

**IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA**

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**CRIMINAL APPEAL NO. 49 OF 2023**

*(Originating from Mlele District Court in Criminal Case No. 22 of 2023)*

**KELVIN SAULO.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*02/11/2023 & 07/12/2023*

**MWENEMPAZI, J.**

Before the Mlele District Court, the appellant was arraigned and prosecuted for the offence of Cattle theft contrary to Sections 258(1) and 268(1) and (3) of the Penal Code [Cap. 16 R.E. 2022].

The particulars of the offence charged were such that on the 05<sup>th</sup> day of February, 2023 at Kamsisi village within Mlele District in Katavi Region, the appellant, fraudulently and without claim of right, did steal three (3) cows all valued at Tshs. 2,000,000/= the properties of **ISARA MADIRISHA**.

The appellant pleaded not guilty to the charges. However, at the end of trial he was convicted as charged and sentenced to be imprisoned for five (5) years.

The appellant was dissatisfied. He preferred the present appeal consisting of four (4) grounds of appeal in which I find best to reproduce as hereunder;

- 1. That, the trial court erred at law and fact to hold that three of the complainant's cattle were stolen without proof of ownership.*
- 2. That, the trial court erred at law and fact to hold that the appellant stole three cattle without summoning as witnesses the children who were said to have grazed the remaining two cows.*
- 3. That, the trial court erred at law to admit the Certificate of Seizure as Exhibit P2 which was procured contrary to law.*
- 4. That, the trial court erred at law to convict the appellant with an offence which was not proved beyond reasonable doubt.*

In arguing the present appeal, the appellant appeared for himself as he had no legal representation. He argued that his grounds of appeal be

considered and that this court should allow this appeal and he be released from custody.

On the other hand, Mr. Mathias Joseph, learned State Attorney represented the respondent and he straight away submitted that his side opposes this appeal and that the trial court was correct in its decision. He added that he will respond to the grounds of appeal generally.

Mr. Mathias started off by arguing that, the appellant was convicted based on the doctrine of recent possession. He proceeded further that, to succeed in this doctrine, there are elements to be proved, in which he referred me to the case of **Joseph Mkumbwa & Another vs the Republic**, Criminal Appeal No. 94 of 2007, Court of Appeal of Tanzania at Mbeya at page 7, where the Court held the elements of Recent Possession to be: -

1. The property was found with suspect.
2. The property is positively identified.
3. The property was recently stolen from the complainant.
4. The property constitutes the subject matter of the case.

The learned State Attorney argued that, the prosecution witnesses testified that on the 05/02/2023, the appellant was found with three cows about to slaughter them. That, the appellant had no reasonable explanation when asked. That, the leadership was involved and upon interrogation he admitted while in the village office and that, the appellant attempted to escape as per PW4.

Mr. Mathias argued further that PW1, the complainant was able to identify the cows by distinctive marks on the legs, color and was able to identify the cows in Court, and that there was no objection from the appellant.

In addition to that, he argued that the evidence of PW1 was corroborated by all witnesses who testified that even before PW1 was shown the cows, he mentioned the distinctive marks.

The learned State Attorney then submitted that on the third element, that the property was recently stolen, it is the evidence of PW3, PW4 who all stated about the event of stealing of the cows. That, it is clearly that the prosecution executed its duty to prove the case to the standard required by law.

Concerning the failure to summon witnesses who were grazing the cows, Mr. Mathias argue that summoning of witnesses is to be the discretion of the prosecution side, and he cited section 143 of the Evidence Act, in support of his argument. However, he referred this court to the case of **Abdallah Kondo vs Republic**, Criminal Appeal No. 322 of 2015 Court of Appeal of Tanzania at Dar es Salaam where the Court held that it is prosecutions who have the discretion on the kind of evidence to be tendered.

Conclusively, he submitted that in this case, exhibits were tendered which were, the stolen cattle, seizure certificate and the chain of custody. That, the appellant signed the certificate of seizure and he never objected to the same, in which it entails he admits to the evidence. Therefore, Mr. Mathias prayed for this Court to upheld the trial court's decision and dismiss this appeal.

After the submissions from both sides, I carefully went through the records of the trial court and the four (4) grounds of appeal filed to this court. When one reads the grounds of appeal keenly it would be noticed that they all can be boiled down into one general ground that, the appellant's case was not proved to the required standard before the trial

court. Therefore, an important question that arises herein is, ***whether the finding of guilty was justified by the evidence on record.***

The evidence on record has that PW1 as the complainant realised about his missing cattle in the morning of the 5<sup>th</sup> of February, 2023. He straight away concluded that his cattle were stolen and initiated a search in which later that day he was informed that his missing cattle were found and they are at the Village Executive Officer's (PW4) office and the culprit is apprehended. See page 8 of the trial court's typed proceedings.

The trial court's decision is based on the corroborative evidence of PW2, PW3, PW5 and PW4 as seen on page 7 of the trial court's typed judgement, that the appellant was the one who was found with the missing cattle and that he had confessed before the VEO that it is true he had stolen the said cattle. Nevertheless, here at this court, the learned State Attorney submitted that the appellant conviction was the result of the doctrine of recent possession where all the ingredients of the said principle (*supra*) were fulfilled in this matter.

This court being the first court of appeal, I choose to defer with the findings of the trial court after re-evaluating the evidence before me.

Looking at the prosecuting evidence, I was not able to underline where it was proved beyond all reasonable doubt that the accused person did steal PW1's cattle. The prosecution did not prove one of the elements of the doctrine of recent possession. At page 8 of the trial court's typed proceedings, when PW1 was testifying he never told the trial court that he had reported to any authority about the missing cattle, but he instead initiated a search himself and later on he was informed that his cattle were found. It is in the records that, none of his witnesses testified that neither there was a report of missing cattle nor they witnessed the appellant stealing the cattle from PW1. In addition to that, PW2's testimony found at page 10 of the trial court's typed proceedings, as the seizing officer, he never testified that there was any report filed at his work station of either missing cattle or stolen cattle. He testified that, as he was informed that there was a person caught with stolen cattle at the VEO's office, and so he and his colleagues headed to where the appellant was apprehended. Similarly, PW4, the VEO never testified that there was a report filed to her which concerns either missing cattle or stolen cattle, but she did testify that the appellant was taken to her by PW3 and she was told that the appellant stole the cattle.

The fact that the appellant was caught with one of the cattle attempting to slaughter the same, it does not automatically mean he was the thief, since there was no any report of stolen cattle. In my opinion, the cattle could have broken the kraal as it is in most cases, and that is why the prosecution evidence is wanting.

In his defence as found at page 22 of the trial court's typed proceedings, the appellant stated that he was tortured to accept that he did steal the said cattle. In relation to this claim by the appellant, the prosecution never tendered in evidence the confession they claimed to have been made by the appellant.

The learned State Attorney rightly submitted before me that for the doctrine of recent possession to succeed, there are ingredients to be proven. Among the ingredients is that *the property must have been recently stolen from the complainant*. In my perusal, this fact is missing, as there is no witness who had proved before the trial court that PW1's cattle were stolen, and that the appellant is the culprit. Therefore, the doctrine was improperly invoked.

In **Republic vs Kowlyk** [1988] 2 SC R. 59. The supreme Court of Canada held thus:-



*"The doctrine of recent possession may be succinctly stated Upon proof of the unexplained possession of recently stolen property, the trier of fact may - but not must draw an inference of guilt of theft or of offences incidental thereto. This inference can be drawn even if there is no other evidence connecting the accused to the more serious offence. When the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon consideration of all the circumstances to decide which if either inference should be drawn. **The doctrine will not apply when an explanation is offered which might reasonably be true even if the trier of fact is not satisfied of the truth.**"*

[Emphasis is Mine]

According to my deep analysis of the records at hand, I find it judicious if the appellant was to be charged with Section 312 of the Penal Code, where the cattle found with him were suspected to be stolen but not Sections 258(1) and 268(1) & (3). It is therefore correct to hold as I do that, the charge against the appellant was not proved to the required standard.

For the foregoing reasons, I allow this appeal as the guilt of the appellant was not proved by the prosecution side. Consequently, the appellant's conviction is quashed and the earlier imposed sentence is hereby set aside. The appellant is to be released immediately from custody unless he is otherwise lawfully held.

It is so ordered.

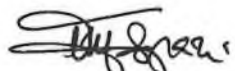
Dated and signed at **Sumbawanga** this 07<sup>th</sup> day of December, 2023.



**T. M. MWENEMPAZI**

**JUDGE**

Judgment delivered in the judge's chamber this 07<sup>th</sup> day of December, 2023 in the presence of Appellant and Mr. Ladislaus Michael and Ms. Neema Nyagawa, learned State Attorneys for the respondent.



**T. M. MWENEMPAZI**

**JUDGE**

**07/12/2023**