

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 172 OF 2022

JELA LUMBETA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

21st June & 26th July 2023

MWANGA, J.

The appellant, **JELA LUMBETA**, appeared before the District Court of Bagamoyo at Bagamoyo on 15th March 2021 to answer a charge of Theft contrary to Section 265 and 268(1) of the Penal Code, Cap. 16 R.E 2019. It was alleged that on the 15th day of March 2021, at an unknown time at Zinga within Bagamoyo District in Coastal Region, the appellant stole three (3) cows valued at Tshs: 4 500,000/=, the property of Daines Mtei.

He denied the charge. After his trial, he was found guilty as charged and convicted accordingly. He was, therefore, sentenced to three (3) years imprisonment. Being aggrieved, the appellant appealed against the conviction and sentence to this court.

Believing innocent, he lodged this appeal against that District Court decision on the following grounds:

1. That the trial magistrates erred in law and facts to convict the appellants based on circumstantial and uncorroborated evidence, which lacks legal basis in the eyes of laws.
2. The trial magistrates erred in law and facts to convict the appellant on a mistake of identity and without identification of parade during the investigation.
3. That the trial magistrate erred in law and fact to convict the appellant without having the exhibit tendered before the court for inspection and the appellant given the right to cross-examine the display; the appellant avers that the conviction was based on a caution statement which was taken in procedural irregularity and excessively use of force.

4. That the trial magistrates misdirected to convict the appellant while denying his vigorous defense of alibi, which the appellant managed to prove and state as the law required before the honorable court and back up with his appellant witness.
5. That the trial magistrates erred in law and facts to convict the appellant while the prosecution failed to prove the offense beyond a reasonable doubt.

The Appeal was argued by way of written submission. Mr. Emmanuel Maleko learned that the Senior State Attorney represented the Respondent; however, the Appellant appeared in person.

The appellant contended that he was convicted based on circumstantial evidence. Therefore, he was challenging the circumstances leading to his involvement in the commission of a crime. It was his submission that he was not chased and arrested at the crime scene. According to him, since it was during the night and PW3 testified that they switched on the lights, it was apparent that an identification parade was necessary.

The appellant argued further that PW3 testified that he identified him at the crime scene. However, he could not tell the court the distance from which the appellant was observed, the intensity of light, and the

source of light that aided in identifying him at around 2:00hrs in the night. In his printed case, he submitted that no descriptions were given of his appearance in terms of height, bodybuilding, attire, the color of his skin, and facial appearance. In the alternative, he contends that the principles established in the case of **Waziri Amani Versus Republic**, Criminal Appeal No. 55 of 1979) [1980] were not met. Given the above, it was his submission that there was the possibility of mistaken identity.

Per contra, Mr. Maleko submitted that circumstantial evidence is as good as other evidence. Apart from that, the learned Senior State Attorney argued that the appellant confessed to the crime, and as a result, he implicated other suspects. Mr. Maleko relied further on the evidence that the mobile phone, which was found at the crime scene and was owned by the appellant, was the one who showed his password to PW1. Therefore, the evidence was corroborated.

Regarding identification, the learned State Attorney submitted that there was no mistaken identity, as PW3 was familiar to the appellant. Upon arrest, he confessed to committing the offense. On that basis, the State Attorney said there was no need to conduct an identification parade. I have perused the available records and considered the submissions of both parties. For being truthful and honest, the case against the appellant

was based on circumstantial evidence. As correctly submitted by the learned State Attorney, much as circumstantial evidence, it is as good as other evidence. However, it has a different test. The Court of Appeal has repeatedly restated that in a criminal case on circumstantial evidence, it must irresistibly point to the accused's guilt and exclude any other person. See the case of **Shaban Mpunzu @ Elisha Mpunzu Versus R**, Criminal Appeal No. 12 Of 2002 (unreported).

In light of the above, the prosecution witness (PW3), who seems to have identified the appellant, stated on page 27 of the typed proceedings that it was around 2:00hrs at Zinga Mzambarauni in the government forest that he saw two motorcycles. After switching on the light, he started chasing the suspects who entered the "chocho" road where they could not pass through. At a hundred meters, they heard people talking, and they switched on the lights and saw four people. He managed to identify the appellant by using a torch. According to him, he knew the appellant before because he was working at Vigwaza. When they reached the crime scene, they found two cows already slaughtered. The mobile phone, make a SUNLG motorcycle with registration No. MC 233 CLX Make boxer.

The issue now is whether, under the circumstances, the evidence points out irresistibly that the appellant was identified. At a distance of a

hundred meters long, equal to a football pitch, and it was during the night, and the fact that PW3 did not state the intensity of lights, there may be the possibility of mistaken identity. The law is settled. In the case of **Magwisha Mzee and Another vs Republic**, Criminal Appeal Nos. 465 and 465 of 2007 (unreported) stated on pages 10-11 thus:

"This Court has consistently held that when it comes to the issue of light, dear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable the identifying witnesses to see and positively identify the accused person. Bare assertions that "there was light"..... would not suffice..."

Apart from that, the claim that the cautioned statement corroborated the evidence also lacks merits. On page 49, the appellant told the court he was forced to sign the same. Nevertheless, the trial court admitted it on page 50 of the proceedings without conducting an inquiry to clear such allegations. In that regard, such a cautioned statement cannot be used to corroborate the circumstantial evidence because it lacks value to be relied upon.

In addition, PW3 told the court that the appellant showed him the mobile phone password, collected at the crime scene, to substantiate his claims that the phone belonged to the appellant. However, it needed to be stated why PW3 did not conduct his investigation further to prove through the relevant telecommunications Company that the mobile phone belonged to the appellant. In addition, there needed details given to PW3 on how he came to know the appellant. On pages 27 to 28, he said, ***"I know the 1st accused from a long time as a resident of Vigwaza because before I was working at Vigwaza."***

That being said and done, there are many patch-marks for circumstantial evidence to convict the appellant. Much as running away from a crime scene is circumstantial evidence that the appellant might have committed the crime, the same would be relevant if the question of identification were undoubtedly cleared.

It is a well-settled principle of law that, in criminal cases, the burden of proof lies upon the prosecution and is beyond a reasonable doubt. That was also the position in the case of **Pascal Yoya @Maganga Versus the Republic, Criminal** Appeal No. 248 Of 2017(Unreported), where it was held that: -

'It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, the prosecution has a burden of proving its case beyond a reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case, and he need not prove his innocence'.

As a result, I now allow this appeal, quash the conviction, and set aside the sentence. The appellant shall immediately be set free unless he is otherwise lawfully in prison.

Order accordingly.



H. R. MWANGA

JUDGE

26/07/2023

COURT: Judgment delivered in Chambers this 26th day of July 2023 in the presence of Nura Manja, learned State Attorney, and in the Appellant in person.



H. R. MWANGA

JUDGE

26/07/2023