

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA  
(IRINGA SUB-REGISTRY)**

**AT IRINGA**

**DC CRIMINAL APPEAL NO. 66 OF 2023**

**KITEO SAID TARUSE ..... APPELLANT**

**VERSUS**

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

(Appeal from the Judgment of the District Court of Iringa at Iringa)

**(Hon. S.A. Mkasiwa - PRM)**

**dated the 02<sup>nd</sup> day of December, 2021**

**in**

**Criminal Case No. 122 of 2020**

**JUDGMENT**

Date of Last Order: 11/03/2024 &  
Date of Judgment: 22/03/2024

**S. M. Kalunde, J.:**

On the 20<sup>th</sup> October, 2020, at the District Court of Iringa sitting at Iringa (henceforth "the trial court"), the appellant, KITEO SAID TARUSE, and two other persons namely HENRY MASANGULA and AVELINO KEWE, were jointly charged with cattle theft contrary to sections 268 and 258(1) and (2)(a) of **the Penal Code [Cap. 16 R.E. 2019]**. The particulars of the count alleged that on the 13<sup>th</sup> day of September, 2020, at Makombe Village within Iringa Rural District in

Iringa Region, the appellant together with his accomplice, did steal eighteen (18) cows, valued at TZS. 12,600,000/=, the property of Yassin Ally. The trial court acquitted the other two accused persons and returned the verdict of guilt against the appellant. Accordingly, he was convicted and sentenced to ten (10) years imprisonment.

The evidence against the appellant was that: on the 13<sup>th</sup> day of September, 2020, Yasin Ally (**Pw2**), a pastoralist from Makombe Village noticed that eighteen of his cows were missing from the kraal. In the same evening he informed his neighbours Kibilandi Nyamhanga and Castro Nyamhanga. Together they went out tracing the cow hoof prints from Makombe Village to Tungamalenga village. However, they were not successful. On the 15<sup>th</sup> day of September, 2020, Pw2 reported the matter at Ifunda Police Station.

Upon reporting the matter to the police, Pw2, went back home. Upon further enquiry to his fellow villagers, he was notified that some people applied for permits to the Gaudencia Finias (**Pw4**), the Village Executive Officer, for transportation of six cows. In her testimony, Pw4 informed the court that on the 12<sup>th</sup> day of September, 2020, at around 19:00Hrs, the appellant called her requesting for six permits for cow transportation. According to Pw4, the appellant informed him that the

permits will be collected by Ancet Nyamhanga (**Pw1**). The next day on the 13<sup>th</sup> day of September, 2020, Pw1 collected the permits from Pw4 and handed them to the appellant. according to Pw1 the permits authorised the appellant to transport six cows.

An investigation into the matter was commissioned, several days later the appellant was arrested whilst at Katesh, Manyara Region. He was brought back to Ifunda Police Station for interrogation during which he admitted having stolen the cows and sell them to Avelino Kewe, a resident of Lugoga, Kitali Village. On the 28<sup>th</sup> day of September, 2020, police officer investigating the matter proceeded to Lugoga, Kitali Village. whilst there they reported to the village chairman, one Silas Kiwuyo (**Pw3**). Thereafter, they proceeded to interrogate Avelino Kewe.

During interrogation, the said Avelino Kewe admitted to have purchased six cows from the appellant but informed the entourage that he had sold three of them and only three remained. The three cows were confiscated and certificate of search and seizure was prepared and signed by the relevant parties. A copy of the certificate of search and seizure and the six permits were admitted as **Exhibit P1** and **P2** respectively.

In his defence, the appellant together with his accomplices denied the charges. Unfortunately, the appellants denial did not save him. He was convicted and sentence as indicated earlier.

Aggrieved by the decision of the trial court the appellant has preferred the present appeal. His memorandum of appeal filed to this court on the 21<sup>st</sup> day of July, 2023 contains the following grounds of appeal (as reflected in the memorandum of appeal):

- "1. That, the learned trial magistrate erred in law and fact to convict and sentence the appellant on the offence of cattle theft while no any witness of the prosecution side testimony before the court of law that appellant was seen stole the cattle.*
- 2. That, the learned trial resident magistrate erred in law and sentence the appellant relying on defective charge by writing the offence is cattle theft while all witness adduced on issue of possession the cows and not stole the cows which are so ambiguities and uncertain charge.*
- 3. That, the learned trial magistrate contradicted himself to believe the PW2 evidence is true that he is the owner of such six cows and ignored to DW3 that such six cows were owned from his relative without PW2 proved to own such six cows (no any document or person witnessed such cows shows its owned by PW2), hence the judgment was not fairness to the appellant.*

4. *That, the learned trial magistrate erred in law and fact to convict and sentence the appellant on believing the evidence of PW2 that his 18 cows were stolen without considering that such large number of cows (18) disappeared must be a village announced loudly to its citizen to search on it till to other nearest villages, failed to do that the evidence of PW2 became so weak evidence to prove that 18 cows being stolen.*
5. *That, the learned trial magistrate erred in law and fact to convict and sentence the 3rd accused (appellant) and to execute the 1st and 2nd accused only while the whole evidences adduced before the court of law were not proved the same against to the 3rd accused (appellant).*
6. *That, the learned trial magistrate erred in law and fact to sentence the appellant based only on ambiguities, contradictory and uncertain evidence adduced by prosecution side with weak evidence adduced by PW2, hence all proceeding an judgment of the trial court become nullity and improperly entered for justice to stand and be seen to all persons who seek for justice be protected.*
7. *That, the learned trial magistrate misdirected himself to believe that its so simple to get six cows from 18 stolen cows and the remained 12 cows be not corrected without PW2 continued to find the remains cows, hence this situation shows that the case was planted against appellant.*

*8. That, the prosecution side failed totally to prove this case against the appellant beyond reasonable doubt."*

Before the court for hearing of the appeal, the appellant was unrepresented, he thus defended himself. The respondent, on the other hand, was represented by Mr. Daniel Lyatuu, learned State Attorney.

The appellant, a lay person, did not have anything of value to submit on his grounds of appeal. He urged the court to adapt and consider the grounds of appeal and set him free. Unaware of the substance of his complaints, the appellant opted to leave the prosecution to submit and respond thereafter.

At the very outset, Mr. Lyatuu informed the court that the republic was supporting the appeal on the ground that the prosecution failed to establish the charges against the appellant beyond reasonable doubt. The learned state counsel submitted that there was no dispute that the appellant was charged with cattle theft. He added that, it was on record that Pw2 stated that he was given three cows as part of the alleged stolen cows. The learned counsel added that there was no evidence on record that the said cows were tendered in evidence. According to the learned state attorney, it was not sufficient to tender the certificate of search and seizure (Exh. P1) without tendering the

recovered cows. To support this contention, the learned counsel cited the case of **Fai Juma Bayonga vs Republic** (Criminal Appeal 1 of 2021) [2021] TZHC 3807 (28 April 2021) TANZLII.

After a careful consideration of the submission of the parties and the record before me including the grounds of appeal, I am of a decided view that the issue for my consideration is whether the charge against the appellant was proved to the required standard.

Undeniably, under section 268 and 258 of the Penal Code, stealing of an animal is offence. For ease of reference section 268 provide as follows:

***"268.- (1) Where the thing stolen is any of the animals to which this section applies the offender shall be liable to imprisonment for fifteen years.***

*(2) Where any person kills any animal to which this section applies with intent to steal its skin or carcass or any part of its skin or carcass he shall, for the purposes of section 265 and this section, be deemed to have stolen the animal and shall be liable to be proceeded against and punished accordingly.*

*(3) This section applies to a horse, mare, gelding, ass, mule, camel, ostrich, bull, **COW**, ox, ram, ewe, whether, goat or pig."*

[Emphasis is mine]

It is worth noting that, section 268 quoted above is part of Chapter XXVII of the Penal Code, which deals with offences related to theft. For purposes of Chapter XXVII, stealing has a meaning prescribed under section 258 which states as follows:

*"258.- (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing.*

*(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say-*

*(a) an intent permanently to deprive the general or special owner of the thing of it;*

*(b) an intent to use the thing as a pledge or security;*

*(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;*



*(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion; or*

*(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner,"*

The two sections read together makes it an offence for a person to steal any animal a property of another person. From the definition of theft under section 258 quoted above, four distinct general requirements can be distilled: (1) there must be the element of fraud or lack of claim of right; (2) there must be 'taking' or 'conversion' (3) the taking or conversion must be for one's own use or any other person's use; and (4) the thing so taken or converted must be capable of being stolen.

It is trite that for the prosecution to succeed in any criminal trial, they must establish all the ingredients or elements of the offence. In the instant case, the allegation was that the appellant stole a heard of eighteen cows, the property of the Pw2. There was evidence from Pw2, Pw3 and Pw4 that on the 28<sup>th</sup> day of September, 2020, police officers investigating the matter recovered three cows from one Avelino Kewe a

resident of Lugoga, Kitali Village. Upon completion of the seizure of the recovered cows, a certificate of search and seizure (**Exhibit P1**) was prepared.

In the charge of stealing a herd of 18 cows under sections 268 and 258 of the Penal Code, it was incumbent upon the prosecution to establish that a herd of 18 cows was stolen from Pw2 by the appellant. The requirement to identify the property stolen and exhibit it evidence was stressed by the Court of Appeal in the case of **Emmanuel Sang'uda @ Salukuka & Another vs. The Republic**, Criminal Appeal No. 422 "B" of 2013 (unreported), which was relied by my brother at the bench **Arufani, J**, in the case of **Fai Juma Bayonga vs Republic** (supra). In that case, the Court stated that:

*"It is a well established practice that in cases where witnesses are required to testify on a document or object which would subsequently be tendered as exhibit that the procedure is not simply to refer to it theoretically as was the case here, but to have it physically produced and referred to by the witness before the court either by display or describing it and then have it admitted as an exhibit."*

Considering the above authority, for the sake of establishing the offence under sections 268 and 258 of the Penal Code, the prosecution ought to have led the complainant (Pw2) to identify the object before

they were tendered in evidence and proceed to tender the same in evidence. The requirement to properly identify each of the stolen heard of cattle was stated in the case of **Stayoo Kundai vs Republic** [2008] T.L.R. 352 [CA]; (Criminal Appeal 267 of 2007) [2008] TZCA 36 (25 July 2008) TANZLII, where the Court (Lubuwa, J.A), at page 12, stated:

*"There is also the aspect regarding the unsatisfactory identification of the two head of cattle which it was alleged were found with Kundai, the father of the appellant. PW1, the complainant was unable to identify the specific marks showing that the two cows and the goats were among those stolen from him. This, again as correctly urged by Mr. Mushokorwa and Mr. Lukosi, further rendered the case against the appellant even weaker. In more or less similar situation, In the case of **Ally Bakari v. R** [1992] TLR 10, the complainant could not identify the sewing machine as his, the Court held that the guilt of the appellant had not been proved beyond reasonable doubt. In similar vein, in this case on this ground alone, it is highly doubtful that the guilt of the appellant could be said to have been proved conclusively."*

The same approach was taken by the Court in the case of **Slaa Hintay vs Republic** (Criminal Appeal 179 of 2008) [2011] TZCA 219 (28 September 2011) TANZLII, at page 8, where the Court (Nsekela, J.A) observed as follows:

*"The case against the appellant depends in part on the identification evidence of the cows and goats found in possession of the appellant. The evidence regarding*

*armed robbery was not conclusive. It was alleged by PW1 that the appellant was one of the bandits who perpetrated the armed robbery at his residence. We have already found that the evidence of identification by PW1 at the scene of the crime was insufficient. However, PW2 and PW3 testified that after a search had been mounted, the appellant was found with the stolen cows belonging to PW1. He was arrested, but other bandits managed to escape. PW2 testified that three of the eight cows were black; one had a white spot on the back; one was red and another one was grey. Those were the identifying marks that enabled PW2 to testify that the cows belonged to PW1. Significantly, PW1 in her testimony did not mention any identifying marks of her stolen cows. Under the circumstances we have found it extremely difficult to link up the appellant with the offence of armed robbery. Can it be conclusively said that the cows were stolen during the armed robbery?"*

In the quoted case, having observed that there was no link that the cows belonged to Pw1 and were stolen as a consequence of an armed robbery at her homestead, the Court concluded that there were doubts which have to be resolved in favour of the appellant.

In the case under consideration, Pw2 allegedly made a positive identification of three of the stolen cows. His description of the said cows is reflected on page 31 of typed proceedings of the trial court where he stated:

*"I managed to identify the remained three (3) cows. I identified my cows since I know them properly. I found two female and one male. One of the male cows was red*

*color with black skin at the side. One female was white with black spots and scared skin at the shoulder. The third one is black in colour with red small spots at the neck.*

*After identifying them the cows were handling over to the Village Officer and prepared the documents of handling over, witnessed by Policeman of Ifunda Police Post."*

In accordance with the above testimony, it would appear that after identifying the cows and certificate of search and seizure was prepared and the cows were confiscated and kept under police custody. According to Pw2, a photograph of the cows was taken and thereafter he was called to collect his cows. Part of his testimony regarding this aspect reads:

*"Thereafter I was called by policeman and told that they had already taken the photograph of my cows as exhibits and directed me to go and take my cows. VEO prepared handing over documents whereby the cows brought to my place."*

The question now is whether this was an appropriate procedure to adopt in disposing the heard of cows recovered. The procedure for handling and disposal of exhibits before, during and after trial is governed by the provisions of section 353 of **the Criminal Procedure Act [Cap. 20 R.E. 2022]**. The respective section provides that:

*"353.-(1) Where anything which has been tendered or put in evidence in any criminal proceedings before any court has not been claimed by any person who appears to the court to be entitled thereto within a period of twelve months after the final disposal of the proceedings or if any appeal is entered in respect thereof, the thing may be sold, destroyed or otherwise disposed of in such manner as the court may by order direct and the proceeds of its sale shall be paid into the general revenues of the Republic.*

*(2) Where anything which has been tendered or is intended to be tendered or put in evidence in any criminal proceedings before any court is subject to speedy and natural decay the court may, at any stage of the proceedings or at any time after the final disposal of such proceedings, order that it be sold or otherwise disposed of but shall hold the proceeds of the sale and, if unclaimed at the expiration of a period of twelve months after the final disposal of such proceedings or any appeal entered in respect thereof, shall pay such proceeds into the general revenues of the Republic.*

*(3) **Notwithstanding the provisions of subsection (1), the court may, if it is satisfied that it would be just and equitable so to do, order that anything tendered, or put or intended to be put in evidence in criminal proceedings before it should be returned at any stage of the proceedings or at any time after the final disposal of such proceedings to the person who appears to be entitled thereto, subject to such conditions as the court may see fit to impose.***

*(4) Any order of a court made under the provisions of subsection (1) or (2) shall be final and shall operate*

*as a bar to any claim by or of any interest in the thing by virtue of any title arising prior to the date of the order.*

- (5) Where an order is made under this section in a case in which an appeal has been lodged the order shall not, except when the property is livestock or is subject to speedy and natural decay, be carried out until the period allowed for lodging an appeal has elapsed or, when an appeal is lodged, until the appeal has been disposed of.*
- (6) In this section the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party but also any property into or for which it has been converted or exchanged and anything acquired by such conversion or exchange whether immediate or otherwise.*
- (7) For the purpose of this section, "court" includes court before which an accused person appears before he is committed for his trial."*

[Emphasis is mine]

Under section 353(3) quoted above, the trial court has powers to order a return of anything intended to be put in evidence in criminal proceedings before such court to the person who appears to be entitled thereto, subject to such conditions as the court may see fit to impose. It would appear that, in the present case, the livestock's allegedly stolen and recovered were handed over to the purported owner without there being an order of the court.

It is also evident that the said items were not properly identified by the complainant because there was no satisfactory description of the said cows before the Court. A description of a domesticated animal, be it a cow, goat or sheep, by colors, without there be a confirmation that it is the same cow that was identified which is tendered in evidence is as good as no identification.

Even assuming, for arguments sake, that Pw2 made a proper description of the cows. It is clear from the records that after the description made by Pw2 the cows were not tendered in evidence, instead a certificate of search and seizure (Exh. P1) was tendered. The failure by the prosecution to tender the alleged cows in court prejudiced the appellant because it denied him an opportunity to verify the correctness of the description and identification made by Pw2. In the same vain, the trial court was also placed in a precarious position to resolve whether the cows confiscated and stated in the certificate of search and seizure, exhibit P1, belonged to the complaint and were indeed stolen by the appellant.

It is worth noting here that, in his testimony the complainant, Pw2, narrated that the cows were given to him after a photograph had been taken by the police officers investigating the matter. However, the



prosecution did not attempt to bring the said investigative officers or the stated photographs to add credence to its case.

In light of the failure to properly identify and tender the evidence of the stolen cows, it is the finding of this court that there is no link between the cows allegedly stolen and the cows allegedly recovered from one Avelino Kewe at Lugoga, Kitali Village and exhibited through Exh. P1. Suffice to say that the charge against the appellant was not established to the required standard.

In the event, the appeal is allowed; the appellants' conviction is quashed and his sentence is set aside. It is also the order of this court that the appellant is to be released forthwith from custody unless otherwise lawfully detained.

**It is so ordered.**

**DATED at IRINGA this 22<sup>ND</sup> day of MARCH, 2024.**



  
**S.M. KALUNDE**  
**JUDGE**