about 100 cows the property of Meja Laizer (PW1), PW3 met with the accused, they ambushed him, and they tied his legs with a rope, then they stole eight cows, but two cows were recovered, so the total number of stolen cows were six. There was an eye witness who was PW5 who saw the entire incident, and saw the appellant carrying a bucket of meat on a motor cycle. PW5 could identify the accused because it was at 11.00 a.m. in the morning hours and it was on a day light,

and that PW5 and PW3 knew the appellant and his allies before the incident. PW3 said he was also assaulted by the appellant and his group, and they tied him on the tree with a rope before they stole the cows. The other people who were with the appellant were not mentioned by the victim or the witnesses for the prosecution.

After taking evidence of five prosecution witnesses and that of the appellant the trial court found the charge proved beyond reasonable doubt, convicted the appellant and sentenced him to Fifteen years imprisonment. It is for this reason that the appellant, who is dissatisfied with the conviction and sentence, has preferred this appeal.

In his petition of appeal as well as in his written submissions filed in court on 20 October 2022, the appellant claims that the evidence was contradictory and inconsistent and unreliable, and that the offence was committed in April 2018 but the appellant was arrested on October 2021, and there is no explanation as to why they arrested him three years after the incident; that he was not positively identified as the robber; and that the prosecution case was not

proved beyond reasonable doubt. He also says the incident was never reported in the village leaders which raises a doubt on the prosecution case. He also alleges that the Magistrate failed to evaluate the evidence and did not take into consideration the defense of the appellant.

The respondent, through learned state counsel Ms. Maria Kaluse, opposed the appeal saying that there was proper identification of the appellant by PW3 and PW5 that the defense evidence was properly considered by the Trial Magistrate and the case for the prosecution was proved beyond reasonable doubt.

Regarding the identification of the appellant there was evidence from PW3 and PW5 that they saw the appellant at the scene of crime, he was the one who tied PW3 by the Rope on the tree, and had enough time to note and describe the appellant's physical appearance; it was on the day light and since the victim and the eye witnesses knew him before the incident as they reside from the same village, the appellant's identification was clear with no any infirmities. Again, he was caught red-handed with the bucket full of meat trying to flee



the scene on a motor cycle. I understand as stated in the case of **Pascal Kitiva vs. R (TLR) 1994**, page 95 in which the Court of Appeal stated that it is unsafe to uphold conviction based on the uncorroborated evidence of the co accused, but here it is safe to rely on the evidence of the victim and that of an eye witness which corroborated each other on identification of the appellant at the scene.

The evidence touching on the identification of the appellant was given by PW3 and PW5 only. PW3 was the victim and had recognized the appellant; they come and reside from the same village. The appellant was properly identified by PW3, the victim, and PW5 the eye witness. The recognition was on a day light and thus the intensity of the light on the day of the incident was thoroughly explained by PW3 and PW5. Apart from this, PW3 and PW5 both said they knew the accused/appellant before the incident, and that is enough identification. It is on record that PW3, the victim, did have a chance to interact and see the accused as the accused pretended to ask for something from the victim, and he turned around and tied him on the tree with a rope, and thus, PW1 had an opportunity to

notice the distinctive features of the accused/appellant. There was evidence by PW3 that at the time of the commission of the crime there was enough light. In these circumstances, if the evidence of the victim was to be relied upon, then there was proper identification of the appellant by the victim.

Again, even though the prosecution witnesses are all from one family, that does not make the case of the prosecution a weak case, as held in the case of **Mustafa Ramadhani Kihyo vs. Republic (2006) TLR 323** "the evidence of related witnesses is credible and there is no rule of practice or law which requires the evidence of relatives to be discredited unless there is a ground to do so. However the story of the prosecution would have carried strength if the investigation officer or even the arresting officer had testified in Court to corroborate the evidence of the victim and his relatives. The records shows that the case was never reported to police, and if it was reported no one from the police testified to court as to what really happened. It is not even known as to when and where the accused was arrested and by whom. It has not been shown if the accused was found with the six cows stolen at the scene, what was

stated by the witnesses of the prosecution was that the accused was found in a motor cycle carrying a bucket of meat. It was not established by the prosecution if the meat on the bucket was from the six cows. Practically, it is impossible for one to carry the meat of six cows in a bucket and in a motor cycle. The case for the prosecution suffered from infirmities and contradictions and it is not safe to rely on evidence which is full of gaps and contradictions to convict any person.

Regarding the 2<sup>nd</sup> ground of appeal, I agree with the submissions of the Appellant that the Magistrate did err in convicting the appellant, and his evidence was not considered. He said he was arrested on 15<sup>th</sup> September 2021 when he went out from his house at around 1.00 responding to a call or an alarm calling all the villagers to go out, and he was arraigned and taken to police. The evidence of Hassan Bakari who said he went to police station to bail out his son, the appellant herein, was a good defense which required the prosecution to state clearly if the appellant was arrested on that day, and he was arrested from which area and for what reasons. All the prosecution witnesses said was that they saw the accused/appellant with a bucket of meat



in a motor cycle, but they could not apprehend him as he fled the scene before he was apprehended, and that the accused appellant was arrested in 2020 after he came out from the hiding, and he was arrested at Misima Village. Thus, if the evidence of the defense or of the appellant was considered, in particular as to who had arrested him either in 2020 or in 2021 and where the arrest was, and since this was not established by the prosecution, then the defense has succeeded to cast a doubt on the evidence of the prosecution.

The appellant was charged with the offence of robbery, it is pertinent to note that "robbery" is defined under the Code as meaning:

"stealing anything, and at or immediately before or after the time of stealing it, using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained."

Obviously before there can be robbery there must be first of all an act which amounts to stealing. So, robbery with violence means simply stealing plus violence used or threatened. On the evidence of P.W. 3. ,it appears to me that there was no enough proof that there



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was violence before theft, as before the six cows were stolen there was no proof that PW3 was ambushed and was tied on a tree, and if so why PW5 who was watching did not untie the ropes on PW3 or even resist or call for help. There is also no proof that the six cows were stolen, and if stolen, they were found in possession of the appellant. There were gaps in the story of prosecution regarding the use of force or violence and theft before or after the incident. That being the case, the case for prosecution was not proved beyond reasonable doubt.

Consequently, the appeal succeeds. The conviction, sentence and orders passed by the District Court for Handeni in Criminal Case No 117 of 2021 are quashed and set aside. The appellant is acquitted of the Charge of Robbery with Violence C/s 285 and 286 of the Penal Code, and shall forthwith be released from imprisonment, unless held for any other lawful cause.

Appeal allowed.



**L. MANSOOR**

**JUDGE**

**15<sup>th</sup> MARCH 2023**

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Judgement delivered in Court today in the presence of the Appellant, Mangowi, State Attorney for the Respondent Republic and Mr Zayumba, the Court Clerk.



  
**L. MANSOOR**

**JUDGE**

**15<sup>th</sup> March 2023**