

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL NO. 47 OF 2022

(Originating from Tunduru District Court in Criminal Case No. 111 of 2022)

SAMORA MALILI LUHANYA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of last Order: 22/02/2023

Date of Judgment: 22/03/2023

U. E. Madeha, J.

To begin with, the Appellant that is none other than; Samora Malili Luhanya, before the District Court of Tunduru ("The Trial Court") was charged and convicted for the offence of cattle theft contrary to section 268 (1) and (3) of the *Penal Code* [Cap. 16 R.E. 2022]. The Appellant was sentenced to serve five (05) years imprisonment. To add to it, he was ordered to pay compensation of Tanzania shillings eleven million and nine hundred thousand (11,900,000/=) after the expiration of thirty (30) days from the date of judgment.

From the Trial Court records, the substituted charge sheet that was put against the Appellant (as an accused) reads as follows:

"STATEMENT OF OFFENCE.

Cattle theft: contrary to section 268 (1) and (3) of the Penal Code [Cap. 16, R.E. 2022].

PARTICULARS OF OFFENCE.

Samora s/o Malili Luhanya on 13th day of June, 2022 at Muhwesi Village within Tunduru District in Ruvuma Region did steal nineteen (19) herds of cattle and one (01) calf total valued at eleven million and nine hundred thousand (11,900,000) Tanzanian shillings the property of Salawa s/o Mabheja."

As a matter of fact, the Appellant was not pleased with the findings of the Trial court and he has preferred this appeal. In fact, through his petition of appeal, the Appellant has fronted five (05) grounds of appeal as his main points of grievance. The grounds of appeal read as follows:

- 1. That, the Trial Court erred in law and facts by convicting the Appellant herein while there was a variation between the charge sheet and the evidence brought before it.*

2. *That, the Trial Court erred in law and facts by convicting the Appellant by relying on incredible visual identification evidence.*
3. *That, the Trial Court erred in law and in facts by failing to evaluate the evidence adduced before it.*
4. *That, the Trial Court erred in law and facts to convict the Appellant herein while the prosecution failed to prove the case beyond a reasonable doubt.*
5. *That, the Trial Court erred in law and in facts by passing its judgment and sentence contrary to the law.*

It is worth considering the fact that, PW1 that is; Salawa Mabheja, while he was under oath, he stated that he is a peasant and pastoralist in Muhuwesi Village in Tunduru District. He has almost six hundred (600) herds of cattle. In fact, nineteen (19) herds of his cattle have been stolen at Muhuwesi Village. He stated further that, he was not present during the incidents; he was actually in Mbalali District where he has a big herd of cattle. He was informed about that incident by his wife who is residing in Nampungu suburb in Muhuwesi Village. His wife's name is Gisha Isung'weno.

On the same note, he has six (6) wives, but they are scattered throughout the country. One of his wives who is residing in Nampungu suburb in Muhwesi Village told him that his nineteen (19) cattle were stolen. He was told that, the robbers attacked his compound and stole nineteen (19) herds of cattle on 13th July, 2022 at around 2:00 hours. To add to it, he acted accordingly and he went to his compound at Tunduru. His wife told him that on the material day at midnight while they were asleep, they were awakened by the noises of their cows. They woke up and they managed to see the accused with other two men taking the herds of cattle. They managed to identify the Appellant with the aid of solar light, which was lighting. They actually managed to identify Mr. Samora Malili, who is the Appellant herein as he was a neighbor and they knew him even before the incident. In fact, the Appellant and his colleagues had a sword, machetes, an iron bar, a hoe handle and wooden sticks. Also, one of the Appellant's colleagues was carrying a black bag. Moreover, his wife asked the Appellant, *"Malili where are you going with the cattle?"* and the Appellant replied that *"If you want to die come, it is better to remain where you are for your safety."*

After that intimidation, his family decided to shout and scream for help. Unfortunately, the Appellant intimidated them to stop shouting and screaming or else he would surely kill them. Then the Appellant and his colleague disappeared with 19 herds of cattle to an unknown location.

As a matter of fact, upon arriving at Muhuwesi Village he reported the matter at the village office, whereby he was given a letter so as to go and report the matter at Nakapanya Police Station and the accused was arrested. It is true that, he knew the Appellant even before the incident since he is actually one of his neighbors. Also, the Appellant was identified while he was at the Court dock during trial.

Apart from the evidence given by PW1, **PW2** who lives in Malaika suburb in Muhuwesi Village, recalls that on 13th June, 2022 at midnight, he was with his mother and they were asleep. They woke up after realizing that the Appellant and two (02) other men were taking their cows to an unknown place without their concern. As a matter of fact, they decided to take the torch and light them; there was also the strong solar light, which assisted them in easily identifying the Appellant together with the other two (02) men. It is important to note that, the Appellant is his neighbour and he know him as Samora Malili. PW2 further testified that the Appellant

threatened to kill them if they dare shout or scream for help. It is true that they only managed to identify the accused because he was actually next to them and he is their neighbour and they never identified the other two (02) men. To add to it, PW2 stated that, the accused was holding a machete, a sword, and an iron bar. Additionally, they asked the Appellant where they were taking the herds of cattle and the accused told them that if they want to die, they should follow them. Strange as it may seem, they took the cows and disappeared to an unknown place. Besides, they decided to shout and scream for help but the Appellant and his colleague ordered them to get inside and stop shouting or else they could kill them. Also, the Appellant and his colleague threw the sword, but it missed them.

For the sake of their dear lives, they had no choice rather than getting inside and later on they went to hide themselves in the bush in order to save their lives. They spent the remaining night hours in the bush and early in the morning they notified his father (PW1). PW2 added that he can remember and identify their cows because they marked them on their back legs; they are marked a symbol of number seven (07). The eighteen (18) cows were heavily pregnant, and one (01) of them was a small bull calf. Lastly PW2 identified the Appellant who was at the Court dock.

On the other hand, **PW3** Nandy Salwa, stated that on 13th July, 2022 during night hours she was at home with his mother and they were asleep. They were wakened by the noises made by cows. In fact, she was awakened by his mother and she had to get out. She found three (03) men, one of them was the Appellant. They saw the Appellant and his colleague because there was a strong solar light that was lighting at the area and they had a torch. They identified the Appellant since he was next to them and they know him before the incident day and he is their neighbour.

They threatened to kill them if they could make noise or scream for help. PW3 added that the Appellant and his colleague had swords, machetes, wooden sticks and iron bars and they took their cattle. His mother asked the Appellant, "*Malili where are you going with our cattle?*" and the Appellant replied "*To be safe you must stay where you are.*" The Appellant threatened to kill them and they were thrown with a sword but it missed them. As a result, they decided to go and hide themselves in the bush until the next morning.

Furthermore, **PW4** Adam Rashid, a peasant from Muhuwesi, stated that he knew Salawa Mabheja; he is his neighbor at their farms. That on

14th June 2022 when he was on his way from Mtetesi Village, it was early in the morning he found two (02) pastoralists who were grazing the cows. As a matter of fact, he only knew the Appellant and he was unfamiliar with the other man. Notably, PW4 stated that the Appellant was with another man and they were grazing cows and they were taking the cows to Liwangila Village. In fact, Mr. Salawa told him that he was needed by the Police Officers at Tunduru Police Station. He went at Tunduru Police Station where he gave his statement. PW4 identified the Appellant at the Court dock and he stated that he knew him before this case as they lived nearby in their suburb and he never bothered to make a follow-up to find out where the Appellant was going with the cows.

Moreover, **PW5** G3959 D/CPL Swalehe stated that he is working at Tunduru Police Station in Criminal investigation Department. He has almost six (06) years of working experience in the that department. As a matter of fact, he has got investigation trainings in different Police Academies and his duties are to mention a few; to arrest, investigate criminal cases. In that regard, he received the police case file from the Nakapanya Police Station to investigate. The file was for the offence of cattle theft, whereby the accused was one Samora Malili Luhanya.

PW5 further stated that the cows were stolen on 13th June, 2022 at Muhuwesi Village. They were eighteen (18) herds of cattle and one (01) calf. As part of his duties, he began investigating this case after he was assigned to do it. As a matter of fact, he interviewed a total of four (04) witnesses who are none other than; - Nandy, Salawa Mabheja, Kale and Rashid Libaba. These witnesses told him that they saw the accused with other men who stole their cattle. In that case, they managed to identify them using a solar light that was lighting at their zoo.

To add to it, Adam Rashid, told him that he met with the Appellant grazing the stolen cows. In addition, he also interviewed Mr. Salawa Mabheja, who told him the description of his stolen cattle. The Appellant was arrested and he denied to commit the offence. He then filed this case and charged him with cattle theft. On the same note, he identified the Appellant who was standing in the court dock.

On the other hand, in his defence case, the Appellant had three (03) defence witnesses. DW1 who was the Appellant himself, told the Trial Court that PW1 is his neighbor and he denied having involved in stealing of the said cows. When cross-examined by the prosecutor he also gallantly denied stealing the said cows.

Whereas, on the side of **DW2** (Mchopa) Luhanya of Malaika suburb in Muhesi Village, told the Trial Court that he wonders if nineteen (19) cows of Mr. Salawa's cattle were stolen because he never heard any alarm as an alert to the villagers. Strange as it may sound, the witness also told the Trial Court that he is PW1's neighbor but he never knows if Mr. Salawa's cattle were stolen.

The evidences given by DW3 and DW4 are all to the effect that it exonerates the accused person from involvement in the incident of cattle theft. DW3 (Manasse Gabriel Malilima), who is the hamlet leader of Muhesi suburb, told the Trial Court that he is residing almost eight (08) kilometers from where PW1 dwells, and he gave his mobile-phone number so that if there was any problem the villagers could easily reach him. Surprisingly, PW1 never dialed him to inform on the incident of cattle theft. The defence case was then closed on that basis.

It is important to note the fact that; the Appellant was represented by none other than Mr. Kaizilege Prosper learned advocate whereas the Republic/Respondent was represented by Ms. Tumpale Lawrence the State Attorney.

Mr. Kaizilege Prosper the Appellant's learned advocate submitted that, on the first (1st) ground of appeal, that there is a variance between the charge sheet and the evidence adduced before the Trial Court, he averred that the charge sheet that was laid before the Trial Court clearly shows that the offence was committed at Muhuwesi Village in Tunduru District within Ruvuma Region. Basically, he contended that the Appellant was charged with the offence of stealing nineteen (19) herds of cattle that belonged to one Salawa Mabheja but after passing through the Trial Court records, he finds the evidence given was varying from the charge sheet. This is because the key witnesses who were present at the crime scene stated that at midnight at around 02:00 hours PW2 was present at the crime scene who saw with her naked eyes all the events as it happened. Notably, he further submitted that in the testimony of PW2 it was shown that the offence was committed on 13th June, 2022, which is quite different from the charge sheet. Therefore, he stated that the evidence given is different from the evidence in the charge sheet and makes the charged laid before the Appellant (accused) to remain unproven beyond reasonable doubt. For more emphasis, he cited with approval the case of **Mashaka Bashiri v. Republic**, Criminal Appeal No. 242 of 2017, The Court of

Appeal of Tanzania (unreported) at page 12 and 13. Which state *inter alia* that:

"After the prosecution had noted that there is variance between the charge sheet and evidence in respect of the stolen items, it was required to seek leave to amend the charge, but that was not done.

The failure to amend the charge sheet is fatal and prejudicial to the appellant and hence lead to serious consequences to the prosecution case as it was stated to the prosecution case as it was stated by this Court in various cases Mohamed Juma @ Mpakama v. Republic, Criminal Appeal No. 385 of 2017, Noah Paulo Gonde and Another v. Republic, Criminal Appeal No. 456 of 2017 and Issa Mwanjuku @ White v. Republic, Criminal Appeal No. 175 of 2018 (All unreported) ... the court dealt with an akin situation where the charge sheet was at variance with the evidence in relation to the types of the properties which were alleged to have been stolen from the complainant."

To add to it, he further submitted that variance between the charge and the evidence was supposed to be noticed by the Trial Court while composing its judgment.

Moreover, with regard to the second (2nd) ground of appeal, he stated that the Trial Court erred in law and facts by relying on the evidence of visual identification. Principally, he stated that the Trial Court did not evaluate the evidence as there was doubt on the issue of identification. He further averred that as the offence was committed at night hours the evidences on identification must be clear. Basically, one of the things is that the Appellant was under observation and the distance between the Appellant and the witnesses, if there was sufficient light which makes positive identification.

He further averred that the witnesses failed to prove the intensity of the light which was found at the cowshed that enabled the witness to identify the Appellant. He also stated that the evidence given by PW2 and PW3 stated that the Appellant was their neighbour that is why they identified him. Also, he contended that the witnesses failed to prove the distance which was between them and where the Appellant was found. Reference was made by citing with approval the case of **Samwel Nyamhanga v. Republic**, Criminal Appeal No. 70 of 2017 Mwanza (unreported) in which the case of **Jaribu Adalla v. Republic** (2003) TLR

271 was quoted with approval. In **Jaribu Adalla v. Republic (supra)** it was stated that:

"In matters of identification, it is not enough merely to look at factors favoring accurate identification, equally important is the credibility of the witness. The ability of the witness to name the offender at the earliest possible moment is a reassuring, though not a decisive factor."

To crown it all, he further stated that it is not correct to conclude that the Appellant was identified at the crime scene just because he was a neighbour of PW2 and PW3.

He added that the identification made by PW2 was too minimal to satisfy that the Appellant was clearly identified. Apart from that, he submitted that if you carefully look at PW2 and PW3's evidence the question of identification leads to doubt and brings similarities to the mistake which was made in the case of **Isa Mgala v. Republic**, Criminal Appeal No. 37 of 2005. For more emphasis, he cited with approval the case of **Ally Miraji Mkumbi** (supra) whereby it was stated that mistake of recognition does not lead to clear identification of the accused person. He argued that the investigator was supposed to visit the crime scene on a

serious note in order to satisfy himself on the issue of the bulb size, in which the witness did not state anywhere.

On the third (3rd) ground of appeal the Appellant's advocate stated that, the Trial Court failed to evaluate the evidence and due to that failure, it convicted the Appellant but if it could have evaluated the available evidence properly, the Appellant was not supposed to be convicted. Moreover, he contended that PW1 and PW3's evidence stated that the offence was committed on 13th July, 2022. On the contrary, other witnesses stated that the offence was committed on 13th June, 2022, and such contradictions raised a reasonable doubt that the Trial Court did not evaluate the evidence on records. He added that even the investigator (PW5) failed to visit the crime scene where the cattle were stolen.

Finally, he prayed his submissions made in the first, second and third grounds of appeal, also to cover for the fourth and fifth grounds of appeal and he prayed that the conviction and sentence entered against the Appellant to be set aside.

On the other hand, Ms. Tumpale Lawrence, the State's Attorney for the Republic, supported the Trial Court's conviction and sentence. In short,

she strongly opposed the appeal. In fact, in her submission she submitted, there was no variance between the charge and evidence. In that regard, she averred that the Appellant had stolen nineteen (19) cattle and looking at the first page of the Trial Court's proceedings the offence of cattle theft was committed on 13th June, 2022 and on 11th July, 2022 the charge sheet was read to the Appellant. She further contended that the offence was committed on 13th June, 2022 but there was a typing error. She added that if the testimony given by PW2, PW4 and PW5 as shown in the proceedings clearly proves that the cattle were stolen on 13th June, 2022 as PW4 saw the Appellant grazing the stolen cattle on 14th June, 2022.

As much as the second (2nd) ground of appeal is concerned, the State's Attorney stated that there were solar lights which enabled PW2 and PW3 to recognize the Appellant. She stated that the evidence related to the lights in the crime scene is important if the accused was under observation. She added that, PW2 and PW3 knew the Appellant as he was their neighbour and the Appellant does not dispute that they knew each other. She submitted that the Appellant was well identified by PW2 and PW3 and even were able to mention his name as Samora Malili while they were at the crime scene. In that case, she did not see whether there was a need to

conduct an identification parade. She cited with approval the case of **Abdul Ally Chande v. Republic**, Criminal Appeal No. 529 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported) in which the Court made reference in the case of **Shamir John v. Republic**, Criminal Appeal No. 166 of 2004 (unreported) in which it was stated that:

"... recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made".

With regards to the third (3rd) ground of appeal she made reference on the decision of the case of **Milban v. Regina** (1954) TLR, in which it was stated that it is the duty of the prosecution to prove its case beyond a reasonable doubt. To add to it, she further stated that the testimonies given by PW1, PW2, PW4 and PW5 before the Trial Court proved the case beyond reasonable doubt. It is true that, PW2 and PW3 identified the Appellant at the crime scene by using solar lights and he was their neighbors. So, it was easy for them to identify him. She concluded that the prosecution proved its case beyond reasonable doubt and she prayed for the appeal to be dismissed.

Mr. Kaizilege Prosper in his rejoinder submission he insisted that drafting of the charge sheet was not proper and that led to the variance between the charge sheet and the evidence tendered. Notably, he further stated that the charge sheet is defective and it was to be cured under section 234 of the *Criminal Procedure Act* (Cap. 20, R.E 2022) but the prosecution failed to note. Basically, he prayed for this Court consider that the evidence given by the prosecution side on identification to be weak and find the prosecution side failed to prove its case beyond reasonable doubt. Lastly, he prayed for this Court to set aside the conviction and sentence imposed to the Appellant.

It is worth considering, having gone through the grounds of appeal, the submissions from both sides and the Trial Court's records, I find two issues which needs to be determined in this appeal. **First**, is whether there is variance between the charge and the evidence given by the prosecution side; **second**, is whether the case against the Appellant was proved beyond reasonable doubt. g

To start with the issue of whether there is variance between the charge and the evidence, as far as I am concerned, I have thoroughly gone through the records of the Trial Court. The proceeding of the Trial Court

shows that the Appellant was brought before it for plea taking on 11th July, 2022. The charge which was read to him in its statement of the offence states that the offence was committed on 13th July, 2022. But, at page eight of the typed proceedings of the Trial Court shows that there was an amendment of the charge sheet on 19th September, 2022. In the amended charge sheet, the statement of the offence states that the offence was committed on 13th June, 2022. Thus, the argument by the learned counsel for the Appellant that there was no amendment of the charge in terms of section 234 of the *Criminal Procedure Act* (supra) is not correct since the proceedings of the Trial Court clearly shows that there was an amendment on 19th September, 2022.

I have also reviewed the evidence of all the five (05) prosecution witnesses who testified in Trial Court. PW1 and PW3 testified that the incident of cattle theft occurred on 13th July, 2022 while PW2, PW5 who is the investigator of the case, testified that the offence was committed on 13th June, 2022. Moreover, PW4 testified that on 14th June, 2022 early in the morning he saw the Appellant with the cows of PW1. In fact, in his testimony PW1 stated that he was not present at the crime scene but he was informed by his wife about the whole incident of cattle theft.

I agree that the prosecution witnesses have exacerbated each other on the date of the incident. There is a variance on dates between the charge and the evidence of some of the prosecution witnesses except for PW2 and PW5. In that regard, where there is variance between the date stated in the charge sheet and the prosecution witnesses, the date that appears on the charge sheet has to be taken into consideration.

On the same note, the evidence given by PW2 and PW5 are consistent with the charge sheet as they indicate that the offence was committed on 13th June, 2022. Notably, PW4 in his evidence also testified that on 14th June, 2022 he met the Appellant with the cows. The testimony given by PW4 that he saw the Appellant with the stolen cattle on 14th June, 2022 collaborates the evidence given by PW2 and PW5.

Therefore, the evidence testified by PW2 and PW5 on the dates are similar to the date stated in the substituted charge sheet. Their evidence indicates that the incident took place on 13th June, 2022. Thus, I find that the evidences given by PW2, PW4 and PW5 supports the charge sheet that the offence was committed on 13th June, 2022. Thus, there is no variance between the evidences and the charge sheet.

On the second issue of whether the case against the Appellant was proved beyond reasonable doubt, I have carefully evaluated the prosecution evidence given during trial. In fact, I have to consider whether the testimony of PW2 established the prima facie case. For clarity and easy of reference, I prefer to quote part of PW2's evidence:

"... when we awoke, we found the accused and two (02) other men taking our cows out of our zoo. We took the torch and light them; there was also the solar light, which assisted us to identify the accused and the other two (02) men. The accused was our neighbor; he is known as Samora Malili. They intimidated to kill us if we could shout or scream for help. We only managed to identify the accused person who was next to us. The other two (02) men were right next to the accused, but we didn't identify and know who they are. The accused was holding a machete, a sword and an iron bar. We knew the accused before this that day as he is our neighbour.

We tried to shout for help but the accused person threatened to kill us. Our mother asked them where are they taking our cattle and the accused told us that, if we want to die, we may follow them and for our safety we must remain inside. They took the cows and disappeared to an unknown place."

As a matter of fact, having observed PW2's evidence who witnessed the incident, I find that it established the prima facie case against the Appellant. His evidence proves that the Appellant was found at the crime scene and was clearly identified by PW2. The Appellants' advocate averred that the Appellant was not identified at the scene of crime. In fact, the Court of Appeal in the case of **Waziri Amani v. Republic** (1980) TLR 250, set up standard parameters that must be met to find whether the identification of the accused person during the night time was proper. The required parameters are the following; *first*, proximity to the person being identified; *second* source of light and its intensity, *third* the length of time spent to be with the accused; *fourth* whether the person being identified was within view and whether the person identified was familiar or a stranger.

Having considered the issue of identification, I find that in this case the Appellant was well identified because there was enough light as testified by the prosecution side and the Appellant was a neighbour to PW2 and he is well-known by PW2 who identified the Appellant directly and he was able even to mention the name of the Appellant at the crime scene. Also, from the available evidence, the witnesses had an ample time to

identify the Appellant as they have an argument between them. The solar light and the torch light also aided them to identify the Appellant. Therefore, I concur with the State's Attorney argument that the Appellant was well identified at the crime scene.

To put more emphasis, I prefer to make reference to the case of **Yohanis Msigwa v. Republic** (1990) TLR, which provides *inter alia* that:

"... as provided under section 143 of the Evidence Act, 1967, no particular number of witnesses is required for the proof of any facts. What is important is the witness opportunity to see what he/she claimed to have seen and his or her credibility."

Finally, I find that the evidence given by PW2, who witnessed the incident, was enough to convict the Appellant for the offence of cattle theft. Also, PW2's evidence was corroborated by PW4 who saw the Appellant grazing the stolen cattle few hours after the incident. The testimony of PW5 also corroborated what was testified by PW2 and PW4.

Conclusively, in the light of what I have stated above, I find this appeal has no merit, I dismiss it and I uphold the conviction, sentence and orders of the Trial Court. Order accordingly.

DATED and DELIVERED at **SONGEA** this 22nd day of March, 2023.




U. E. MADEHA

JUDGE

22/03/2023

COURT: Judgment is read over in the presence of the Appellant and Ms. Tumpale Lawrence State Attorney for the Respondent and Mr. Zuberi Maulid (Advocate) holding brief for Mr. Kaizilege Prosper, the Appellant's advocate.




U. E. MADEHA

JUDGE

22/03/2023