

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 38 OF 2023

(Arising from Criminal Case No. 169 of 2021 District Court of Biharamulo)

JAPHET SAMWEL VENANCE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

24th August and 12th September, 2023.

BANZI, J.:

The appellant and three other persons who are not party to this appeal namely, Verediana John, Faustine Laurian @ Mapinduzi and Mjalula Behuta @ Kalikwale, whom I shall refer as the second, third and fourth accused person, respectively, were jointly and severally charged before the District Court of Biharamulo ("the trial court") with three count; cattle theft contrary to sections 258 (1) and 268 (1) (3) of the Penal Code [Cap. 16 R.E. 2019] ("the Penal Code"); slaughtering of animals and sale of meat contrary to section 41 (1) (2) and 123 (1) of Tanzania Food Drugs and Cosmetic Act of 2003 and retaining stolen properties contrary to section 311 of the Penal Code.

It was alleged in the first count that, on 10th December, 2021 at Nyabugombe village, within Biharamulo District in Kagera Region, the

appellant, the second, third and fourth accused person did steal 16 herd of cattle valued at Tshs.16,000,000/= the property of Evarist Rukoleleka. In the second count, it was alleged that, on 13th December, 2021 at Nyabugombe village, within Biharamulo District in Kagera Region, the appellant, the second, third and fourth accused person with intent to sale meat for human consumption, did unlawful slaughter cow and for the third count, it was alleged that, on 14th December, 2021, at Nyabugombe village, within Biharamulo District in Kagera Region, the appellant and the second accused were unlawful found in possession of 6 herd of cattle knowingly that the said property were stolen from Evarist Rukoleleka.

At the end of the trial, the second, third and fourth accused person were acquitted on all three counts. On the other hand, the appellant was acquitted on the second count and convicted with the first and third counts. Consequently, he was sentenced to five years imprisonment for the first count and three years imprisonment for the third count. The sentences were ordered to run concurrently. Dissatisfied with his conviction and sentence, he lodged his appeal before this Court containing eight grounds and later, he filed seven additional grounds which taking them together, they fall under the following complaints; **one**, the case was not proved beyond reasonable doubt; **two**, his defence was not considered and **three**, the judgment

contravenes section 312 (2) of the Criminal Procedure Act [Cap. 20 R.E. 2022] ("the CPA").

Briefly, the evidence leading to the conviction of the appellant reveals that, on the night of 10th December, 2021, Evarist Rukoleleka (PW1) received a call from his son with information that, his 16 herd of cattle were missing. According to him, his cattle had marks as their ears were cut on top. Upon such information, they searched for those cattle in vain. On 12th December, 2021, he reported the matter to Nyakahura police post. On 13th December, 2021, PW1 was summoned and informed that, there is a person selling meat at Mkanyange market. While he was on the way with F.3903 D/SGT Dickson (PW2), they saw the third accused on a bicycle carrying meat. After seeing them, he abandoned the bicycle and ran away. Then PW2 received a call from another search group who informed him that, they searched the house of the third accused person and found meat and one person who confessed to be the one who brought the meat in that house. They went to the house of the third accused where they found the appellant and the second accused person. PW2 seized dried meat, one bag and rope through certificate of seizure (Exhibit PE1). According to PW1 and PW2, the appellant informed them that, they stole the cattle and slaughtered them at the bush.

On the same date, A/Insp Edgar Nguo (PW3) prepared inventory (Exhibit PE3) of seized meat from the house and on the bicycle (40 pieces in

total) and procured disposal order from Lusahunga Primary Court. On 14th December, 2021, the appellant led PW1, PW3, his colleague and local leader one, Adrian Elisha (PW4) to Burigi Chato National Park where they found six cattle (Exhibit PE5) and PW1 claimed to identify them by their special mark mentioned above. PW3 seized them through certificate of seizure (Exhibit PE4).

In his defence, the appellant denied to have committed the alleged offences. He claimed to be found and arrested in a certain house where he went to drink water while he was on his way to Mihongola village. He further stated that, after being arrested, he was taken to Nyakahura police post where he was severely beaten in an attempt to procure his confession. He denied to lead PW1 and PW2 to the bush to show them where they slaughtered the said cattle. He also denied to have known the second, third and fourth accused persons.

At the hearing of the appeal, the appellant appeared in person unrepresented whereas, the respondent Republic was represented by Mr. Amani Kilua, the learned State Attorney.

In his submission, the appellant challenged the prosecution witnesses for not producing any document to prove their claim that, he confessed to steal those head of cattle. He added that, all witnesses made dock identification without conducting identification parade. It was also his

contention that, no witness was brought to prove their claim that, he was arrested while selling meat. Besides, the meat in question was disposed without being examined by doctor to prove that, it was beef and not any other meat. Also, he was not present when they took the meat to the court for seeking for order of disposal. He further denied to have led the witnesses to the place where they found cows as the prosecution did not tender either sketch map or photograph to prove the same. He finally prayed for his grounds to be considered so that he can be released.

In response, Mr. Kilua from the outset, supported the conviction and sentence meted against the appellant claiming that, the offences of cattle theft and retaining stolen properties were proved on the required standard through the testimony of PW1 to PW4. According to him, although the evidence does not reveal who exactly searched the house and arrested the appellant in the first place, the evidence of PW2 shows that, he was the one who seized the meat in question in the house of the third accused where the appellant was arrested. He added that, the appellant confessed orally and the same confession led into discovery of six head of cattle stolen from PW1 which is relevant under section 31 of the Evidence Act [Cap. 6 R.E. 2022] ("the Evidence Act"). The fact that he led the police to the place where they found the remaining cattle is a clear proof that, he was involved in the said stealing. He cited the case of **Chamuriho Kirenge @ Chamuriho Julius**

v. Republic [2022] TZCA 98 TanzLII to support his argument on confession leading to discovery.

It was also his submission that, identification parade was not relevant because none amongst the witnessed said to have seen the appellant at the crime scene on the night of incident, and besides, the prosecution relied on circumstantial evidence. He further submitted that; the trial magistrate properly analysed the defence evidence as indicated at page 14 of the judgment. Also, the judgment is in compliance with section 312 (2) of the CPA. On the issue of expert to examine the meat, he responded that, the same was not relevant and it was an afterthought because, the appellant was facing the offence of cattle theft. On the issue of credibility of witnesses, he stated that, the trial magistrate believed the witnesses that is why, he acquitted other accused persons and convicted the appellant. On the issue absence of sketch map or photograph, he contended that, it is not the requirement of the law for each incident to be proved by sketch map.

On the issue of disposal of exhibit, although he conceded on absence of the appellant, he submitted that, such irregularity does not make the prosecution case of flop. He concluded his submission by stating that, there was no need to call witnessed to prove that, the appellant was found selling meat because selling meat without licence was not among the offences

against the appellant. Thus, he prayed for the appeal to be dismissed for want of merit.

In his rejoinder, the appellant insisted that, he was arrested with nothing and there was no documentary evidence to prove that, the stolen cattle were found with him. He reiterated his prayer for this Court to consider all grounds and allow his appeal by releasing him from custody.

Having considered the submissions of both parties in the light of evidence on record, the issue for determination is whether the case against the appellant was proved beyond reasonable doubt.

It is important to underscore that, according to section 3 (2) (a) of the Evidence Act, in criminal cases, a fact is said to be proved when the court is satisfied by the prosecution beyond reasonable doubt that the fact exists. In the matter at hand, the appellant was convicted on two offences *i.e.*, cattle theft and retaining stolen properties. Looking closely at the record, the prosecution relied on oral admission of the appellant leading to discovery of the remaining stolen cattle. Section 31 of the Evidence Act provides that:

"When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant."

What I gathered from the extract above is that, admission leading to discovery is not only relevant but also reliable. This was also stated in the case of **Chamuriho Kirenge @ Chamuriho Julius v. Republic** (*supra*) where it was held that:

"...it is the stance of the law that, a confession leading to discovery is reliable."

In the instant case, it was the testimony of PW1 and PW2 that, soon upon his arrest, the appellant admitted to them that, he stole the cattle in question. Likewise, PW3 testified that, during interrogation, the appellant admitted to steal cattle from Nyabugombe village together with the third and fourth accused persons and took them to Burigi Chato National Park for slaughtering. It was also the testimony of PW1, PW3 and PW4 that, the appellant led them to Burigi Chato National Park where they found six cows that were successfully identified by PW1. The admission of the appellant made before PW1, PW2 and PW3 is not only relevant but also reliable because through such admission, the remaining stolen cattle were discovered within Burigi Chato National Park. In addition, it was the appellant who led them to the area where they found those cows. It was stated in the cited case of **Chamuriho Kirenge@ Chamuriho Julius** that:

"...we find that the appellant's admission to the commission of the offence to PW3 and PW6 was for all purposes and

intend, a valid confession in terms of section 31 of the Evidence Act, Cap 6 R.E.2019 and that it was sufficient by itself to ground a conviction against him for the offence charged.”

From the position of the law above, it is the finding of this Court that, the appellant's admission to the stealing which led to discovery and recovery of stolen cattle is a valid confession in terms of section 31 of the Evidence Act and it sufficed to convict him with the offences of cattle theft and retaining stolen properties. Since the confession of the appellant was orally, his complaint about tendering of cautioned statement or extra judicial statement is immaterial. Equally, the argument by the appellant about lack of document to prove that it was him who led them to the alleged area is unfounded. Besides, the certificate of seizure which was signed by him is a clear proof that it was him who led them to the area where the stolen cattle were found because by signing it, he acknowledged that those cattle were retrieved from him.

Moreover, the issue of identification parade does not arise because, as rightly submitted by learned State Attorney, the appellant was not seen at the crime scene which would require for identification parade. On the complaint concerning disposal of exhibit, the established procedure requires the accused person to be present and be heard before the magistrate issues the disposal order of perishable exhibit intended to be produced later in

evidence. See the case of **Mohamed Juma @ Mpakama v. Republic** [2019] TZCA 518 TanzLII. In our case, looking closely at the testimony of PW3, there is nowhere indicating that, the appellant was present and heard when the disposal order was obtained. With such irregularity, the inventory, Exhibit PE3 is expunged from the record. However, Exhibit PE3 was not the material evidence to prove the offence of cattle theft or retaining stolen properties. Likewise, whether or not the appellant was found with meat was not relevant to the fact in issue and thus, it is immaterial to prove the offence of cattle theft.

Reverting to the complaint concerning failure to consider his defence, it is settled law that, this Court being the first appellate court, can step into the shoes of the trial court and analyse the defence evidence. See the case of **Soud Seif v. Republic** [2020] TZCA 216 TanzLII. The appellant in his defence, claimed to be severely beaten in an attempt to procure his confession while he was at Nyakahura police post. However, he did not even cross-examine PW2 and PW3 on the alleged torture. If he was really tortured at the station, it was expected to be raised when PW2 and PW3 were testifying but he did not cross-examine them on this aspect. Thus, whatever he raised later amounts to an afterthought. Apart from that, he also failed to cross-examine PW1, PW2 or PW3 on his admission as the one who stole the cattle in question which as a matter of law, he accepted the truthfulness

of witnesses' testimony on that aspect. In that regard, it is the finding of this Court that, his defence did not shake the prosecution evidence. The last complaint need not detain me. It is undisputed that, section 312 (2) of the CPA was not fully complied for want of section of the law under which the appellant was convicted. However, the appellant did not explain how he was prejudiced by such omission. Section 388 of the CPA provides that:

"Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable."

Basing on the position of the law above and since there is nothing to establish that, the omission in question had occasioned failure of justice or prejudiced the appellant, it is the finding of this court that, such omission is curable under section 388 of the CPA.

For those reasons, it is the finding of this Court that, the case against the appellant was proved to the required standard. Consequently, I find the appeal without speck of merit and it is hereby dismissed entirely.

It is so ordered.



I. K. BANZI
JUDGE
18/09/2023

Delivered this 18th September, 2023 in the presence of Mr. Yusuph Mapesa, learned State Attorney for the respondent and the appellant in person. Right of appeal duly explained.



I. K. BANZI
JUDGE
18/09/2023