

THE UNITED REPUBLIC OF TANZANIA
(JUDICIARY)

THE HIGH COURT
(MUSOMA SUB REGISTRY)

AT MUSOMA

CRIMINAL APPEAL No. 115 OF 2022

*(Arising from the District Court of Bunda at Bunda in
Criminal Case No. 29 of 2022)*

STANLEY JAMES @ MABESI APPELLANT

Versus

THE REPUBLIC RESPONDENT

JUDGMENT

15.05.2023 & 16.05.2023

Mtulya, J.:

The Court of Appeal (the Court) on the 1st June 2015, in the precedent of **Gwisu Nkonoli & Three Others v. Republic**, Criminal Appeal No. 359 of 2014, at page 9 of the Judgment, had observed that:

...concerning the complaint that the case was not proved beyond reasonable doubt as PW1 failed to give description of his alleged stolen cattle, we are of the view that special marks of those cattle ought to have been described by PW1. It is now settled that, a detailed description by giving special marks of the alleged stolen items has to be made before such exhibits are tendered in court. That act will

avoid doubts as to the correctness of the alleged stolen items.

This thinking is shared in a bunch of precedents of the Court without any reservations (see: **Bundala Mahona v. Republic**, Criminal Appeal No. 224 of 2013; **Mustapha Darajani v. Republic**, Criminal Appeal No. 242 of 2005; and **Godfrey Lucas v. Republic**, Criminal Appeal No. 151 of 2014). In the indicated precedent of **Gwisu Nkonoli & Three Others v. Republic** (supra), the Court had finally observed that:

In the instant case, no special marks were given by PW1 before the complained stolen cattle were tendered at the trial court as exhibits. We are of the considered opinion that such a failure is a fatal omission in the prosecution case. According to the facts on record, there is no doubt that the fifth accused, who was a very important witness would have helped the prosecution's case against the appellants. Having been acquitted without adducing his evidence that has weakened the prosecution case. All said and done, having examined the shortfalls stated above, we find the appellants' appeal with merit.

In the present appeal, **Mr. Stanley James @ Mabesi** was convicted with the offence of stealing contrary to the provision of section 258 (1) & 265 of the **Penal Code [Cap. 16 R.E 2019]** (the Code) at the **District Court of Bunda at Bunda** (the district court) in **Criminal Case No. 29 of 2022** (the case). Following the conviction, the district court had sentenced him to serve three (3) years imprisonment or in alternative to pay fine of a tune of Tanzanian Shilling Three Hundred Thousand Only (300,000/=).

According to the charge levelled against the appellant, the Republic alleged that on 20th January 2022, the appellant stole one hundred and twenty (120) fishnets valued Tanzanian Shillings Nine Hundred Thousand Only (900,000/=). The fishnets were allegedly belonged to a fisherwoman Marry Ibrahim (PW2) and the offence was claimed to have been committed at Nambubi Village within Bunda District in Mara Region.

PW2 was summoned by the Republic to testify for the prosecution case in the case at the district court on 19th July 2022, as reflected at page 9 of the proceedings of the district court. In her testimony, PW2 testified, in brief that:

...on 19/01/2022, at 04:00 PM, I was at Nambubi fishing camp. I prepared people to go for fishing. I

gave them fishing boat, engine, fuel and 120 fishnets. Fishing nets were of 7 and 6 inches of blue, yellow and reddish colours. My employee went into the lake for fishing. On 20/01/2022 at 02:00 AM, I received a call from my employees that fishnets are lost into the lake...in the morning they came to the mainland. They were Fred Japhet and Fuliari James.

Following the report from **Mr. Fred Japhet** (Mr. Fred) and **Fuliari James** (Mr. James), PW2 had reported the incident at Kisorya Police Station, and the police started investigation which led to the arrest of the appellant and **Mr. Dickson Misato @ Nyamwero**, who was acquitted for lack of evidence. During the hearing of the case, the appellant had cross examined PW1 on the receipts and specifications of the fishnets, and the reply is found at page 10 of the proceedings that:

I use four colours. Any one can use the same colours. Colours are arranged. We did not count holes from each colours...I did not bring the purchase receipt.

Finally, PW2 did not tender any exhibit to substantiate ownership of the complained fishnets. It was unfortunate the

record is silent on the evidences of the very first persons who were given the fishnets and first reporters of the lost fishnets, Mr. Fred and Mr. James. Instead, the Republic had marshalled **Mr. Mashaka Baluhi** (PW1) and police officer, **F. 9133 D/Cpl. Cosmas** (PW3) to testify for the Republic and had testified on different colours of fishnets.

According to PW1, as reflected at page 7 of the proceedings of the district court, the colours of the stolen fishnets were blue, brown, green and yellow. PW3 on the other hand had testified, as reflected at page 12 of the proceedings of the district court, to have identified the colours of the stolen fishnet being blue, redish, green and yellow. The two identified colours of green and redish were added by PW1 and PW3 respectively.

Following his conviction and sentence, the appellant was aggrieved by the judgment and reasoning of the district court in the case hence approached this court and lodged **Criminal Appeal No. 115 of 2022** (the appeal) complaining that the prosecution had failed to prove its case beyond reasonable doubt as per law enacted in section 3 (2) (a) of the **Evidence Act** [Cap. 6 R.E. 2019] (the Evidence Act). Yesterday morning, the appeal was called for hearing and both parties preferred learned officers

of this court, namely **Mr. Emmanuel Paul Mng'arwe**, learned counsel for the appellant and **Mr. Ibrahim Isihaka** assisted by **Mr. Felix Mshama**, learned State Attorneys for the respondent.

In interpreting the facts of the case, Mr. Mng'arwe stated that the case against the appellant in the district court was not proved beyond reasonable doubt and had produced four (4) reasons to fault the judgment.

First, all prosecution witnesses who were brought before the district court in the case had produced hearsay evidence as there was no eye witness hence the district court had convicted the appellant based on suspicion; second, there is no proof on the record that the complained stolen property belongs to the complainant PW1 as per law in the precedent of **Yunus Habibu v. The Republic**, Criminal Appeal no. 239 of 2017; third, the respondent had declined to summon Mr. Fred and Mr. James, who are material witnesses hence this court may draw adverse inference as per precedent in **Wambura Marwa Wambura v. The Republic**, Criminal Appeal No. 115 of 2019; and finally, the district court had declined to consider defence case as the appellant had produced heavier evidence in exhibit D.1.

The submission of Mr. Mng'arwe was supported by Mr. Ibrahim with different approach. According to Mr. Ibrahim, the prosecution had failed to prove its case as the record shows that prosecution witnesses produced different materials regarding the colours of the complained fishnets. In his opinion, the identification of the fishnets without special marks is contrary to the directives of the Court in the precedent of **Gwisu Nkonoli & Three Others v. Republic** (supra)

I have perused the record in the present appeal and found that the complainant PW2 had declined to produce a detailed description of the alleged stolen fishnets by giving special marks to distinguish them with the appellant's fishnets exhibited in D.1. The act invited doubts as to the correctness of the alleged items. It is also unfortunate that in the present appeal, important witnesses Mr. Fred and Mr. James were not summoned to corroborate the testimony of PW2 as directed in the precedent of **Wambura Marwa Wambura v. The Republic** (supra). All these had weakened the prosecution case. Under the circumstances of this case, it cannot be said that the prosecution had proved its case beyond doubt.

In the end, I find the appellant's appeal with merit. I am therefore moved to allow the appeal, quash the conviction and set aside the sentences meted against the appellant. I decline to give any other order as there are no relevant materials on record to support any other move.

It is so ordered.




F.H. Mtulya

Judge

16.05.2023

This Judgment was delivered in Chambers under the Seal of this court in the presence of the appellant's learned counsel **Mr. Emmanuel Paul Mng'arwe** and in the presence of the respondent's learned State Attorney, **Ms. Happiness Machage**.


F. H. Mtulya

Judge

16.05.2023