THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 100 OF 2022

(Originating from Criminal Case No. 06 of 2022 in the District Court of Newala at Newala)

MBARUKU STEPHANO KADAKUDEDA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 24.04.2023
Date of Judgment: 10.05.2023

Ebrahim, J.

The appellant herein was charged with three counts of cattle theft contrary to **section 268(1) and (3) of the Penal Code Cap 16 RE 2019** (now 2022). At the end the Appellant was found guilty of the first count only the particulars of which are that he stole 36 herds of cattle valued at Tshs. 25,200,000/- the property of one Hussein Hassan Lupanga. It was alleged by prosecution that the Appellant stole the said cattle at night hours of 23rd January, 2022 at Chihanga Village within Newala District Council in Mtwara

Region. Upon conviction the Appellant was sentenced to serve 5 years in prison.

Aggrieved by conviction and sentence the Appellant preferred the instant appeal raising five grounds of appeal as follows:

1. *That, the trial court erred in law and facts by convicting the Appellant while the prosecution side failed to prove their case beyond reasonable doubt.*
2. *That, the trial court erred in law and facts by failure to give the Appellant right to cross examine PW1 during the time when PW1 was recalled to tender bulls.*
3. *That, the trial court erred in law and facts by convicting Appellant while the proceedings tainted with irregularities to wit; the charge was not read at the preliminary hearing and during the commencement of the prosecution case.*
4. *That, the trial court erred in law and facts by convicting an accused person while the identification of an accused person was not properly conducted following the circumstances of the case at hand.*
5. *That, the trial court erred in law and facts by convicting the Appellant without considering and evaluating defense evidence.*

When this case was called for hearing, the Appellant was represented by advocate Rainery Songea; and the Republic was represented by Mr. Edson Mwapili, learned State Attorney.

Submitting in support of the appeal, advocate Songea prayed to argued the 1st and 4th grounds of appeal and abandoned the remaining grounds.

Arguing the 4th ground of appeal on identification, advocate Songea submitted that the light used to identify the appellant was by torch however there is no any evidence of the light, distance or where the light was directed. He invited the court to visit the case of **Frank John Libanga @ Lampard V R**, Criminal Appeal No. 55 of 2019 pgs 14-15; and the case of **Masanja Lupilya V R**, Criminal Appeal No. 444 of 2017 pgs 11-12 concerning the light from the torch. He concluded on the point that since the prosecution evidence shows that the Appellant was identified by the security guards, they were supposed to be called to give evidence. He further referred to the case of **Gervas Gervas Cosmas @ Chambi and 5 Others V R**, Criminal Appeal No.557 of 2021 which discussed the intensity of light from a torch and the requirement to describe special marks which he submitted that they lack in the instant case and the trial magistrate admitted at page 5 of his judgement.

Submitting on the first ground of appeal that prosecution failed to prove the case beyond reasonable doubt he contended that while prosecution said the Appellant stole 36 herds of cattle, they only tendered into evidence 17 herds only. Moreover, at no point prosecution prayed to amend the charge sheet.

He referred the court to the case of **Boniface Thomas Mwimbwa and Another Vs R**, Criminal Appeal No. 325 of 2019 which allowed the appeal where there was variance and no amendment of the charge sheet was done.

From the pointed out anomalies, advocate Songea prayed for the appeal to be allowed.

Mr. Mwapili, learned State Attorney informed the court that they support the appeal following the presented legal arguments. He conceded that prosecution case was not proved to the required standard because the charge sheet says 36 cows but evidence revealed only 17 cows (PW1). He cemented his concession by referring to the cited case of **Boniface Mwimbwa (supra).** In supporting the appeal further, he agreed also that the criterions set for identification in **Frank Limbaga's case (supra)** were not followed.

Admittedly, when coming to the issue of identification/recognition prosecution case greatly relies on the evidence PW1 as the person who identified the accused at night with his cattle. Court of Appeal said in the case of **Mengi Paulo Samweli Luhanga and Another V Republic**, Criminal Appeal No. 222 of 2006 (unreported) that:

"eyewitnesses testimony can be a very powerful tool in determining a person's guilt or innocence".

From that position of the law and on the basis of the powerful nature of eyewitness, Court of Appeal again in the case of **Salim S/O Adam @Kongo @ Magori V Republic**, Criminal Appeal No. 199 of 2007 illustrated the salutary principles of law on eyewitness identification that among other principles that in a case where its determination depends on the identification such evidence must be water tight even if it is evidence of recognition **(Hassan Juma Kanenyera V Republic** (1992) T.L.R 100).

Going by the evidence on record, PW1 said that when he reported the matter to VEO he was availed two militia guards to go with him at the forest. He said at 0100hrs at night they saw the Appellant and another person who escaped with PW1' herds of cattle. PW1 said he identified the Appellant by using a torch light but it is obvious that he did not know the Appellant before. The only person who is said to have recognised the Appellant was the militia guard. However, as observed by the advocate Songea he was not called to adduce evidence and no reason was assigned for failure to call such an important witness. PW1 only said in his evidence that they arrested two people and one was the Appellant without even mentioning his name to confirm that he indeed identified the accused. I am

saying so because, the evidence show that the Appellant escaped and the Appellant found him three days later. However, in all it is said is that he identified him by a light from the torch and there is nowhere such intensity of light was evidenced or where was the light directed. The trial Magistrate admitted at page 4 of his typed judgement that according to the law the conditions for identification were not favourable. He however, only his imagination on the distance and time taken from the apprehension of the Appellant to when he escaped. Verily, the trial magistrate implored his own imaginations and suppositions to rely on his conviction and not according to the evidence adduced in court. Court of law is only required to decide the matter from the evidence produced in court and not one's imagination.

Perhaps, if prosecution has called the said guard who recognised the Appellant because they were living in the same village, it would have given weight and corroborated prosecution case.

Certainly, the said militia guard who recognised the Appellant was a crucial witness to prove identification. To the contrary, he was not called to adduce evidence and no reason for his absence was availed to the court. It is trite principle of the law that failure to bring important witness invites the court to draw adverse inference as to the evidence of the said important witness

would have proven another adverse scenario. I hereby do. I subscribe to the position of the Court of Appeal held in the case of **Samwel Joseph Kubaya V R**, Criminal Appeal No. 40 of 2017 pg 14-15 on failure to bring important witness.

That being said, I hasten to agree with advocate Songea that the identification was not water tight for the trial court to base its conviction of the Appellant.

The issue of identification alone is enough to dispose this appeal in favour of the Appellant. I therefore find that the Appellant was not conclusively identified hence prosecution could not prove their case to the required standard i.e., beyond reasonable doubt. Therefore, I allow the appeal. It is hereby ordered that the Appellant be released from prison forthwith unless otherwise lawfully held by other lawful cause.

Accordingly ordered.

R.A Ebrahim
JUDGE

Mtwara
10.05.2023