

IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)
AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 16 OF 2022

*(Originating from the District Court of Kalambo at Matai in Criminal Case No. 96 of
2021)*

MAIKO ^{s/o} LUSAMBO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

20th July & 31st August, 2023

MRISHA, J.

The appellant, **Maiko ^{s/o} Lusambo** was initially charged and arraigned before the District Court of Kalambo at Matai (the trial court) with one count of Stealing Cattle contrary to section 258(1) and 268(1)(3) of the Penal Code, Cap 16 R.E. 2019(the Penal Code).

The particulars of the charged offence were that on 07.07.2021 at Mikonko Village within Kalambo District in Rukwa Region the appellant unlawfully did steal one animal to wit cattle valued at 200,000/= the property of Dismas ^{s/o} Nzelani.

The appellant denied such allegations after being afforded an opportunity to answer the charge that was read over and clearly explained to him. This led to a full trial whereby in order to prove its case, the prosecution side marshalled four witnesses and tendered one exhibit, while on the adversary side, the accused stood alone as the sole defence witness with no exhibit to tender on his side.

After a full trial the trial court found that the prosecution side had proved its case beyond reasonable doubts. It thus, found the appellant guilty of the said charged offence, convicted him as charged, and sentenced him to serve a five (5) year custodial sentence, and the alleged stolen cow was ordered to remain with its owner.

Being aggrieved by the above conviction and sentence, the appellant lodged a petition of appeal which contains the following grounds: -

- 1. That, the case against the appellant was not proved beyond all reasonable doubt as required by the standard law,*
- 2. That, the trial court erred in point of law and fact by convicting and sentencing the appellant relying on the prosecution's evidence while mis observed that no any document tendered before the trial court to show if there was agreement about exchanging cow between PW1 and DW1,*

3. That, the trial magistrate misdirected himself by convicting the appellant without taking into consideration that PW2 is the one who was found with the said exhibit P1. Obviously, the doctrine of recent possession was not considered. Please refer the case of **Godfrey Lucas vs Republic**, Criminal Appeal No. 23 of 2013(unreported),
4. That, the trial Court erred in law point and fact by convicting and sentence the appellant basing on the evidence adduced by PW1 who testified before the court that he did not know the people who stole his cow. But in the question for clarification, he testified to know the appellant as the one who steal the said cattle.
5. That, the trial court erred in law and fact by convicting the appellant relying on the evidence adduced by prosecution witnesses while mis observed that the prosecution side failed to prove the charge as no any caution statement was tendered before the court as required by procedural law,
6. That, the Village Chairman of Mtuntumbe Village was not called as the witness to prove the allegations while he was present at the time the appellant was arrested.

At the hearing of this appeal the appellant stood alone, unrepresented whereas the respondent Republic had the legal services of Ms. Godliver Shio, learned State Attorney. The evidence which convinced the trial court to find the appellant guilty of the charged offence came from four witnesses as well as Exhibit P1 which is the alleged stolen cow.

Dismas s/o Nzelani (PW1) testified before the trial court that on 07.07.2021 his cow was stolen. He did not know who had stolen it, but after tracing, he came to find it in the custody of Mr. Lucas s/o Mwananjela @Kasungamo (PW2) who told him that the appellant had brought it to him in order to exchange with his (PW2) cow. PW1 described his cow as being black in colour, and went on to pray to tender it as an exhibit and the trial court admitted it as exhibit P1 due to want of objection from the appellant.

During cross examination PW1 told the trial court that he did not apprehend the appellant with that alleged stolen cow, and upon being examined by the trial court, PW1 said the appellant had stolen his cow and exchange it with PW2's cow.

When testifying before the trial court PW2 said he recalls that on 07.07.2021 he wanted to exchange his cow with the one prepared for burial ceremony but the Village Chairman asked him to wait until on

07.07.2021 for it to be slaughtered, but he asked the said Chairman to buy it so that it could be slaughtered on that date.

That thereafter the appellant went to his cowshed and told his son that he talked to him (PW2) and agreed that the appellant should take his cow. The appellant later approached and told him he had taken his cow. That he wanted the appellant to give him his money. He thereafter matched the appellant to the Village Chairman whereby the appellant committed himself that he would pay him (PW2) his money.

However, according to PW2 the appellant did not pay him that money, but he brought to him another cow with costs of Tshs. 10,000/=. That after a lapse of one month, PW2 heard some people looking for one cow which is black in colour.

Having realized that, PW2 went to the Village Chairman and arrested the appellant then he took the cow he got from the appellant to the Village Chairman and it was discovered by its owner. When probed by the appellant, PW2 said he live with his neighbours.

That the appellant brought the stolen cow to his cowshed, and the Village Chairman told him to receive it. Upon being examined, PW2 told the trial court that he told the Village Chairman his cow was stolen by

unknown people, but later the appellant told him he is the one who took it.

Next from the prosecution side was one Nemes s/o Dason (PW3). He testified that on 04.07.2021 he was drinking alcohol with one Mr. Simchindo who told him of his intention to dispose of his one cow which had a broken leg. Suddenly, the appellant emerged and asked for the value of that cow. However, according to PW3, Mr. Simchindo told the accused he would mention the price after the cow is seen.

That, thereafter the accused went to the cowshed of Mr. Simchindo and told the livestock keeper that he was sent by Mr. Simchindo to go and pick one cow therefrom. Later on, the appellant and Mr. Simchindo agreed that the appellant would pay Tshs. 250,000/= or repay another cow.

That, on 07.07.2021 the appellant took another cow which was black in colour to Mr. Simchindo's cowshed and later on Mr. Simchindo agreed to receive it. PW3 submitted further that on 04.07.2021 he was told by Mr. Simchindo's son one Msafiri that the cow he had received from the appellant in exchange with his cow was a stolen cow, hence the said son asked him to arrest the appellant. Thereafter, PW3 managed to arrest the appellant.

During cross examination PW3 said the appellant was brought by Mr. Simchindo in the office of the Village Chairman and he agreed orally with Mr. Simchindo to pay the cow.

Finally, it was the testimony of Deus s/o Kaonde (PW4) that on 07.07.2021 their cow was stolen and it was later found at Semalonje Village. The cow was black in colour. He went at Semalonje for milling his maize, and then he met a Village Chairman who told him that they got the stolen cow and urged him to inform PW1.

That thereafter he went to that village with PW1 and PW1 managed to identify that stolen cow which was stolen around Kalambo River when grazed by the youths. Upon being cross examined PW4 said they arrested the appellant with the cow. When examined by the trial court PW4 said the Village Chairman told him that they already found the cow and arrested the appellant.

On his side, the appellant who testified as DW1 narrated that on 05.04.2021 he was arrested by three people when he was at Semalonje Village. Upon arresting him the said people matched him to the office of Village Chairman; it was at 1500 hours. While there DW1 heard the Village Chairman planning to call the Police.

That at 1800 hours the Police arrived there and conveyed him to Matai Police Station and in the morning of the following day they recorded his caution statement. Thereafter, they took him to the trial court. DW1 further testified that PW1 stated that he arrested him with no exhibit; hence he is not the one who stole his cow.

DW1 went further to testify that PW2 told the trial court that DW1 took his cow without informing any leader. He touched the evidence of PW3 saying that despite accusing him as the one who picked the stolen cow at the grazing area, the said witness did not identify the said cow. DW1 also challenged the evidence of PW3 because PW3 did not tender any document to show that he had entered an agreement about the cow. He also stated that it is not true the said witness arrested him at the bar.

As for evidence adduced by PW4, the appellant said it is not true that such prosecution witness arrested him when he was on his way to Semalonje Village. Finally, the appellant urged the trial court to disregard all prosecution witnesses' evidence for not been true and acquit him. During cross examination, DW1 said he knows PW1 but he had no grudges with him.

From the above evidence, the trial court was satisfied that the prosecution side had proved its case on the standard required by the law. It then convicted and sentenced the appellant as aforesaid.

Submitting in support of his grounds of appeal the appellant briefly stated that he prays to this court to adopt his grounds of appeal since the same are self-explanatory. Hence, he requested the court to allow his appeal, quash his conviction; set aside the sentence imposed upon him and set him free.

On her side, Ms. Godliver Shio opposed the instant appeal and proposed to combine grounds number two, five and six and deal with them together. She submitted on the second ground that there is no legal requirement for the agreement to be written; the same can also be made orally.

She added that in the present case the agreement between the appellant and PW2 was made orally as shown at page 8 of the typed proceedings. She went on arguing that such agreement was witnessed by PW3 as it is shown at page 8 of the said proceedings. Hence, according to her there was no need of tendering a written document to prove its existence.

Regarding the fifth and sixth grounds of appeal, the learned counsel submitted that there is no legal requirement which binds the prosecution side to tender the caution statement of the appellant and also there is no legal requirement regarding the number of witnesses to be paraded by the prosecution side in order to prove its case as provided under section 143 of the Evidence Act, Cap 6 R.E 2022(the TEA).

She further submitted that in the case at hand there was no need for the prosecution to bring the Village Chairman of Muntumbe to prove the allegations against the appellant because the fact that the appellant was arrested had already been testified by PW3 as appearing at page 10 of the typed proceedings. Hence, it was her submission that the above three grounds of appeal have no merits. Thus, she urged the court to dismiss them.

In the same manner, Ms. Godliver Shio proposed to argue on grounds number one, three and four all together and submitted that the prosecution side had proved its case against the appellant beyond reasonable doubt through its four prosecution witnesses.

She said, for example, at page 8 of the typed proceedings PW2 stated how he entered into an agreement with the appellant about selling of

cattle and the appellant failed to pay him his money and brought to PW2 another cow for an exchange.

However, after a month it was discovered that the cow brought to him by the appellant was stolen and PW2 reported the matter to the Village Chairman who arranged for the arresting of the appellant. Ms. Godliver Shio submitted that the above evidence was corroborated by the evidence of PW1 and PW3.

She also submitted that during the hearing of the case before the trial court the prosecution evidence was not shaken by the appellant despite being given a right to cross examine the prosecution witnesses which indicates that the appellant did not raise any doubt to show that he is not the one who stole the alleged stolen cow.

The learned counsel was therefore of the view that given the above circumstances, there was no any reason for the trial court to disbelieve the evidence adduced by the prosecution witnesses. She supported her stance with the case of **Goodluck Kyando v. Republic**, Criminal Appeal No. 118 of 2013 in which it was held that:

"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

Having said the above, the learned counsel submitted that due to the foregoing reasons, it is apparent that the evidence adduced by the four prosecution witnesses is watertight and had connected the appellant with the offence he stood charged; hence, the prosecution had successfully proved beyond reasonable doubts before the trial court that the appellant is the one who had stolen PW1's cattle.

From the above submissions, Ms. Godliver Shio prayed to the court to dismiss the appellant's appeal for want of merits and uphold the conviction and sentence meted to him. Rejoining, the appellant had nothing new rather than reiterating his previous prayers that this court be pleased to consider his six grounds of appeal and set him free.

I have keenly gone through the rival submissions by the parties herein as well as the trial court typed proceedings. The question that is supposed to be determined by this court is whether or not there was sufficient evidence to ground conviction against the appellant on the offence he stood charged before the trial court.

In a bid to protest for his innocence, the appellant has appealed this court to consider his six grounds of appeal as his submission in chief. One of his grounds is that the case against him was not proved beyond all reasonable doubt as required by the law.

Another ground is that the trial court erred in law and fact by convicting the appellant relying on the evidence adduced by prosecution witnesses while mis observed that the prosecution side failed to prove the charge as no any caution statement was tendered before the court as required by procedural law.

As it has been indicated above, the respondent Republic has strongly opposed the entire appeal by the appellant, and in making her submission regarding the same, the respondent's counsel proposed to argue on grounds number 2, 5 and 6 generally by merging them and finally conclude her submission by arguing grounds number 1, 3 and 5 in similar in the same vein.

Before I begin my deliberations on the above issue, I wish to reaffirm that as the appellate court, this court is bound to consider each and every ground of appeal raised by the appellant before deciding whether the instant appeal has merit or not. However, there is an exception to that general rule. This was stated in the case of **Malmo Montagekonsult AB Branch v. Margret Gama**, Civil Appeal No.86 of 2001 (unreported), the Court of Appeal had the following to say: -

"In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is,

however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address the decisive ground of appeal only or discuss each ground separately."

In my view, although the above instructive decision emanates from a Civil Appeal case, the same applies also in criminal appeals as the present one, because the manner of dealing with appeals is almost the same. Thus, guided by the above instructive decision, I find it convenient to address the grounds of appeal lodged by the appellant generally.

As I do so, I wish to restate as a trite law, that normally the appellate court will not interfere with the concurrent findings of fact of the lower courts, unless it is shown there are misdirection or non-directions (See **Mustafa Darajani vs The Republic**, Criminal Appeal No. 277 of 2008, CAT at Iringa(unreported)).

In the case at hand the trial court proceedings clearly reveal that none of the prosecution witnesses witnessed the breaking of PW1's cowshed and stealing of the alleged stolen cow; even despite alleging through his testimony that the said cow was stolen at Kalambo river while being

grazed by PW1's youths, PW4 did not mention any of such youths, nor did he allege that either of them saw the appellant asporting such cow therefrom. In my considered opinion, the above prosecution witnesses' evidence indicates that theirs was circumstantial evidence which particularly falls under the doctrine of recent possession. The crucial question here is whether such doctrine was properly invoked.

In the case of **Joseph Mkubwa & Samson Mwakagenda vs Republic**, Criminal Appeal No. 94 of 2007(unreported) cited in **Godfrey Lucas's** case(supra), the Court of Appeal was emphatic that the following three conditions must be satisfied before the doctrine of recent possession can be applied to convict an accused person: -

*"...First, that the property was found with the suspect; second, that the property is positively proved to be the property of the complainant, and lastly, that the stolen thing constitutes the subject matter of the charge against the accused... **The fact that the accused does not claim to be the owner of the property does not relieve the prosecution to prove the above elements...**" [Emphasis added]*

Also, in the case of **Mustafa Darajani** (supra) it was stated that:

"Where an accused person is found in possession of property recently stolen which property was duly identified by the complainant, then such an accused person is taken to have been either the actual thief or a guilty receiver."

Through his third ground of appeal, the appellant has complained that the trial magistrate misdirected himself by convicting the appellant without taking into consideration that PW2 is the one who was found with the said exhibit which, according to him, tells that the doctrine of recent possession was not considered.

Unfortunately, I have noted that in her submission regarding such ground of appeal, the respondent's counsel did not talk anything about such omission by the trial magistrate, while it is obvious that given the circumstances of the instant case, it was inevitable for him to properly invoke the doctrine of recent possession before arriving at a conclusion that the appellant is responsible for the stealing of PW1's cattle.

The trial court proceedings are clear that when the offence of stealing PW1's cow was committed on 07.07.2021, PW1 did not see the appellant at his cowshed committing such offence; he took some efforts to trace its whereabouts and came to find it in possession of PW2 who told him he got it from the appellant after exchanging with his cow. This is shown

at page 6 of the said typed trial court proceedings where PW1 was recorded to have said the following: -

"I recall on 07.07.2021 my cow was stolen. I did not know who stole my cow. I find to trace it and found the cow at Kasungamo's". Mr. Kasungamo told me that Michael brought that cow to him and exchange by his cow..."

From the above quoted excerpt, it is obvious that it is PW2 who was recently found in possession of that alleged stolen cow; not the appellant. Since, it appears that the appellant denied to have stolen that cow, then it was the duty of the prosecution side to prove beyond any reasonable doubts that the accused is the one who had stolen it, as required of it under section 110(1) of the TEA. The fact that the appellant did not claim ownership over such cow could not relieve the prosecution from the duty of proving that the appellant was found in possession of the said alleged recently stolen cow.

The counsel for the respondent had it that there is no legal requirement for the prosecution to tender the appellant's caution statement and that the prosecution was not mandated to bring the Village Chairman as their witnesses because the available four witnesses testified before the trial court and they deserve credence.

If I got her right, it looks like she wanted to convince this court to find that the evidence adduced by PW1, PW2, PW3 and PW4 coupled with Exhibit P1 which is the alleged stolen cow, was enough to prove beyond reasonable doubts that appellant herein was responsible for the commission of an offence of cattle theft contrary to section 258(1) and 268(1)(3) of the Penal Code.

However, before deciding whether or not it is right for me to follow such invitation by the respondent's counsel, I found it apt to make a thoroughly scrutiny of the trial court proceedings only to satisfy myself.

In so doing, I noted; first, that during the preliminary hearing, among the alleged facts were that after being arrested at Mikonko Village near Kalambo river, the appellant was matched to Matai Police Station and interrogated by a police officer with Force Number F. 7205 D/C Said, whereby he confessed to have committed the offence of stealing cattle. That is shown at pages 3-4 of the trial court proceedings.

It is also revealed, at page 5 of the same court records, that during that preliminary hearing, the prosecution side through a Public Prosecutor one Inspector Mrisho, informed the trial court the following: -

"Your honour, I intend to call five (5) witnesses and two exhibits to wit one cow and caution statement of accused."

Surprisingly, when the said case took off for a full trial, the prosecution did not include the interrogator who recorded the appellant's caution statement as one their five prosecution witnesses, nor did they pray to tender the alleged caution statement for it to be admitted as an exhibit, contrary to their previous notification to the trial court and presumably, the appellant who is the subject of that caution statement.

While I am all aware that the prosecution is not bound to have a certain number of witnesses in order to prove any fact, as indicated under section 143 of the TEA, I am not persuaded to go along with the respondent's counsel invitation that the prosecution was not bound to tender the caution statement of the appellant and bring the interrogating police officer to testify before the trial court in order to prove their case against the appellant beyond any reasonable doubts.

I say so because by alleging during a preliminary hearing, that the appellant had confessed before No. F. 7205 D/C Said to have committed the said charged offence, and by listing such caution statement as one of the intended exhibits, it means that the prosecution made the trial court and the appellant to have expected them to have tendered such document in the trial court and bring that interrogating police officer.

Secondly, the trial court typed proceedings indicates pretty well that the appellant disputed the allegations of being involved in the commission of an offence of cattle theft, not only when asked to plead to the charged offence, and when given an opportunity to comment on the correctness or otherwise of the facts read over and clearly explained to him during the preliminary hearing, as appearing at pages 1, 3 and 4 of the trial court typed proceedings, but also he denied such allegations during defence hearing. That is shown at page 15 of the said proceedings where the appellant was recorded to have said the following: -

"...I pray this court to disregard all their evidence, it is not true, they lied the court. I pray the court to acquit me".

In my understanding, the above quoted appellant's words mean that he was challenging the evidence adduced by all the four prosecution witnesses against him and in the circumstances, it was incumbent upon the prosecution side to lead sufficient evidence, including parading the interrogating police officer, in order to prove their case against the appellant beyond any reasonable doubts. So, with due respect to the respondent's counsel, it was not correct for her to submit that such prosecution witnesses' evidence was not challenged by the appellant.

If that is not enough, I have also noted that the appellant challenged the credibility of almost all the four prosecution witnesses when given an opportunity to cross examine them, but for the reason known to him, the trial magistrate did not consider that in composing his judgement.

That is justified at pages 3, 4 and 5 of the trial court typed judgement which does not show anywhere if the trial magistrate considered the appellant's cross examination questions towards the four prosecution witnesses.

I may also add, that the prosecution's failure to parade the interrogating police officer before the trial court for him to testify against the appellant, without assigning any reasons for not doing so, had in my considered opinion occasioned failure of justice on the part of the appellant who might have expected to comment on the alleged document either positively or otherwise, and cross examine that police officer.

The above court's observation is fortified by the principle stated in the case of **Charles Ambrosi vs The Republic**, Criminal Appeal No. 338 of 2019(unreported) whereby at page 16 of its judgment the Court of Appeal sitting at Arusha, had the following to say: -

*"A court may be invited to draw a permissible adverse inference against the prosecution case **where a crucial or material witness who could have testified against a critical or decisive aspect of its case is withheld without sufficient reason...**" [Emphasis added]*

Also, at page 17 of its judgment, the said superior court observed that:

*"Failure to call the police officer from Arusha to testify on those doubts entitles the Court to draw adverse inference and **the logical conclusion is that the prosecution did not prove the case beyond reasonable doubts.**" [Emphasis added].*

In the case at hand, it is apparent the police officer one D/C Said whose Force Number is F. 7205, was the one who recorded the caution statement of the appellant, as indicated at page 4 of the trial court typed proceedings, but no reasons were given by the prosecution side why the evidence of such material witness was withheld, and why the appellant's caution statement was not produced in the trial court to form part of their evidence.

In the circumstances, and being guided by the principle of law as stated in the case of **Charles Ambrosi**(supra), I am inclined to draw an adverse inference on the prosecution failure to bring such material

witness to testify on the serious allegations of cattle theft levelled against the appellant. Consequently, I find and hold that the prosecution side failed to prove their case against the appellant on the standard required by the criminal law, as elaborated above.

Again, I am not persuaded by the respondent's counsel submission that there is no legal requirement binding the prosecution to bring documentary evidence to prove the alleged cow exchange agreement between the appellant and PW2. If the same was witnessed by PW3 who seems to be a government leader at the village level, then it would be sufficient for such agreement to be reduced into writing and have it produced in court as documentary evidence.

Therefore, due to the reasons which I have provided above, I am of the view that the doctrine of recent possession was not properly considered by the trial court in order to see whether the prosecution had proved its case beyond any reasonable doubts; also that there was no sufficient evidence in which the trial court could be justified to ground conviction against the appellant on the offence he stood charged before it.

Accordingly, basing on the above reasons, I find merit in the appellant's petition of appeal. I therefore, allow the present appeal, quash the conviction entered against the appellant, set aside the sentence passed

upon him and order for his immediate release from remand prison, unless he is held for some other lawful cause. For the avoidance of doubts, the trial court's order regarding the alleged stolen cow is left undisturbed because the appellant has not claimed any interest over it.

It is so ordered.



A.A. MRISHA
JUDGE
31.08.2023

DATED at SUMBAWANGA this 31st August, 2023.



A.A. MRISHA
JUDGE
31.08.2023