

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SUMBWAWANGA

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 39 OF 2023

(Original Criminal Case No. 144 of 2022 in the District Court of Kalambo at Matai)

PAUL S/O SINYANGWE 1ST APPELLANT
FREDRICK S/O KASIANO 2ND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

26/10/2023, 30/11/2023

JUDGMENT

MWENEMPAZI, J:

The appellant was arraigned in the District Court of Kalambo District at Matai herein after referred to as the trial Court for the offence of Stealing animals contrary to section 258(1) and (2) and 268(1) and (3) of the Penal Code, [Cap 16 R.E 2022]. It was alleged by the prosecution that the accused persons (the appellants) herein named on the 17th day of December, 2022 at about 23:00 hours at Kalepula 'A' Village within Kalambi District in Rukwa Region willfully and unlawfully did steal five animals to wit five cows valued at Tshs. 3,000,000/= the property of one DAUD S/O NG'HABI.

The appellant distanced himself from the commission of the offence when the charge was read over and explained to him. The case was heard and at the end the trial magistrate found him guilty and convicted him with the offence of stealing animals contrary to section 258(1) and (2) and 268 (1) and (3) of the Penal Code, [Cap 16 R.E 2022]. The trial Court meted the accused with a sentence to serve five (5) years in jail. This appeal has been filed to challenge the said decision of the trial Court (Hon. N.K. Temu – SRM). The appellant has raised four grounds of appeal, namely: -

1. That the defence of the appellant were very clearly and enough to discharge the accused's (appellants) from the offence of they are charged with, but the trial Court instead of doing so re – laid (sic) on the prosecution evidence and discounted the defence without comply with the statutory provision of law. Please refer in the case of **Bahati Kabuje Versus republic**, Criminal Appeal No. 252 of 2014, Court of Appeal of Tanzania at Mbeya (unreported) also **Henry Mpanwe and 2 Others Versus Republic [1974] L.R.T No. 50**.
2. That, the trial Court erred in law and fact for trying the matter in contravention with the principles of natural justice by admitting exhibit P2 which was prepared contrary to the law.

3. That the case against the appellants was framed and cooked by prosecution side in order to legalize the fraudulence of first appellant's salary.
4. That, the learned trial magistrate Court erred in law point and fact to convict and sentence the appellants while the prosecution side failed to prove the charge against the appellants beyond all reasonable doubts.

The appellants pray that the appeal be allowed, judgment and conviction be quashed and the meted sentence be set aside and they be set free from prison.

At the hearing the appellants were unrepresented and the Respondent was being represented by Mr. Mathias Joseph, learned State Attorney. The appellants were brief in their submission that they prayed their grounds of appeal to be considered and the appeal be allowed.

The Respondent's counsel in reply submitted that after going through the evidence and the grounds of appeal, they are opposing the appeal. For them the findings of the trial Court were proper. He prayed to submit generally on the appeal.

Mr. Mathias Joseph, learned State Attorney submitted that the findings in the case against the appellant depended on the doctrine of recent possession. They were found with the stolen property.

The counsel referred to the case of **Joseph Mkubwa and Another Versus Republic**, Criminal Appeal No. 94 of 2007, Court of Appeal of Tanzania at Mbeya page 7 – 8 where in there was listed factors for the doctrine of recent possession to apply. The factors are: **one**, the property was found with the suspect; **two**, the property is positively the property of the complainant, **three**, that the property was recently stolen from the complainant; and **lastly** that the stolen thing is possession of the accused constitutes the subject of charge against the accused. It must be the one was obtained during the commission of the offence charged.

It was argued that factors in the referred case were proved. Witnesses who were called PW1, PW2 and PW3 testified that during the night hours on 17/12/2022 they heard dogs barking. They went out and at the kraal they found five cows missing. They followed the trail. Ahead of them they found the appellants at Mosi river with the stolen cows. The appellants were arrested with the stolen cows.

The owner, PW4 was able identify the accused because he knew them before the date of the incident. They had an ample time to see them and identify them.

The accused persons were interrogated they could not explain how they came into possession of the cows. The cows were also positively identified by colour and special marks which he mentioned to be ticks.

It was the argument of the counsel for the respondent that since the identification was done physically in Court then the laws were complied. He cited the case of **Emmanuel Saguda @ Sulukula and Another Versus The Republic**, Criminal Appeal No. 422 'B' of 2013, Court of Appeal of Tanzania at Tabora (page 9 – 10) where it was held that identification of an exhibit must be physically in the proceedings before the Court. The stolen cows were tendered in Court by PW5.

PW5 tendered a seizure certificate as exhibit P2 and the appellants did not object (refer page 37 – 38 in the proceedings). It is a settled law that failure to object is an admission that the appellants were found with the properties and technically they are admitting to committing the offence. In the case of **Waziri Shabani Mizogi Versus The Republic**, Criminal Appeal No. 476

of 2019, Court of Appeal of Tanzania at Mbeya at page 30 it was held that signing of certificate of seizure meant acceptance that the narrotic drugs were found in his possession.

The doctrine of recent possession was properly applied and proved by PW1, PW2, PW3, PW4 and PW5.

The first appellant alleged the case is fabricated because he was claiming salary. In the proceedings when PW1 was testifying the 1st appellant did not raise my question to show that there was a conflict on the basis he alleged. Since the 1st appellant did not cross examine that means the testimony by PW1 is truthful.

I have read the record of the trial court, the proceedings and the judgment. Also, I have read the grounds of appeal and also heard the submissions made by the parties.

The appellants are aggrieved by the decisions of the trial court and they would like this court to overturn the decision and allow the appeal based on the ground of appeal raised. In my view the grounds as they have been coached to fault the trial magistrate in the evaluation of evidence which was tendered. Hence they argue, the decision arrived at is a wrong one.

This court being the first appellate court is empowered to re-assess the evidence and make its own finding while taking precautions that it had no advantage to observe the witnesses while tendering their evidence.

The issue in my view, is whether the appeal has merit. That question is dependent on the question whether the trial magistrate properly evaluated the evidence tendered in arriving at the impugned decision.

In my assessment, I have realized that the appellants were arrested with the alleged stolen cows as they were pushing them to their desired destination. The arrest was effected at around 23:00 hours. The owners of the cows was alerted of the event by the barking of the dogs he keeps at his kraal. Once he responded to the barking of the dogs, found the kraal has been broken and some cows were missing. He woke up the shepherd and neighbours, together they followed the trails of the footprints of the cows and the light which was being switched on and off. At Mosi River, they found the appellants and a child not charged with the five cows which were positively identified by the owner, PW1.

Efforts were made to involve the village leadership and militia men, which culminated by securing the appellants in the hand of police. PW5 G. 7827

D/Cpl. Alexander is the police officer who was involved in investigation of the case, he seized the cows and filed a seizure certificate which was admitted as exhibit P2. There were no objection. The same was signed by the Appellants.

It was decided in the case of **Waziri Shabani Mizogi Versus The Republic**, Criminal Appeal No. 476 of 2019 Court of Appeal of Tanzania at Mbeya that court quoting/citing **Song Lei Versus The Director of Public Prosecutions**, Criminal Appeal No. 16A of 2016 and 16 of 2017 (unreported) observed that: -

"Signing of the certificate of seizure by the appellant meant acceptance that the ^{narcotic} ~~narratic~~ drugs were found in his possession".

In a similar way, the appellants signed a certificate of seizure and also did not objection to its admission. It is clear they admitted the fact that they were found with the stolen cows. I have noted they did object to the admission of cows as exhibit. My view, is that once they admit to have been found with the cows, it is a futile exercise to deny they were not found with the cows.

This case, stood to convict the appellants relying on the doctrine of recent possession. The doctrine is applicable where the property is found with the suspect, it has been positively, identified as belonging to the complainant the property was recently stolen and lastly the property is the subject of the case in which the doctrine is being relied. **Refer Joseph Mkumba and Another Versus The Republic**, Criminal Appeal No. 94 of 2007, Court of Appeal of Tanzania at Mbeya.

In my view, the trial court properly applied the doctrine and no injustice was effected to the appellants. It is not true, in my view, that the defence by the accused/appellants was not considered, in the trial court judgment the defence evidence was considered.

For the reasons, the defence raised by the 1st appellant that he went to take his salary is incompatible with him being found with cows at river mosi while he was not authorized to take them.

For the reasons, I find the appeal has no merit and it is dismissed. The trial court decision is hereby upheld.


It is ordered accordingly.

Dated and signed at **Sumbawanga** this 05th day of December, 2023.


T.M. MWENEMPAZI
JUDGE

Judgment delivered in Court this 05th day of December, 2023 in the presence of the appellants and Mr. Ladislaus Michael, State Attorney and Ms. Neema Nyagawa, State Attorney for Respondent.




T.M. MWENEMPAZI
JUDGE
05/12/2023