

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB-REGISTRY OF TABORA

AT TABORA

CRIMINAL APPEAL NO. 4 OF 2023

(Arising from Criminal Case No. 59 of 2021 before the Resident Magistrate Court of Tabora)

SAMWEL S/O JOHN @ JALUO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date: 03/7/2023 & 21/7/2023

BAHATI SALEMA,J.:

SAMWEL S/O JOHN @ JALUO, the appellant, and 2 others not part of this appeal stood charged before the Resident Magistrate Court of Tabora (herein referred to as "the trial court") in Criminal Case No.58 of 2023. The latter accused was charged with being in possession of property suspected to have been unlawfully acquired contrary to section 312(1)(b) **of the Penal Code**, Cap. 16 [R.E 2022]. The appellant's count was armed robbery contrary to section 287A of **the Penal Code**, Cap.16 [R.E. 2022]. All accused pleaded not guilty to their respective offences.

The particulars of the offence were that on 19/July,2021 Said s/o Nassib @ Khalfan Kala and William Jacob @Chichi at Malanga Village, Usenye

Ward, within Kaliua District in Tabora; were allegedly found in possession of 6 cows and 12 cow hides unlawfully acquired.

On the 19th day of July, 2021 during night hours at Malanga Village, Usenye Ward within Kaliua District in Tabora region, Samwel John @Jaluo was alleged to steal 25 cattle worth TZS 18,000,000/= the property of one Nzuga s/o Charles and Khamis s/o Nzuga. It was claimed further that, he used machetes to obtain and retain the stolen property.

During the trial before the trial court, the prosecution called nine (9) witnesses and the accused defended under oath. Later on, the 1st and 3rd accused persons were convicted of the respective offence and sentenced to a one-year conditional discharge. However, the appellant's trial terminated with him being convicted of armed robbery which earned him the maximum sentence of thirty (30) years imprisonment.

The appellant is aggrieved by both conviction and sentence meted out by the trial court. He, thus, has preferred the present appeal before this Court. In his petition of appeal, the appellant itemized three grievances as listed below:

- i. That, the trial Magistrate erred in law and fact by convicting the appellants without following a fundamental principle of criminal justice that at the beginning of a criminal trial the accused must be arraigned.*
- ii. That the appellant was not positively identified at the scene.*
- iii. That the prosecution failed to prove the case against the appellants beyond reasonable doubt.*

Relying on the strength of the above grounds, the appellant pleaded that the appeal be allowed and that the conviction be quashed, and the sentence be set aside.

On 03rd July, 2023 when this matter came for hearing, the appellant was represented by Ms. Flavia Francis, learned counsel, whereas Ms. Idda Rugakingira and Ms. Wivina Rwebangira, learned State Attorneys acted for the Republic.

Submitting on the grounds, the learned counsel for the appellant prayed to abandon the 1st ground of appeal and combine the 2nd and the 3rd grounds since they were related. Ms. Francis submitted that the appellant was not identified at the scene of the crime and the case was not proved beyond reasonable doubt. She added that all prosecution witnesses did not identify the appellant on the date of the crime. One person called Nzuga who was said to have seen him did not come to court to testify and to clear such doubts. She stated that reading through the judgment, the 1st accused person (Said s/o Nassib) in the said case is the one who mentioned the appellant. He was the one who testified in court and mentioned the appellant. This evidence has doubts since he wanted to exonerate himself from the charge.

She further added that there are no exhibits to prove the said cattle were sold by the appellant. There was no proof from the prosecution side showing that if that was the one stolen was really from the said incident. She insisted that failure by the appellant to cross-examine does not mean that the appellant was responsible and it is the prosecution's duty to prove the case beyond reasonable doubt as underscored in the case of **Joseph**

John Makune v Republic, TLR [1986] on page 44. Therefore, the prosecution failed to prove the case beyond reasonable doubt.

On the issue of identification, Ms. Francis submitted that the prosecution did not bring any witnesses to support the alleged offence either the victim in this case who was alleged to be injured did not come to testify. She submitted that there is nowhere in the evidence the appellant was identified by any person in respect of the offence of armed robbery and there is no record showing the reason for non-appearance of the victim. She then prayed to this court to allow the appeal.

Opposing the appeal, the learned State Attorney, Ms. Idda Rugakingira, submitted that the appellant was properly identified. The proceedings reveal that the appellant was identified by the 1st accused, Said Nassibu @Khalfan @Kala. The appellant was identified since they were doing transactions together and managed to buy 28 herds of cattle and this was evidenced by the 3rd accused, William S/O Jacob @Chichi. She stated that the appellant was also identified by PW1, Nzugo Kadaki. To propound her stance, she cited the case of ***Emmanuel Barakanfitye @ Rais V R***, Criminal Appeal No. 67 page 16 (unreported);

"The guilty of the accused can be proved either by direct evidence, circumstantial, or through confessional statements of the accused. Direct evidence is what a witness says he/she saw or heard or did while circumstantial evidence is the evidence of surrounding circumstances which by un- designed coincidence is capable of proving a proposition with accuracy."

As to the second ground of appeal, she submitted that the prosecution proved to the hilt since the appellant was charged with the offence of armed robbery contrary to section 287A of ***the Penal Code***, Cap.16 [R.E 2022] where there must be 3 ingredients. To the state attorney, all such circumstances were proved as indicated on page 13 of the proceedings where PW1 stated that the cattle were stolen and the attacker had weapons, and the stolen property was proved by PW1, Nzugo Charles Kadaki and PW4 F. 4941D/S Musa who testified that he was told by the complainant that they were invaded by 3 or 4 persons who were armed and since the victims were injured and they took them to the police station and were given PF3.

She further submitted that in this matter, the appellant did not cross-examine which means he agreed with the evidence given. To substantiate her argument, she cited the case of ***Kisandu Mboje v Republic***, Criminal Appeal No. 453 of 2018 (unreported) on page 11. She concluded that the case was proved beyond reasonable doubt and the appellant's appeal should thus be dismissed.

In her rejoinder, the learned counsel submitted that on the issue of cross-examination that the prosecution has not stated exactly according to the proceeding. She opposed the argument that failure to cross-examine should necessarily lead to a conviction. As stated in the case of ***Kisandu Mboje*** (*supra*), she had no objection, but in the matter at hand, this case is distinguishable. On page 13, PW1 was called by his son Hemu. That is, PW1 was not at the scene of the crime and neither did he witness the accused-appellant. Also, referring to page 43 of the proceedings, she reiterated that there is no corroboration between DW1 and the contract between them.

Further, there is no evidence from the prosecution to prove that the stolen cattle were the ones stolen from the complainant.

On identification, she submitted that the prosecution did not state whether they identified the appellant on the date of the incident and how they managed to arrest the appellant. No one came to testify on his identification. Hence the decision stated is distinguishable. She further submitted that there was a contradiction in respect of the number of stolen cows. Whereas DW1 stated it was 28, PW1 stated it was 25 herds. She beckoned to this court to allow the appeal.

Upon careful perusal of the records and submissions made by the parties, the question that I am now required to determine whether the present appeal is merited.

The cardinal principle in criminal cases places on the shoulder of the prosecution the burden of proving the guiltiness of the accused beyond all reasonable doubt. I refer to the case ***Furaha Michael Versus Republic***, Criminal Appeal No 326 of 2010 CAT (unreported).

Beginning with the second ground of appeal as the first ground of appeal was abandoned, the appellant argues that the prosecution failed to prove the case against him. The second ground of appeal involves re-assessing the evidence in line with the ingredients that form the offence of armed robbery. There is no dispute that the appellant was charged with the offence of armed robbery. Section 287A of ***the Penal Code***, Cap. 16[R.E 2022] defines, armed robbery to mean;

Any person who steals anything, and at or immediately after the time of stealing is armed with any dangerous or offensive

weapon or robbery instrument, or is in the company of one or immediately after the time of stealing uses or threatens to use violence to any person, commits an offence termed armed robbery and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment."

In this matter at hand, the respondent submitted that PW1 Nzugo Kadaki testified to the court that he was called on 20 July, 2021 by his son Hemi Nzugo informing him of the theft of 25 herds of cattle stolen on 19 July, 2021 during the night hours. PW2 Elia Elisha, a militia, stated that he found cows at Wilson cows' camp where the complainant, PW1 identified cows at Wilson cow camp and those cows belonged to Said Kalla. As to PW3, (Insp Mustapha) tendered a certificate of seizure as an exhibit "P1". He further stated that Said Kalla bought from Jaluo Samwel who was charged with cattle theft.

Having assessed the evidence on record and blended it with the above offence of armed robbery; according to the above provision of law, for the offence of armed robbery to be proved, the prosecution must prove that; one, there was an act of **stealing**. Two, that the assailants were armed **with dangerous** or offensive weapons or robbery instruments and that the said assailants used or threatened to use **actual violence in order** to obtain or retain the stolen property. From the above ingredients, it is true that the act of stealing took place and 25 herds of cattle were stolen as testified by PW1, however, the other two ingredients were not proved by

any person. Therefore, proof of armed robbery was not substantiated to the hilt following the evidence adduced at trial.

Upon perusal of the court files and reading the judgment, beginning with the evidence of PW1; his evidence is pure hearsay. PW1 testified to the court that he was phoned by his son Hemu Nzoga(sic) who did not appear to testify and prove the case. As stated by the appellant's counsel, the prosecution did not call the important witness. The same goes for the evidence of PW4 F.4941 D/S Musa who was told by the complainant. PW4 while adducing evidence, did not mention in this case, the name of the victim who was injured and was taken to the police for PF3. In this case, the court finds that such evidence is also hearsay.

It is trite law that the court cannot rely on hearsay evidence to find a conviction because the subject evidence lacks requisite evidential value. This akin situation was held in the case of **Vumi Liapenda Mushi v. The Republic**, Criminal Appeal No. 327 of 2016 [2018]. The other evidence is that of the doctor, one Zemba Omary Mumbi (PW5), who went to the scene of the crime for inspection of the slaughtered animal. His evidence does not connect the appellant with the charged offence of armed robbery.

The learned counsel also impugned the prosecution for failure to call material witness Hemu Nzugo which this court draws an adverse inference against the prosecution. That is evidence of PW1 Nzugo Charles Kadaki who testified on the information of cattle theft. The said son was not called to testify and no reason was advanced why he was not called to testify. I find a basis for this argument in the case of **Hemed Said vs Mohamed Mbilu** [1984] TLR 113 which held that:

"Where for undisclosed reasons a party fails to call material witnesses on his side, the court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interest."

The same position was stated in the case of ***Aziz Abdallah vs Republic*** [1991] TLR 71. Hence, the court draws an adverse inference against the prosecution for failure to call a witness Hemu Nzugo.

Further, as noted by the appellant's counsel, all prosecution witnesses did not identify the appellant on the date of the crime. Legally, where a place of commission of the offence is mentioned in the charge, the evidence must be led to prove that indeed the appellant committed the offence at that place. See ***Marki Said@Mbega V R***, Criminal Appeal No. 204 of 2018; and ***Salum Rashid Chitende V R***, Criminal Appeal No. 204 of 2015 (both unreported). In the latter case, the court stated;

" When a specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove the offence that the offence was committed on that specific, time and place."

As noted from the charge the complainant's evidence tendered was completely different from that of the charge as to where the appellant committed the alleged offence. Therefore, I find merit in the appellant's argument on this basis.

On the issue of identification, as correctly stated by the counsel for the appellant, to prove the offence charged beforehand, is whether the appellant

was identified by the complainant at the scene of the crime or not. As previously stated, no witness identified the accused at the scene of the crime and no one ever testified to this court on the above three elements of armed robbery. However, the trial court only relied on the evidence of DW1 that the cattle of the complainant was stolen and some of the stolen cattle were sold to the first accused by the appellant; and PW2, Elia Elisha who made an investigation obtained information that some of the stolen cattle of the complainant were at Ushokora "V" Kaliua District and obtained six herds of cattle.

Even though in this matter, the evidence of PW1 and PW2 was believed by the trial court that there was corroboration, I am of a different observation. Having traversed the evidence of the defence DW3, who was mentioned by DW1 to have witnessed the transaction I find that he never corroborated with him. The law is settled that the evidence of a co-accused requires corroboration. No corroboration was provided. It was not established that the property in question belonged to the appellant. Therefore, I am of the considered view that the offence of armed robbery to the appellant was not proved to the required standards. That the prosecution evidence left much to be desired; first, the ingredients of the offence charged were not met. The prosecution failed to establish if the cows purported to be stolen were actually stolen on the scene of the crime since DW1 stated they were 28 and the PW1 stated were 25. Second, the identification of the appellant was not at the scene of a crime but rather by DW1 only which leaves a lot to be desired.

Therefore, from the above analysis, I agree with the learned counsel for the appellant that the evidence of PW1, PW2, PW4, and PW5 is insufficient to sustain the conviction for the offence of armed robbery sentence meted out to the appellant. I, therefore, find merit in this ground of appeal.

In the end, I find the appeal has merit. I hereby allow it and proceed to quash the conviction and set aside the sentence imposed on the appellant. Accordingly, the court orders that the appellant, **Samwel John @ Jaluo** should be released forthwith from prison unless he is otherwise lawfully held.

Order accordingly.



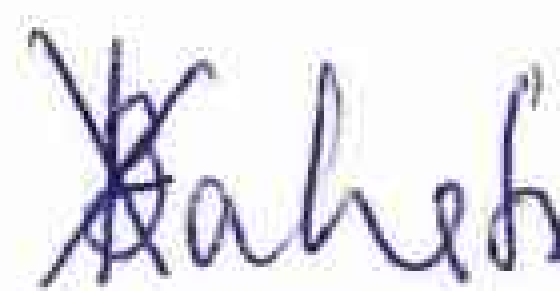
A. BAHATI SALEMA
JUDGE
21/7/2023

Court: Judgment delivered in presence of both parties.



A. BAHATI SALEMA
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Right of Appeal fully explained.



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