

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)
AT DAR ES SALAAM**

CRIMINAL APPEAL NO. 175 OF 2023

(Originating from Criminal Case No. 269 of 2022 in the District Court of Bagamoyo at
Bagamoyo before Hon. V. P. Mwaria, RM)

KIDE KUSHOTO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

26th Oct & 3rd Nov, 2023.

KIREKIANO, J.:

The District Court of Bagamoyo convicted the appellant of an offence of cattle theft contrary to section 268 (1) (3) of the Penal Code Cap 16 [R.E 2022]. Ultimately, a custodial sentence of five years term of imprisonment was inflicted. The conviction and sentence were arrived following the allegation that, on 26th September, 2022 at Samalogo area within Bagamoyo District the appellant did steal 20 cows valued at Tshs. 10,000,000/= the property of one Kimaki Dafu.

The prosecution side paraded six witnesses to prove the charge. PW1 Samson Kimaki, PW2 Papaa Kimaki, PW3 Kimaki Dafu, PW4 Lambaigwa Shakaile, PW5 MG 494411 Gundo Mohamed and (PW6) E 3987 D/Sgt Yohana.

The substance of the prosecution case was that PW1 Samson is the son of PW3 Kimaki Dafu. On 26/09/2022, PW1 was grazing a herd of cattle that is 200 cows along Wami River in Bagamoyo. He met three people he described as "Mang'ati" (pastoralist tribe) He identified one of those people as the appellant. He said two of those people got into the mix of the herd of cattle and chased PW1 and his fellow. The appellant remained with some of the cows. PW1 reported to his father PW3 Kimaki Dafu that "*mangati*" had stolen their cows. At this point, PW3 noted that twenty cows were missing.

PW3 Kimaki Dafu in the company of others started searching for the missing cattle. On 28/09/2022, PW3 while at the appellant's house found a calf which they identified as one of the missing cattle. When they informed the police at Kiwanga about this discovery, the police told them to take a photo of the same and report it to the local leader for identification. The

Local leader could not be found and the next day when police arrived for further investigation the said calf was also missing.

The appellant was "arrested" by PW3 and his company and taken to the police station at Kiwangwa. According to the police who investigated the offense (PW6 Sgt Yohana), he relied on identification by PW1 and the version that a calf was found in the appellant's residence as one of the stolen cattle.

The appellant's defense was complete denial. He said, that when arrested on 26/09/2022 he knew nothing about the missing cows. Even the group of Maasai who arrested him did not know where the missing cow was.

It was the basis of this evidence the trial court found that the charge was proved beyond reasonable doubt. The trial court was satisfied that the appellant was well-identified by PW1. Dissatisfied, the appellant preferred this appeal setting five grounds: -

- 1. That, the trial Magistrate erred in law and in facts held that the prosecution proved the case against the appellant beyond reasonable doubt whereas not.*

- 2. That, the trial Magistrate erred in law and fact by basing its conviction on the weakness of the appellant's defense rather than on the strength of the prosecution case.*
- 3. That, the trial Magistrate erred both in law and fact by failing to evaluate the evidence properly and convicting the appellant.*
- 4. The trial Magistrate erred in law and fact to convict the appellant based on inconsistent evidence.*
- 5. The trial Magistrate erred in law and fact in convicting the appellant based on insufficient evidence.*

The appeal was heard by way of written submissions. The appellant had the service of Miss Evarista Kisanga and Yusuph Mkanyali learned advocates. The respondent was represented by Neema Kwayu, learned State Attorney.

Arguing the appeal, the appellant's counsel merged and submitted on grounds on 1st, 2nd, and 3rd arguing that, the prosecution side failed to prove the ingredients of the offense of theft provided under section 258 (1) of the Penal Code. This is to say, based on evidence on record, the prosecution

case did not establish who was the owner of the alleged stolen cattle between PW1 Samson and PW3 Kimaki.

As such it was argued that the evidence of missing 20 cows did not establish stealing by the appellant. He said the evidence by (PW1) did not prove an element of stealing specifically asportation. He cited the decision in **Director of Public Prosecutions vs Shishir Shyamsingh (Criminal Appeal 141 of 2021) [2022] TZCA 357**, CAT on page 11 to the effect that the elements of the offense of stealing are cumulative and must all be proved.

On the 4th and 5th grounds, the counsel for the appellant argued that there was no clear and proper identification done. Even PW3 did not say that the witness PW1 gave a clear description of the person who committed the offense before they arrested him. To buttress this argument, the decision in **Ombeni Nduminsari Mkini vs. Republic**, Criminal Appeal No. 37 of 2022 was cited arguing that identification should include the accused height and even the clothes worn. As such given decision in **Abdullah Bin Wendo vs. Republic** [1953] 20 EACA, since the alleged identification was by a single witness the same ought to be tested with great care.

Miss Neema Kwayu for the respondent submitted that the ownership of the stolen cattle was proved by (PW1) Miss Neema took a stance that (PW1) being the son of (PW3) Kimaki Dafa the words "our cows" and upon screening all evidence, should be broadly understood to mean property of PW3. It was also submitted that the fact that PW1 found a calf at the appellant's house corroborated (PW1) evidence.

On grounds no 4 and 5 it was the respondent's submission that the appellant was well known to PW1 thus the question of mistaken identity does not arise. Citing **Waziri Amani vs. Republic** 1980 TLR 250 it was argued that the condition was favorable for mistaken identity.

It is crystal clear and indeed a well-established principle that this court being the first appellate court has the power to re-evaluate the evidence on record and come up with its finding. See the case of **Kaimu Said v. Republic, Criminal Appeal NO 391/2019** which cited with approval the case of **Siza Patrice v. Republic, Criminal Appeal No. 19 of 2010 (unreported)** that:

"We understand that it is settled law that a first appeal is in the form of a rehearing. As such, the first appellate court must

reevaluate the entire evidence objectively and arrive at its finding of fact, if necessary.

Now in this appeal, the appellant's grounds of appeal boil down to two major issues that is whether there was theft in the first and secondly, whether the appellant was correctly identified as the person who committed the offence. I shall address these issues by reassessing the evidence on record.

On the first aspect of ingredients of stealing, I agree with the appellant's counsel that the elements of theft as enumerated in the cited case of **Shishir Shiyansigh** are cumulative and they must be proved. The appellant's counsel questioned who was the owner of the stolen cow pointing out that, PW1 Samson said his cow was stolen while PW3 Kimaki said he was the owner.

Miss Kwayu for Republic was of the view that screening the whole evidence would reveal that PW1 was the son of PW3 who was grazing PW3's cattle hence a family property of PW3. I agree with the counsel for the respondent because this evidence is reflected on the record.

On the aspect of asportation, I agree asportation is an important element of theft. There was evidence on record that after PW1 and PW2 had been chased away by people armed with spears PW3 cattle were nowhere to be seen. The words "lost" or "missing" as used by witnesses should not be taken narrowly without consideration of the circumstances surrounding the "loss" or "missing" of the cattle. I see no merit in this aspect.

The other aspect pointed out in the second ground that is there was failure of trial court to consider the appellant's defense. The appellant did not say a word on this in his submission, but assuming this was the case the omission will be curable. This is because this is a first appeal and this court has power to revisit the evidence see **Massanja Maliasanga Masunga & Others vs Republic (Criminal Appeal No. 328 of 2021) [2023] TZCA**. The 1st 2nd and 3rd grounds of appeal lack merit

On the complaint of identification, the evidence relied on by the prosecution is basically that obtained at the scene of the crime. Admittedly the offence was committed during daylight time. However, there are other considerations to consider in identification. PW1 in his evidence said.

"Accused remained with the cow while his fellow was chasing me one of them had a spear and another a sword, they chased me I ran toward my fellow who also ran we ran toward home"

PW2 testified how PW1 was running towards him. He said;

they started chasing him with spear and sword I was not far he ran towards me and I saw them coming to us while armed and making noises.

These "thieves" were not identified nor charged. PW1 said during this encounter the appellant remained with the cattle. It is on this condition that consideration ought to be made whether the conditions were favorable for unmistakable identity and whether the evidence by PW1 alone could safely be relied upon. My assessment is fortified by the decision in

Wamalwa and another v Republic [1999] 2 EA 358 (CAK) thus;

'The evidence of identification by Muliro was identification by a single witness in very stressful circumstances. The trial Magistrate did not appreciate this as he never warned himself of the danger of convicting on such evidence'

PW2 who was also grazing cattle his version on identification appears to be what he heard from PW1. This is because when PW1 ran towards him the

person they stated to be appellant remained with cattle. According to PW3 and PW4, they arrested the appellant at his *boma* after PW1 had pointed him. PW1 in his testimony said the appellant was familiar to him they met at Wami River. There were no details given on the appellant's description and what led PW2 PW3 and PW4 to go to his residence to arrest him. As such PW2 in his testimony on page 12 said;

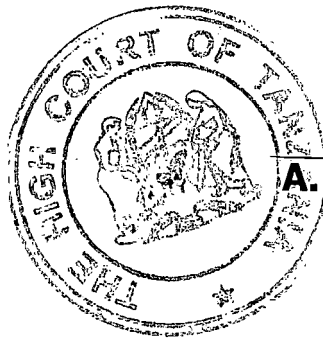
'We told the father that one of the accused we know by face since we normally meet at the river but we do not know his home'.

PW3 was the complainant who was in search of the cattle. This has to be taken with caution considering that the appellant was arrested by the complainants only. Unfortunately, the police officer PW5 did not investigate more than what he heard from PW1 and Pw3.

There was however another version from PW2 Papaa Kimaki, PW3 Kimaki Dafu, and PW4 Lambaigwa Shakaile that while in search of the missing cattle they found a calf at the appellant's residence. There was no evidence proving this fact, according to PW2 the police instructed them to report this to the local leader and take a photo. The trial court rightly found this not worth any weight. I thus find merit in the second complaint that

identification was not sufficiently done, the 4th and 5th grounds of appeal are allowed.

All said I find that this appeal was brought on sufficient reasons. The same is allowed. The appellant's conviction and sentence are set aside. He is to be released from custody unless otherwise lawfully held.




A. J. KIREKIANO
JUDGE

3/11/2023

COURT: Judgment delivered in presence of the appellant, Mr. Yusuph Mkanyali and Evarista Kisanga for appellant and in presence of Mr. Clarence Mhoja the state attorneys for respondent.

Sgd: A. J. KIREKIANO

JUDGE

3/11/2023