

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 79 OF 2022

(Originated from Criminal Case No. 239 of 2021 of the District Court of Tarime at Tarime)

ONYANGO MARUCHA MWITA @ ORYA 1ST APPELLANT

NG'ONG'ONA MARWA MANGURE MANYERERE.....2ND APPELLANT

BONIFACE MARWA MAO.....3RD APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

03th & 17th July, 2023

M. L. KOMBA, J.:

Appellants were found guilty of the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 [R. E. 2019] and were sentenced to 30 years imprisonment. Dissatisfied by the conviction and sentence pronounced by the District court of Tarime at Tarime, (the trial court) and in searching for justice they knocked the door of this court hoping for the best.

In brief, facts of the case go like this; On 03/09/2021 at Nyamusi village within Rorya District in Mara Region appellants were alleged to steal four cows worth 1,950,000/ the property of **NELSON ODOYO OGWANG** (PW1) and immediately before and after stealing they used gun and machete in order to obtain and retain such properties.

It was alleged further that in the night of the fateful day, PW1 heard movement outside his house and awake his wife, he slowly opened the door and saw three people stealing his cattle. When asked who was that, they throw machete which hit the wall near the door then he decided to close the door and starting peeping via the window. He heard someone instructing others to untie cattle and he saw two people 2nd and 3rd appellants untie cattle while 1st appellant was around the door watching the victim. In the morning they make an alarm (yowe) and many people responded including PW2 William Okumu. It was revealed further that PW1 and PW2 followed the bandits but in vain.

Between 10-12/09/2021 appellants and other two people were arrested in connection of this incident and were arraigned in court facing the stated charge. Upon full trial, appellants were convicted and sentenced as narrated previous. Dissatisfied, they are here searching for justice in way of appeal

equipped with nine grounds which were consolidated by the counsel for appellants and came with three which are;

- 1. That the trial court erred in law and fact for convicting accused while the case was not proved beyond reasonable doubt.*
- 2. That the trial court erred in law and fact for convicting appellants while they were not properly identified.*
- 3. That the trial court erred in law and fact basing on proceedings tainted with illegality and irregularities.*

When the matter was scheduled for hearing, appellants were remotely connected from Musoma Prison and represented by Mr. Marwa Samwel learned Advocate while republic was represented by Mr. Abdulkher Sadiki and Ms. Natujwa Bakari, both State Attorneys.

It was Mr. Marwa who make the ball roll by submitting on the first ground that prosecution relied on identification and had no other evidence to corroborate the PW1 evidence and he find prosecution case lacks some important things. Starting with the testimony of PW1 that informed the trial court that he saw appellants while committing the offence, he said, he went outside and saw people taking his cattle, with the aid of solar light and that when he asked who are those he was order to go inside. Then he was flashed by torch via the door then he heard people saying Onyango kill

him with a gun. He submitted further that when he looked via window this witness heard '*Ngo'ngona na Marwa fungua ng'ombe haraka kutakucha,*' to mean untie the cow as soon the sun will shine. Counsel argue that his evidence does not show that he managed to identify them and it is impossible for a person who is inside to see a person who is outside while he was flashed with torch.

It was his further submission that the evidence of PW2 based on what was informed by PW1 that four cattle were stolen. He said there is no corroboration of these two testimonies to allow conviction against the appellants specifically when looking at the way appellants were arrested was by aid of the co accused (Peter Range) as per page 19 of proceedings who when arrested he mentioned other suspects including appellants.

Mr. Marwa said PW3 explained all accused confirmed to commit the offence when they were interrogated and all of them had cautioned statements. It was expected that prosecution could tender all caution statements to establish corroboration as it is the appellants and their co-accused who did commit the offence and he concluded that prosecution failed to prove the offence beyond reasonable doubts and that doubts should benefit appellants.

On the 2nd ground counsel relied on the famous case of **Waziri Amani** that visual identification is vulnerable to mistake particularly in the environment of darkness and that because there was darkness then identification to be proper there must be no doubt. He submitted that PW1 managed to mention the distance from his home to the cattle shade which is 10 (ten) footsteps. He said the solar lamp which was used has a length of like one ruler and he reasoned that a solar lamp of that size cannot provide a bright light to enable a person see clearly without leaving doubts.

About early mentioning the accused it was his submission that when PW1 said he saw accused in his testimony he did not mention them at the early stage. He only mentioned them during evidence after investigation. This suggests that he might be informed, he was told. He said if he managed to report to police why didn't he mention them. He complained that principles in the case of **Samwel Nyamhanga vs. Republic** Criminal Appeal No. 70 of 2017 CAT Mwanza were not adhered at all.

Further it was his submission that PW1 failed to mention appellants as was in the case of **Hassan Hussein vs. Republic**, Criminal Appeal No. 40 of 2022 at page 10-11 where it is about ability of the witness to name the accused at the earliest time and they refer the case of **Marwa Wangita**

Mwita vs. Republic (2002), TLR 39. It was his submission that PW1 and PW2 did not mention or named the appellants at the earliest opportunity.

Counsel pointed variance on source of light as investigator testified that the source of light is electricity contrary to what was testified by PW1 and PW2. He said if the investigator was not well informed or informed the court it was electricity while PW1 said it was solar this makes doubts on whether there was any light. In the case of **Wilfred Lukago vs. Republic** (1994) TLR 189 and **Michael Haishi vs. Republic** (1992) TLR 92 the court held that contradictory evidence must be decided in favour of the accused/appellant and he prayed these doubts to benefit the appellants, these include the failure to tender cautioned statement, identification and failure to mention the accused earlier.

Arguing for the 3rd ground about irregularities, he submitted that the right of re – examination was not given to all appellants during trial. Reading proceedings at page 33 when prosecution complete the cross examination then court closed the testimony then started DW2 and all defendants. He submitted that this omission affects fair trial and right to fair hearing as it is in Article 13(6) of the Constitution and that it is the right of accused

person as it was held in **Victor Mtasi vs. CRDB**, Civil Appeal No. 96 of 2021 High Court DSM.

Another issue of irregularity as submitted by the counsel was that, the court to shift burden of proof to accused persons it appears at page 11 of judgment he pointed that appellants failed to defend which was right as it is upon prosecution to prove and not accused. The duty of accused was to create reasonable doubts and therefore he said to enter conviction due to their weak defence is like shifting the burden. He boosts his argument by the case of **Joseph John Makune vs. Republic** (1986) TLR 44 that it is the prosecution who has duty to prove its case and **Mohamed Said Matura vs. Republic** (1995) TLR 03 that accused has no duty to prove his innocence.

Another irregularity as submitted by Mr. Marwa is on PH, at page 6-8 of proceedings show that S. 192 of CPA was infringed due to the fact that when facts were read to the accused there was agreed facts then accused signed without being elaborated to them. He refers this court to the case of **Republic vs. Abdallah Salum @ Haji**, Criminal Revision No. 04 of 2019 failure to observe S. 192 is fundamental and fatal and may lead this court to nullify proceedings and conviction and set appellants free. He was

of the views that there is no option of re-trial when proceedings will be nullified basing on the principle in **Ijumaa Issa @ Athman vs. Republic** Criminal Appeal No. 53/2021 CAT Dodoma.

Ms. Natujwa while responding this appeal she submitted that in cases of these nature duty of prosecution has been mentioned in various CAT decision one of them is **Shaban Said Ally vs. Republic**, Criminal Appeal No. 270/2018 where key elements to be proved were elaborated to be (1) Theft, that property was taken, (2) The use of dangerous weapon immediately before or after commission of offence, (3) The use of weapon must be directed to the victim.

Starting with theft, she submitted that the testimony of PW1 show that he heard voices outside his house and when he went outside, he saw three people who was known to him they were familiar there was electricity light that extend to 100 (hundred) meters but the cattle shade was within 10 meters. At page 11 he explained on who was holding a gun. Appellants were arrested while selling the stolen cow. PW3 at page 18-19 when at the home of the victim mentioned names of the appellant.

About dangerous/offensive weapon it was her submission that PW1 testifies that when he asked them one of the appellants threw the machete and fall at the door. Then he heard that "Onyango kill him with gun if he will start shouting". She said there were two weapon machete and gun and were used at the process of stealing. Explaining about torch flash she said the torch was used later when accused closed the door. On the issue of caution statements, she explained that, this was not the base of the conviction as explained at page 11 of the trial court judgment.

State Attorney denied the fact that appellants were given the burden. On this ground she elaborated that trial Magistrate was trying to show that appellants did not raise any doubt and DW1 and DW4 show they were remorseful. Generally, she submitted that prosecution managed to prove the offence and accused did not shade any doubt therefore she prayed this court to find this ground is baseless.

On the second ground she submitted that prosecution relied on recognition more than identification as the victim know those people before the incident, he used to saw / meet them in cattle caution as it appears at page 11 of the proceedings. He mentioned them by their names that means he know them and supported her submission by the case of **Peter**

Marco @ John vs. Republic, Criminal Appeal No. 258 of 2017 where it was said the evidence of recognition is more reliable than identification and the victim must explain how he recognized accused, in this case, appellants. She submitted that victim recognized appellants while at his house and mentioned them to investigator by their names. All this was possible as there was light as explained by PW2 and distance was mentioned it was 10 footsteps(paces). Guided by the case of **Waziri Amani** about time, it was her submission that PW1 explained he saw them, he elaborated how they dressed and what they were holding that show the time was enough and she prayed this court to find this ground to be of less merit.

On the 3rd ground about illegal and irregularity, about re-examination she was of the submission that every case must be decided on its own facts. And that re-examination intends to give the party time to explain what he has explained previous. This is not a must; a party may opt not to utilized re-examination option. However, she was of the opinion that the accused was already testified in court and he was cross examined and the counsel failed to explain how accused/appellants were infringed by not allocated

time to re-examination. She prays the court to apply section 388 of CPA to cure errors in proceedings.

Responding to irregularities during Preliminary Hearing, State Attorney submitted that the procedure was adhered and the trial Magistrate write that S. 192(1) (2) (3) that means he complied. The requirement is to prepare the memorandum of agreed fact and she said the cited case is distinguishable. She prays for this court to read proceedings of the lower court where the procedures were adhered and to sustain the conviction.

During rejoinder, Mr. Marwa submitted that Section 388 of the CPA should not be used as a curtain as its provision is not mandatory but the section cited by counsel for appellant is mandatory and that the omission infringed the justice as the issue of re-examination is the right to be heard and records are silent to prove that the right was given. He insisted that S. 192 (2) and (3) was not complied. Record must show that explanation was done by the court by indicating vividly.

On Identification counsel insisted that PW1 did not recognized appellants but he heard the voice mentioning names. Moreover, looking by the window there is obstacle it is easy to do a mistake. About the source of

appellants arrest PW4 said the source of arrest is co accused as evidenced at page 26 of the trial court proceedings where he was arrested for being suspected to be the cattle theft. If at all the victim mentioned the appellants why based on the identification done by the victim, he submitted that this is the major point. About doubts because there is no corroboration from the complainant and other witness. It is obvious that case against appellant was not proved bearing in mind that caution statements of the other accused was not tendered and depend on the evidence of PW1 and prayed this court to find the offence was not proved.

I have dispassionately considered the rival arguments by the parties to this appeal in the light of the petition of appeal, the grounds of appeal as well as the substance of the oral submissions in the hearing of the appeal. I am now in a position to confront this appeal for determination as appearing in the grounds of appeal raised and in doing so, I will join all grounds of appeal and come up with one ground on whether prosecution managed to prove the offence beyond reasonable doubt.

First and foremost, with respect, I discovered that both counsel, counsel for appellants and State Attorney who represented Republic did not read facts and proceedings well as a result some of activities in their submission

which claimed to take place during trial were not party of the proceedings. PW2 did not testified on source of lights and no witness testified during trial that they arrested appellants while selling cattle, to cite a few. The polite reminder is that, both of them are officers of the court and they have to know their duties.

Reverting to the appeal specifically in the consolidated ground of appeal, after a thorough reading the trial court proceedings, I find variance and contradictions on prosecution witnesses. **First**, PW1 informed the trial court at page 11 that when he heard sound of people outside his house and when he opened the door he saw three people without mentioning their names. While PW3 testified that PW1 saw a group of people and managed to identify three people. This is found at page 19 of the trial court proceedings.

Second, during examination in chief PW1 made a dock identification by naming Onyango, Marwa and Ng'ong'ona and during cross examination by the 1st appellant, PW1 informed the trial court that he only knows one name of the 1st appellant which is Onyango. To the contrary, PW3 at page 19 of the trial court proceedings informed the trial court that PW1 identified people who robbed him by their faces and their names and he

mentioned Onyango Marucha Mwita, Ng'ong'ona Marwa Mangure and Marwa Mao that he mentioned these people to be the ones robbed his cattle. Is it true that PW1 mentioned Onyango Marucha Mwita to investigator?

Third, when cross examined by the 1st accused, PW3 informed the trial court that the stolen cattle were sold to Marwa Mao who was the 4th accused and when cross examined by the 7th accused, he testified that cattle were brought to the car by thieves who, among them is Marwa Mao (see page 24 of the trial court proceedings). Is Marwa a thief or a buyer of the said cattle?.

Four, PW3 at page 19 of the trial court proceedings informed the trial court that PW1 identified people who robbed him by their faces and their names and he mentioned Onyango Marucha Mwita, Ng'ong'ona Marwa Mangure Manyerere and Marwa Mao but PW1 informed the trial court that he doesn't know the second accused/appellant (Ng'ong'ona Marwa Mangure) and that they have never met before as it appears at page 13 of the trial court proceedings, he just heard the name when this person was called by his fellow. Am asking myself how prosecution said their evidence

was based on recognition rather identification if victim declared he never knew the accused before.

It is trite law that in a case whose determination depends on identification the evidence must be watertight before a conviction can safely lie. In the case at hand prosecution did not find the necessity of tendering caution statements of accused, it is supposition of this court, which is true that prosecution relied on recognition and identification of accused, now appellants. PW1 is the victim who claimed to be robbed by appellants and an eye witness, evidence on record does not wholly support that finding. Although PW1 claimed that he knew appellants by their name as he used to see them in auction and claim to recognized them at night, he is also on record to have said:

'I opened the door slowly then I saw three people stealing my cattle. It was night but I have solar light one lightening direct towards cattle hooves. I asked who is that, one of them throw a machete and beat at the wall near the door, I closed my door. He also lightened me with a torch light and I heard one of them saying.....'

PW2 informed the trial court that;

'..I heard noise (yowe) from Mzee Nelson I went to Mr. Nelson's place...I find his wife making noise outside. He told me that his four

cattle were stolen by the bandits, using weapon. We started following foot prints when we reached at Kogaja village we reached the road....it shows that those cattle were loaded to the vehicle.'

It is clearly in the excerpt of above that there was no mention at all of the accuse/appellants in the record that he saw them by their names. If PW1 knew the appellants as the trial court found, why did he not mention the names of the appellants when he said he saw three people. Further, PW2 responded to shout and met PW1 at his home while PW1's wife was shouting, PW1 and PW2 then started to follow footprints all the way the said victim did not mentioned appellants to PW2 who was the first person to met that morning. But PW1 claimed that he mentioned the name of appellants to police who went to his home in the afternoon (if at all went in that day). I believe that the trial court presumably arrived at the conclusion that appellants were mentioned at the earliest opportunity time by inference without questioning itself as to why he did not mention them to PW2.

I find the trial court disregarded some key factors on the evidence of visual identification. As stated herein, this witness did not name appellants to PW2 whom he met first in that morning. Court of Appeal once held that in

matters of identification, it is not enough merely to look at factors favouring 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. See **Jaribu Abdalla vs. Republic** [2003] TLR 271.

I find these doubts and contradictions are not minor as they answer a question who robbed the house of the victim. Doubts and contradictions were not cleared by prosecution. It is a settled law that when the doubts are not cleared, it should benefit accused, in this case appellants.

Among the duties of prosecution side, especially in criminal cases, is to prove the offence beyond reasonable doubts. The law imposes this obligation under section 3 (2) (a) of the Evidence Act, Cap. 6 R.E. 2019 that;

'A fact is said to be proved when- (a) In criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;'

The same has been amplified in plethora of authorities including **Anatory Mutafungwa vs. Republic**, Criminal Appeal No. 267 of 2010, Court of Appeal of Tanzania and **Festo Komba vs. Republic**, Criminal Appeal No.

77 of 2015, Court of Appeal of Tanzania (both unreported). In **Abdul Karim Haji vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2014 (unreported), in which Court of Appeal held that:

'....It is an elementary principle that he who alleges is the one responsible to prove his allegation.'

How can one say prosecution managed to prove the case in these variations and doubts. Contradictions goes to the root of the case as was in the case of **Sylivester Stephano vs. The Republic**, Criminal Appeal No. 527 of 2016 CAT at Arusha and the appellants has to benefit from the doubts created as was in **Aidan Mwalulenga vs Republic**, Criminal Appeal No. 207 of 2006 and **Chacha Ng'era vs. The Republic**, Criminal Appeal No. 87 Of 2010 (July 2013).

In its totality considering the above, it can well be settled that the prosecution had failed to prove the alleged offence beyond reasonable doubt. The same suffices to dispose the appeal.


Therefore, I allow the appeal and I hereby quash the entire judgment and proceedings of the criminal case No. 239 of 2021 of Tarime District Court and order appellants **Onyango Marucha Mwita, Ng'ong'ona Marwa**

Mangure Manyerere and **Boniface Marwa Mao** be released with immediate effect unless held for another lawful cause.

It is so ordered.

Dated at MUSOMA this 17th Day of July, 2023.




M. L. KOMBA
JUDGE

Judgement Delivered today in chamber in the presence of Mr. Samwel Kivuyo, State Attorney and Mr. Magwayega counsel for defendants who was connected from Dodoma.


M. L. KOMBA
JUDGE

17 July, 2023