IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOROGORO SUB-REGISTRY

AT MOROGORO

CRIMINAL APPEAL NO.40803 OF 2023

(*From original Criminal Case No. 04/2023 of Kilosa District Court of Kilosa dated 23/11/2023 before Hon. J.J. Rushwela, SRM*)

ISAKA DAGLAS ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

18/03/2024 & 27/03/2024

KINYAKA, J.

The appellant, Isaka Daglas was jointly charged with Daymoni Joashi before the District Court of Kilosa, at Kilosa for the offence of cattle theft contrary to sections 258(1) and 268 (1) of the Penal Code Cap.16. R.E. 2022). It was alleged by the prosecution that the appellant and Daymoni Joashi stole 7 herds of cow valued at 5,600,000/= the property of Yohana Neemia.

After a full trial, the prosecution case was proved only against the 1st accused (the appellant herein) who was consequently convicted and sentenced to two years imprisonment.

Dissatisfied, the appellant preferred the instant appeal seeking to challenge the decision of the district court of Kilosa, herein referred as "the trial court" on ten (10) grounds of appeal as reproduced hereunder:

1. That, I entered the plea of not guilty that I did not commit the said offence.
2. That, the trial magistrate erred in law and fact by convicting and sentence the appellant in the case where the prosecution failed to prove his guilty beyond reasonable doubt.
3. That, in considering the evidence adduced by the prosecution there were no case to answer on the part of the appellant, because there is a lot of doubts on the part of prosecution but the trial magistrate erred in law and fact base on that evidence.
4. That, trial magistrate erred in law and fact by convicting the appellant with contradictory evidence because the name of appellant is Isaka Daglas Mwisolwa while in the charge read Isaka Daglas.
5. That, the trial magistrate erred in law and in fact by convicting the appellant while the police failed to investigate and interrogate the case clearly because if the appellant was the one who stole the said cows why did the appellant escape.

6. That, the trial magistrate erred in law and fact where by the police officer who investigated the case failed to identify the permit which allowed those cows was the property of PW1 or not.
7. That, the trial magistrate erred in law and in fact by receiving the evidence of PW6 who interrogate and investigate the case while the appellant was still feeling pain because he was beaten with those people therefore that interrogation is against Tanzanian Evidence Act section 27(3).
8. That, if appellant was a passenger and help those escaped people the trial court erred in law and in fact by connecting him with the case.
9. That, the trial Court erred in law and in fact by convicting the appellant with the different name of PW1 in the copy of judgement Yohana while in the proceedings Yohana Nahemia Mwangile.
10. That, the trial magistrate erred in law and in fact by convicting the appellant only while the second accused was the one who carried the said cows.

Before me, the appellant Isaka Daglas appeared personally and unrepresented while Mr. Shaban Kabelwa, the learned State Attorney

entered appearance for the respondent. Hearing of the appeal proceeded through oral submissions.

The Appellant was the first one to address the court. On his brief submission in support of the appeal, the appellant argued that the offence fronted against him was not proved beyond reasonable doubts. He said there was no proof as to whether the car that was confiscated was the one seen by PW1 in the bush carrying the cows. Similarly, the appellant believed that there was no proof of ownership of the stolen cows and complained further that the stolen cows were neither brought before the court as exhibits nor identified by PW1.

On his part, Mr. Kabelwa the Learned State Attorney, conceded to the appellant's appeal specifically on the 1st ,2nd ,3rd ,4th and 5th grounds of appeal revolving around a complaint that the case against the appellant was not proved beyond reasonable doubt. He stated the reasons towards his concession to be; the contradictions by the prosecution witness on identification of the stolen cows and the scene of crime, failure to produce the cows in court and failure to establish the chain of custody of the cows.

Nevertheless, the learned state attorney conceded to the fact that the trial court erred to rely on the evidence of the co-accused to convict the

appellant and also that the appellant was denied with the right to be heard.

Manifesting the contradictions on the evidence of the prosecution, the learned state attorney specified that there were contradictions on the prosecution evidence concerning the identification of stolen cows and the scene of crime.

Illustrating the contradictions on identification of stolen cows, the learned state attorney submitted that PW1 who was the owner of the cows, in paragraph 2 of page 9, last two lines, testified to be capable of identifying the stolen cows based on colour and marks. He said the witness testified that one cow had an earring on its ear and the other was cut twice on its ear. Mr. Kabelwa said, PW1 neither stated the colour of the cow nor the type of a mark of the cow, and that he did not state which between the two cows, had an earring and which had marks.

Referring this court to page 11 of the typed proceedings, the learned state attorney submitted that PW2 testified to have seen two cows, one being red with earing on his ear and the other one to be of black-brown colour mixed with white colour being cut twice on its ear.

Still portraying the contradictions, he referred this court to page 12 of the trial court typed proceedings and submitted that PW3 testified to have

seen a red cow with earing on his ear and the other was of black and white colours. He contended further that PW4 the police officer who arrested the cows, on page 13, 1st paragraph of the typed trial court proceedings, testified that he arrested two cows, one was white coloured and another red coloured.

At the end, he concluded that the witnesses failed to identify the stolen cows on their colours and marks, which were, the earring and cuts on their ears. He expounded further that PW1 who was the owner of the cows, failed to identify and state the colours and marks and also that he failed to state that uniqueness of his cows including the marks he made to his cows. To sum up Mr. Kabelwa was of the view that the contradictions are material to the prosecution case.

Expounding the contradictions regarding identification of the scene of crime, the learned state attorney submitted that PW1 testified on page 9 paragraph 2 that he was informed by Richard Anold that he saw the car loaded with cows entering the bush. At the same time, PW6 testified that he was informed by DW2 that the 1st accused had hired him to carry the cows to Surya cattle market.

He complained that PW6 did not testify on the place where DW2 met with the appellant and a place where the cows were loaded to DW2's car. Mr.

Kabelwa went further by referring this court to the evidence of DW2 and submitted that DW2 stated that when he reached Ibindo area, he met three persons including the appellant where the agreement to carry the cows was concluded and the cows were loaded in the car. The learned counsel concluded that Ibindo area is different from the bush as testified by PW1. He contended further that PW1 did not mention the area in the bush and it was not proven that the bush was around or in Ibindo area. At the end, he established that the contradictions were material to the prosecution case.

As for the trial court's reliance on the evidence of the co-accused in convicting the appellant, the learned state attorney referred this court to page 3 of the trial court's judgement, and submitted that, the trial magistrate relied on DW2's testimony to convict the appellant. He maintained that the prosecution evidence does not corroborate the testimony of DW2. He lamented further that the trial court erred in relying on the said evidence without warning itself on the danger of convicting the appellant on the evidence of co-accused. To support his stance, he was fortified with section 33(2) of the Evidence Act, Cap. 6, R.E. 2022 and the case of **Baven Hamis & Others v. R, Criminal Appeal No. 99 of 2014**.

He submitted further that, the confession of DW2 was not taken in accordance with the law as the evidence of PW6 clearly established that he took DW2's statement on 05/01/2023.

Comparing the evidence of PW3, PW4 and PW6, the learned state attorney submitted that the evidence suggests that the accused persons were arrested at night around 1:00 am, but the evidence of PW6 is that he took caution statement of DW2 in morning hours. He contended that there was no specific time indicated between 1:00 am when the accused persons were arrested and the time when DW2's caution statement was taken, the absence of which create doubt as to whether DW2's statement was taken within the time prescribed by the law, and whether or not he admitted to commit the offence.

Speaking on the appellant's rights to be heard, Mr. Kabelwa submitted that DW1 was not given the right to examine DW2. He found it to amount to the denial of appellant's right to be heard contrary to the Constitution of the United Republic of Tanzania of 1997 as amended from time hence vitiating the entire proceedings and the resultant judgement. Suggesting on the way forward he contended that ordinarily he would have prayed for retrial but he was of the view that there are many gaps in the prosecution case in which retrial is not proper in the circumstances.

Concerning the issue of presenting the cows before the court, the learned state attorney submitted that the alleged stolen cows were not presented to court. He is of the view that such piece of evidence was material in order to prove that the cows were stolen as identified by the prosecution witnesses. Mr. Kabelwa substantiated that even the chain of custody of handling the cows was not established. He referred the evidence of PW4 and PW5 during the trial and submitted that PW4 testified that he arrested two cows but it is not shown whether the cows were handed to PW5.

At the end, he concluded that the prosecution failed to prove its case for its failure to produce the cows in court, failure to establish the chain of custody of the cows, and the contradictions of identification of the cows by the prosecution witnesses.

There was no rejoinder from the appellant.

I have examined and considered the grounds of appeal, records of the trial court as well as the submissions made by the parties. The crucial issue for determination is whether or not the instant appeal has merits. I will make a deliberation on the grounds as submitted by the appellant and conceded by the state attorney in *seriatim* as they were argued.

I will begin with the issue of the contradictions on prosecution evidence. Having scanned the evidence on record, I agree with the learned state

attorney that there were contradiction on the evidence of the prosecution witness regarding the identification of the stolen cows and the scene of crime. The evidence shows as rightly submitted by the state attorney that PW1 who was the owner of the cows failed to state the colour of the stolen cows but only described that one had earring and the other had two ear cuts. On the other hand, PW2 gave evidence that he saw two cows, one was red colored and had earing on his ear, and the other one was black-brown and white and was cut twice on its ear, while PW3 testified that he saw a red cow with earing on his ear and the other was of black and white color. On his part, PW4 the witness who arrested the accused with the cows testified that one was white and another red.

As to what was the exact scene of crime, I agree with the state attorney that there was no adequate evidence from the prosecution to describe the scene of crime given the circumstances of the case. However, I disagree with him as to the contradiction he has pointed out from PW1 and PW6's testimonies as regard to the crime scene. I say so because at the onset, the said testimony from the said witnesses ought to have been accorded little weight as they were all hearsays. While PW1 told the court that he got the information from one Richard Anody (see page 10 of the typed proceedings), PW5 gathered the said information from the second

accused (DW2) upon interrogating him. It follows that, there was no direct evidence adduced by the said witnesses on the place in which the alleged theft took place, sufficient to subject the same under scrutiny as to whether the same were contradictory or not. With such observation, I will only resolve the complaint as to discrepancy in the identification of stolen cows.

It is the principle of the law that minor contractions or discrepancies in the evidence which do not go the root of the matter should be ignored. The Court of Appeal propounded the principle in a number of cases. **In Chrisant John v. R., Criminal Appeal No. 313 of 2015** (CAT unreported) on page 19 through to 20, it stated:-

> *"Contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However, in considering the nature, number and impact of contradictions, it must always be remembered that witnesses do not always make a blow by blow mental recording of an incidence. As such contradictions should not be evaluated without placing them in their proper context in an endeavor to determine their gravity, meaning whether or not they go to the root of the matter or rather corrode the credibility of a party's case".*

In another case of **Elia Nshambwa Shapwata and Another v. R., Criminal Appeal No. 92 2007** (CAT unreported), on page 7, the Court of Appeal when called to resolve as to whether there were contradictions in the testimonies of prosecution witness in the identification of the accused person during the trial at the High court, it underscored as follows:-

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."*

In the matter under consideration, it is undisputed that the prosecution evidence was marred with contradictions. Guided by the above authorities it is now my duty to determine whether the pointed out contradictions between the principal witnesses were minor or material that they go to the root of the matter. As shown earlier on above, the witnesses were not at one on the colour and marks of the stolen cow.

From onset, I share the same view with Mr. Kabelwa that the contradiction goes to the root of the matter. In the present case the appellant was accused of cattle theft which in my view, in the absence of strong evidence

clearly establishing the identification of the subject matter of theft, in this case the stolen cows, it cannot be safely concluded that the prosecution proved their case to the required standards. In making deliberation as to whether the prosecution case was proved in the situations where there was a contradiction as to the property actually stolen from the victim, the Court of Appeal in the case of **Masota Jumanne v. Republic, Criminal Appeal No. 137 of 2016 (unreported)** on page 11 categorically held;

> *"In a nutshell the prosecution evidence was riddled with contradictions on what was actually stolen from PW1. Such circumstances do not only imply that there was a variance between the particulars in the charge and the evidence as submitted by the learned State Attorney. This also goes to the weight of evidence which is not in support of the charge."*

In the instant matter, it is even much worse that the alleged contradictions among other things, arose from two key witnesses at the trial, that is the person alleged to be the owner of the stolen cattle (PW1) as against the person who arrested the cattle (PW2). In my firm view, the proper and description of the stolen cows free of contradictions was crucial especially now that there exists a settled position that the same

has to be made for the purpose of clearing doubts as to the actual stolen property. That was a position in the case of **Gwisu Nkonoli Others vs Republic Criminal Appeal 359 of 2014 (Unreported)** at page 10 where the Court of Appeal underlined;

> *"Second, concerning the complaint that the case was not proved beyond reasonable doubt as PW1 failed to give description of his alleged stolen cattle, we are of the view that special marks of those cattle ought to have been described by PW1. It is now settled that, a detailed description by giving special marks of the alleged stolen items has to be made before such exhibits are tendered in court. That act will avoid doubts as to the correctness of the alleged stolen items..."*

That being said, I hold that the discrepancy on the identification of the stolen cows pointed out by the learned state attorney not only went to the root of the matter but also has corroded the credibility of the principal prosecution witnesses, and that the trial court ought to have discredited the evidence of those witnesses as I hereby do.

On the issue of chain of custody, I will be guided by the principle underscored in the case of **Paulo Maduka and 4 Others v. R., Criminal Appeal No. 110 of 2007** on page 18 through to 19, where the Court of Appeal insisted that:-

"By chain of custody we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime - rather than, for instance, having been planted fraudulently to make someone appear guilty. Chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it".

In the present matter, the salutary guiding principle in criminal investigations was not observed and enforced as rightly argued by the state attorney. As a result, there was no linkage between the evidence of PW4 who testified to have arrested two cows and PW5 the exhibit keeper. There is no evidence to indicate that the cows were handed to PW5 and how PW5 handled them. PW5 testified to have received the motor vehicle, Toyota Noah with Registration No. T269 DKF but not the cows. Without this linkage, the entire prosecution case was bound to fall.

In the same vein, if the appellant was found with stolen cows, the stolen thing should have been proven in evidence. Even in the circumstance where the cows could not be produced in court due to some difficulties in

keeping them, an inventory should have been prepared and procured for the purpose of record and evidence. Absence of such proof casts doubt on the prosecution case.

Regarding reliance of the evidence of the co-accused to convict the appellant. I fully subscribe to the observation made by the learned state attorney that the evidence of a co-accused owing to its inherent danger, requires corroboration as a matter of a well-established practice but not in law as provided under section 142 of the Evidence Act, Cap. 6 RE 2002 which reads.

> *142. An accomplice shall be a competent witness against an accused person; and conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.*

Expounding on the above provision, the Court of Appeal in the case of **Lusungu Duwe v. Republic, Criminal Appeal 76 of 2014 (unreported)** page 8 through to 9 had this to say;

> *"Also, though we agree with Mr. Chaula that PW2 was an accomplice, we are strongly opposed to his view that his evidence generally ought to have not been believed and relied upon on that basis alone. We are saying so because that is contrary to the spirit of section 142 of the Evidence Act Cap 6 of the Revised Edition, 2002 which is to the effect*

that an accomplice shall be a competent witness against an accused person; and conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. ***However, we are aware that as a matter of practice, such evidence should be taken with due care, or that it may require corroboration****. See the cases of Mwinyi Mohamed Abdalla v. SMZ [1988] T.L.R. 37 (CA) and Patrick Jeremiah v. Republic, Criminal Appeal No. 34 of 2006, CAT, (unreported). We are comfortable that in our present case, the evidence of PW2 was corroborated by that of PW1."*
[Emphasis is added]

In the case at hand the trial magistrate took the view that a statement by 1st accused person admitting commission of an offence amounts to corroboration of an accomplice evidence. The trial magistrate believed that the appellant's confession before PW6 corroborated the statement of Daymoni Joashi, a co-accused of the appellant. However, looking at the prosecution evidence in relation to the caution statement as rightly argued by the state attorney, there was no specific time indicated between 1:00 am when the accused persons were arrested to the time when DW2's caution statement was taken, the absence of which create doubt as to whether DW2's statement was taken within the time prescribed by the law. This was contrary to what has been insisted by this Court in the case of **Innocent Mataba v. The Republic, Criminal Appeal No. 76 of**

2021 where on page 16 this Court borrowed wisdom from the case of **Said Bakari v R., Criminal Appeal No. 422 of 2013**(unreported) where it was observed that:-

> *"If there is no enough evidence that the accused was interviewed within 4 hours and no extension of time, the caution statement becomes meaningless."*

Owing to the shortcomings observed on the appellant caution statement, I find error on the trial magistrate's reliance on the uncorroborated accomplice evidence to convict the appellant.

Finally, and briefly I wish to deal with the concern that the appellant was not afforded with chance to cross examine DW2, his co-accused. Mr. Kabelwa, referred to the evidence of DW2 at the trial court in which the records are silent on whether the appellant was afforded with the chance of cross examining DW2 governed under section 146 of the Law of Evidence Act.

From my scrutiny of the record, I have no hesitation in agreeing with Mr. Kabelwa that the appellant was not afforded with the chance to cross examine DW2. It is trite principle that it is a serious misdirection on the part of the court not to afford the appellant with such a chance. Since the purpose of cross examination is essentially to contradict the evidence,

with respect, I think it was a misdirection on the part of the trial magistrate to deny the appellant with the chance. I am at one with Mr. Kabelwa that the appellant was denied the right to be heard in respect of the evidence adduced by DW2 as enunciated in the case of Charles **s/o Kidaha Others v. Republic, Criminal Appeal No. 395 of 2018** (unreported) on page 10, where the Court of Appeal emphasized that;

> *"A right to be heard is not only a cardinal principle of natural justice but also a fundamental right constitutionally guaranteed such that no decision should be left to stand in contravention of it, even if the same decision would be reached had the party been heard."*

As for the consequence of the breach of the said fundamental right, on page 11, the Court of Appeal went on and held: -

> *"Thus, in this appeal, the learned Judge breached the basic rights of the 2nd and 3rd appellants when he proceeded to hear and determine on the admissibility of Exhibit P2 without giving an opportunity to the 2nd and 3rd appellants to cross-examine the witnesses for both the prosecution and the defence. Consequently, consistent with settled law, we are of the firm view that the decision of the trial court was reached in violation of the 2nd and 3rd appellant's constitutional right to be heard and it cannot be allowed to stand."*

In the event, for the foregoing reasons, I nullify the proceedings of the District Court of Kilosa in Criminal Case No. 4 of 2023, quash the conviction and set aside the sentence imposed on the Appellant.

Ordinarily, having nullified the proceedings due to procedural irregularities, I ought to have ordered for retrial against the appellant as per the decision in **Fatehali Manji v. Republic (1966) E.A 343.** However, having satisfied myself that at the trial court, the case against the appellant had not been proved to the standard required in criminal cases due to insufficiencies of the prosecution evidence earlier pointed out, I find justice demands the acquittal of the appellant instead of subjecting him to fresh criminal proceedings which will enable the prosecution to fill the gaps in its weak evidence.

In the end, this appeal is allowed. The appellant ISAKA DAGLAS is hereby set free, and should immediately be released from imprisonment, unless he is held for any other lawful cause.

It is so ordered.

DATED at **MOROGORO** this 27th day of March 2024.

H.A. KINYAKA

JUDGE

27/03/2024

Court:

Judgment delivered in this 27th day of March, 2024 in the presence of the Appellant who appeared in person and unrepresented and in the absence of Respondent.

S.P. Kihawa

DEPUTY REGISTRAR

27/03/2024

Court:

Right of the parties to appeal to the Court of Appeal of Tanzania fully explained.

S.P. Kihawa

DEPUTY REGISTRAR

27/03/2024