

**IN THE HIGH COURT OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**CRIMINAL APPEAL NO. 81 OF 2022**

*(Originated from Criminal Case No. 238 of 2021 of the District Court of Tarime)*

**BONIFACE MARWA MAO ..... 1<sup>ST</sup> APPELLANT**

**NG'ONG'ONA MARWA MANGURE MANYERERE.....2<sup>ND</sup> APPELLANT**

**ONYANGO MARUCHA MWITA @ ORYA .....3<sup>RD</sup> APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**JUDGMENT**

*04<sup>th</sup> & 17<sup>th</sup> July, 2023*

**M. L. KOMBA, J.:**

Appellants together with other four persons (who are not subject of this appeal) were charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 [R. E. 2019] upon full trial, the trial Magistrate rule out and convict appellants with cattle theft contrary to section 258 and 268 of Cap 16 and were sentenced to 10 years imprisonment. Dissatisfied by the conviction and sentence pronounced by the district court of Tarime at Tarime, (the trial court) they appealed to this court armed with ten (10) grounds of appeal.

In brief, facts of the case go like this; On 04/09/2021 at Nyanchabakenye village within Rorya District in Mara Region appellants were alleged to steal three cows worth 2,300,000/ the property of Chacha Mome (PW1). It was claimed that immediately before and after stealing they used gun and machete in order to obtain properties.

It was alleged further that in the night of fateful day PW1 head dog barking and there was a movement outside his house and wake his wife, he wanted go outside but he couldn't as he was warned by bandits not to dare. He heard voices. He decided to watch via holes of the grill made in his door and managed to saw three people stealing his cattle from the cattle shade next to his house. As narrated, three people were convicted and appealed. Equipped with ten (10) 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 tinted with illegality and irregularities.*

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

Mr. Magwayega after consolidating grounds of appeal he started by submitting on the first and second grounds jointly that it is the responsibility of the prosecution to prove the offence beyond reasonable grounds as required under section 3(2) and 110 of The Evidence Act, Cap 6. And that he doubts the credibility of all prosecution witnesses except PW2. It was his submission that PW1 testified that while he was attempting to go outside, he heard a voice of 1<sup>st</sup> appellant that he should not go outside or else he will be shot but he did not testify that he knew the voice of 1<sup>st</sup> appellant before the crime and when he heard him talking.

He further submitted that it was not explained when he decided not to go out he stand at which door that enable him see outside and he never provide description of houses so as the trial court can know how many doors were there. More over this witness testified that he returned inside

while he has never been outside and lamented that credibility of this witness is questionable.

On the issue of light, it was his submission that PW1 said the house has a solar light but he did not explain intensity of lights and refer this court to the case of **Raymond Francis vs. Republic** (1994) TLR 100 where CAT analysed the circumstances of the case and identification that he was already threatened how was he able to remain at the door watching as it was easily to be seen from outside although he did not explain the size of the space at grill to enable him to see outside.

Mr. Magwayega submitted that PW1 never prescribed nature of cattle shade, what was it made of to enable him to see what was going on in the cattle shed regardless of the distance of where it was located to the house where he was. In proving that the identification was difficult or impended, he further submitted that PW1 explained the distance from his house to the cattle shed to be three to five footsteps but that measurements are from the wall to wall. As he was inside, he did not explain he was at what angle and what was the distance from the angle he was standing and he did not explained position of the appellants in that cattle shed was they at the middle of the shed or at the edge. He said these doubts has to benefit

appellants as the elements derived from the case of **Waziri Amani** was not met.

Counsel for the appellants submitted that there are contradictions on the source of lights, when PW1 and PW3 testified that his house had solar lights PW6 at page 35 of the proceedings informed the trial court that the house had electricity lights. PW6 testified that when bandits left, some of them remained and guided the victim for 30 minutes while PW1 testified that when bandits left, he remained quiet for two (2) hours before he shouted. To him this was major contradictions.

Furthermore, counsel for appellant submitted that PW5 testified to the effect that he found appellants without exhibits but testified in trial court that appellants admitted to steal cattle from the victim but there was no caution statement which were tendered during trial and according to him how can the offence said to be proved. At this juncture Mr. Magwayega refer this court to the case of **Bulabo Kabelele and Mashaka vs. Republic** Criminal Appeal No. 224 of 2011 CAT at Mwanza that a witness can be credible unless he tells lie and that lie should benefit appellants.

Mr. Magwayega further submitted that PW1 and PW3 did not mentioned appellants at the earliest stage when at police station that are ones who stole their cattle and this is contrary to what was said in the case of **Jaribu Abdallah vs. Republic** (2003) TLR at 271.

On the fourth ground he said there was variation as in the charge there was the use of machete and gun but in testimony nobody explained about the gun and to him the charge sheet was not correct and the trial Magistrate did not order amendment but he altered the offence to cattle theft. He prayed this court to find the offence was not proved and to set aside the conviction and the sentence.

Mr. Marwa, the second counsel for appellants submitted on contradiction that during PH it was explained that the crime took place on 04/09/2021 at the house of Chacha Nyamhanga at Bukene Area in Rorya District but the charge sheet shows the crime took place at Nyachabakenye village in Rorya District. Further he submitted that PW1 informed the trial court he was invaded the night of 04/09/2021, PW2 testified that he heard shout the morning of 05/09/2021 but PW6 at page 35 of the proceedings informed the trial court that he visited the scene of crime on 04/09/2021 while police were informed of the crime on 05/09/2021. He wondered how

was it possible for the police to visit the scene before the crime was committed and there was no patrol. To him this is a contradiction which is polished by PW2 who informed the trial court that police visited the scene on 11/09/2021.

He said the doubts were not cleared by prosecution and referred this court to the case of **Wilfred Lukago vs. Republic** (1994) TLR 198 and **Michael Haishi vs. Republic** (1992) TLR 92 that doubts should be decided in favour of the accused and pray appellants to benefit.

On the 3<sup>rd</sup> ground of appeal Mr. Marwa 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 the court close the testimony then started DW2 and all defendants. He said although at page 44 of the proceedings trial Magistrate write section 210 has been complied but he did not write Nil and refer this court to the decision in **Victor Mtasi vs. CRDB**, Civil Appeal No. 96 of 2021 High Court DSM where it was decided that deny re-examination is equal to deny the right to be heard. He submitted that, from record, appellants were not given the right to re-examination which is mandatory.

Mr. Marwa further submitted that the trial Magistrate shifted the burden of proof to the appellants basing on their weak defence which was not confession. He lamented that it was the duty of prosecution and not accused as was in **Mohamed Said Malula vs. Republic** (1995) TLR No. 3 and **Joseph John Makune vs. Republic** (1986) TLR No. 44. He said all these shortcomings lead to conviction to be illegal and prayed for nullification of the conviction. Counsel was not of the option of re-trial when proceedings will be nullified basing on the principle in **Fathel Manyi vs. Republic** (1966) EA at 341.

Mr. Abdulher while responding the appeal he started with the issue of offence as written in charge sheet and submitted that appellants were charged with armed robbery but during trial the offence was not proved specifically on the use of weapon and therefore was changed to cattle theft contrary to section 258 and 268 of Cap 16 and led to alternative verdict under section 300 and were convicted and sentenced. He said, the offence of cattle theft has three elements which are asportation, fraudulent intent to permanent deprive the owner of the property and who committed the crime.



He agrees that it was the responsibility of prosecution to prove the offence and invited this court to read proceedings at page 11 where PW1 testified he heard voice of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused outside and then managed to saw them as there was a big solar bulb. He said the 1<sup>st</sup> appellant was Ward Executive Officer of Susumi so he knows him and the 2<sup>nd</sup> appellant was used to go together with the 1<sup>st</sup> appellant to cattle auctions.

It was State Attorney's submission that PW1 went outside his house then he was threatened and he went back inside and that he managed to recognize them through solar light which was charged on that day. While he agreed on the principles in **Amani Waziri case**, he submitted that determination on intensity of light vary depending on the environment. To boost his argument, he refers this court to the case of **Emmanuel Luka and 2 others vs. Republic**, Criminal Appeal No. 325 of 2010 (unreported) that the test was objective.

It was his submission that type of cattle shed does not matter as PW1 explained how he managed to saw people who untied cattle. Moreover, PW3 managed to mention one appellant and explained his appearance, to him the testimony of PW1 was corroborated by PW3.

In respect of the caution statement, he said prosecution did not find necessity of tendering caution statement basing on nature of evidence. About the variance in charge sheet and proceedings it was his submission that variance does not go to the root of the case as the offence was cattle theft and gun was useless and refer this court to the case of **Jonas Boniface Masawe vs. Republic**, Criminal Appeal No. 52 of 2020 about contradictions which goes to the root of the case.

State Attorney further submitted that the offence of cattle theft was proved as cattle moved from one place to another and PW2 testified that when he arrived at the scene and saw footprints of cattle. He agreed that the record is silent of re-examination but poses a question that how was it affect the appellants as it was prosecution who was supposed to build their case and not the accused persons (appellants) and incase this court find there was no fair hearing he prefer retrial as in the case of **Fathel Manyi vs. Republic** (1966) EA at 341 (supra)as the hearing will start from the defence case where re-examination was not recorded.

In fortification he submitted that trial Magistrate did not shift the burden of proof to appellants rather it was prosecution who proved the case to the required standard. In respect of identification it was his submission that the

identification of appellants was visual identification and it was based on recognition and there was no need of conducting identification parade as victim knew appellants before and cited the case of **Charles Nanati vs. Republic** Criminal Appeal No. 286 of 2017 to support his submission.

About variance on time and date of commission of offence he submitted that the offence was committed the night of 04/09/2021 around 01:00 hrs to 03:00 hrs as PW1 explained. He further said Police officers conducted investigation and arrested appellants on 14/09/2021. PW2 knew about the commission of offence on 05/09/2021 when PW1 and his wife reported him and further PW5 a police officer he knew the crime on that date and insisted that there is no variance of date and time of commission of offence.

Finally basing on S. 110 of Cap 6 he said the doubt about the guilty of appellants were proved beyond reasonable doubt and he prayed the decision of the trial court to be upheld and in alternative he prays retrial from the where defence case was opened in case this court will find miscarriage of justice on the side of appellants.

Having carefully gone through the grounds of appeal, submissions and cited references I find it apposite to start with the 1<sup>st</sup> ground of appeal found in the consolidated grounds of appeal which was about the failure of prosecution to prove the case beyond reasonable doubts.

In discussing this ground, a perusal of the charge sheet, records of preliminary hearing and the evidence presented by the prosecution to prove their case, what is apparent, not noted by the learned State Attorney as variance between the facts which were read during preliminary hearing and the particulars of the charge as it relates to where the crime took place. State Attorney addressed the issue of Gun that because the conviction was based on stealing therefore gun in the charge sheet has nothing to do.

At this juncture for ease of reference, I find it appropriate to reproduce facts read during preliminary hearing (PH) on 20/12/2021 at page 6 of the trial court *proceedings*.

!.....

*PP: I pray to remind the charge to the accused.*

*Court: The charge reminded to the accused who pleaded: -*

*1<sup>st</sup> – 7<sup>th</sup> accused: 'It is not true'.*

*Court: the PONGE to all accused.*

***SGD: Y. C. MYOMBO***

***20/12/2021***

***PRELIMINARY HEARING***

- 1. That the charge is for armed robbery as per the charge sheet.*
- 2. ....*
- 3. That on 14/09/2021 at 03:00 am the accused were at the house of Chacha, Nyamhanga at Bukene in Rorya District.*
- 4. That when they were there they had local weapons and a gun.*
- 5. That while there the accused entered the compound of Chacha and stole three cows (two bulls and one cow).*
- 6. Thereafter the incidence reported at the police station and in different dates the accused were arrested.....*
- 7. That on 27/09/2021 the accuse was brought this court when when their charge read over to them and denied their offence.*

***MEMEORANDUM OF UNDISPUTED FACTS***

*The accused herein undisputed the here under listed facts:-*

- 1. That the names and personal particulars are as per charge sheet.*

***LIST OF WITNESSES'***

Because part of the PH refers the charge sheet, for easy of understanding I find prudence to reproduce it hereunder;

**'CHARGE**

**STATEMENT OF OFFENCE**

***ARMED ROBBERY:*** *Contrary to Section 287A of the Penal Code (Cap 16 R.E. 2019).*

**PARTICULARS OF OFFENCE:**

***BONIFACE S/O MARWA MAO, NG'ONG'ONA S/O MARWA MANGURE MANYERERE, ONYANGO S/O MARUCHA MWITA @ OYRA, PETER S/O RANGE CHACHA, MAMKO S/O MCHUMA JOBE, DANNY S/O LABAN NYAMONGO, GEORGE S/O OMOLLO*** *on 14 September, 2021 at Nyanchabakenye village within Rorya District in Mara region, stole three cows worth 2,300,000/= the properties of CHACHA S/O MOME and immediately before and after such stealing used a gun and Machete in between in order to obtain and retain the (sic) such properties.*

***DATED at TARIME this 23<sup>rd</sup> day of September 2021.***

***SGD***

***STATE ATTORNEY'***

As can be discerned from the above excerpt, the particulars of offence show that the place which the crime took place on the material day is

called Bukene village while information read to accused (charge sheet) read to accused persons refer the village as Nyachabakenye and the evidence of PW1, PW2 and PW3 shows the crime took place at the house of Chacha Mome at Nyachabakenye.

Moreover, properties in the charge sheet which said to be robbed are of **CHACHA S/O MOME** but facts read to accused before trial read the properties robbed belong to **CHACHA NYAMHANGA**. All these witnesses testified they live at Nyachabakenye village and specifically PW2 in his testimony explain they were tracing cattle up to the road where they found animal prints, is the road at Nyachabakenye and investigator, PW6 went to Nyachabakenye for investigation. From this analysis, the prosecution evidence is at variance with facts in respect of the area/village where the crime occurred.

In the instant case, I entertain no doubt that there was variance between facts and the evidence adduced by prosecution on the village alleged the crime to have been took place.

Another variance is to the owner of cows who alleged to be stolen. Facts which were read to accused show cows belonged to **CHACHA**

**NYAMHANGA** while the charge sheet read the stolen cows belonged to **CHACHA MOME** and there is no any document which show the said Chacha used three names neither any witness who identified the victim with three names to show that the case involve one chacha who is referred with different names.

Moreover, there is variance on date where crime occurred. PW1 testified and is evidenced at page 11 of the trial court proceedings that it was the night of 04/09/2021 when he was at his home sleeping, he heard voices of bandits who took his cattle. They shouted for help and people gathered. PW2 informed the trial court that early morning of 05/09/2021 he heard a shout (yowe) from the house of Chacha Mome (victim) then Chacha Mome went to his place and informed him of the incident. During cross examination PW2 informed the trial court that together with his husband, PW1 they went to police in the morning of 05/09/2021. To the contrary, PW6 testified and evidenced at page 35 of the trial court proceedings that on 04/09/2021 he was in the office where he was told to go Chacha Mome's home where bandits who had weapons robbed his cattle. PW6 went to Chacha Mome on 04/09/2021 for investigation and he prepared Exh P3 which was prepared on 04/09/2021 at 15:00hrs. That being not



enough, in the said Exh P3 it was recorded PW6 was lead by PW1 while preparing the sketch map.

Furthermore, PW1 and PW2 testified that their house uses solar light, that is, there was solar bulb which brightens his home when bandits invaded. PW6 testified that PW1 used electricity light to identify bandits.

Am aware that in our legal system there is major and minor contradictions. State Attorney submitted that the issue of gun in the charge sheet is minor as the conviction was varied to cattle theft. He submitted nothing about the variance in village where the alleged crime took place. Where exactly PW1 live and where exactly theft of the said animal took place. These questions have different answers and I find this contradictions is major as it goes to the root of the case as it will answer where did bandits steal the said cattle and when did the crime occur between the night of 04/09/2021 or 03/09/2021. If at all the crime took place at night, what was the source of light enable PW1 to see and identify appellants. It is settled in our legal regime that doubts are to be resolved in favour of the accused persons. There is a lot of precedents insisting on the subject (see: **Enock Kipela vs. Republic**, Criminal Appeal No. 150 of 1994; **Faustine Kunambi vs. Republic**, Criminal Appeal No. 32 of 1990; **Mohamed Said Matula vs.**

**Republic** [1995]; **Marwa Joseph @ Muhere & Another vs. Republic**, Criminal Appeal Case No. 96 of 2021; **Aidan Mwalulenga vs. Republic**, Criminal Appeal No. 207 of 2006; **Wilfred Lukago vs. Republic** (1994) TLR 198 and **Mikael Aishi vs. Republic** (1992) TLR 92.

Consequently, the prosecution case, as submitted by counsels for appellants was not proved to the required standard. In the premises, I find this ground to have merit.

Having found that facts was at variance with the charge sheet and evidence adduced in court, the issue left for determination is what are the consequences thereto. Undoubtedly, facts form basis of a criminal trial. Its purpose among others being to inform the accused person the nature and magnitude of the charge facing him to enable him/her to prepare his/her defence. In criminal charges, the prosecution side has the duty to prove the charge against an accused person beyond reasonable doubt and this burden never shifts. See **Thabiti Bakari vs. Republic**, Criminal Appeal NO. 73 of 2019 CAT at Dar es salaam.

Being guided by various decision and as I have amply demonstrated, certainly, I believe even though in the instant appeal the variance in the

village where crime took place and whose property was stolen, the consequences should be the same. Variances as listed above show the offence against appellants was not proved.

In the end, this suffices to dispose of the appeal, and I find no need to determine the remaining grounds of appeal. For the foregoing reasons, the appeal is allowed, the conviction is hereby quashed and sentence set aside. The appellants to be removed from custody unless otherwise held for other lawful purposes.

**DATED at MUSOMA** this 17<sup>TH</sup> 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**