

IN THE HIGH COURT OF TANZANIA

AT SONGEA

CRIMINAL APPEAL NO. 42 OF 2023

(Originating from Criminal Case No. 21/2022 of Tunduru District Court)

SALUM CHALAMANDA ATHUMANI @ CHALA.....
ALLY RASHID HASSAN..... } **APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

18th March & 15th April, 2024

KARAYEMAHA, J

In this case, the appellants, namely Salum Chakamanda Athumani @Chala and Ally Rashid Hassan were charged with cattle theft contrary to section 268(1) and (3) of the Penal Code, [Cap 16 R.E 2019] (henceforth, the Penal Code).

It was alleged by the prosecution that on 21/01/2022 at Chingulungulu village within Tunduru District in Ruvuma Region the appellants jointly stole eight (8) heads of cows valued at 4,600,000/= the property of Mayunga Lugwasha Mtogwambuli. They were accordingly convicted and finally sentenced to serve a term of 5 years



imprisonment. In addition, they were ordered to pay compensation at a tune of Tshs. 4,600,000/= for the lost heads of cows.

Appellants pleaded not guilty to the charge. In a bid to prove the charge, the prosecution lined up five (5) witnesses, namely, Mayunga Lugwasha Mtogwambuli (PW1), Basu Lugwashi (PW2), Hamis Abdala Adamu (PW3) G3956 D/C Richard (PW4) and Mohamed Luwambano (PW5).

Perhaps before going into the nitty-gritty of the appeal, it may be fitting to narrate, albeit briefly, the relevant background facts leading to the appellants' arraignment. It is this: on 21/1/2022 at 22:00hrs PW2 with his siblings were asleep at Masikiti hamlet when he heard people talking. He woke up and peeped through the window and saw ten (10) people and others who were in the kraal armed with machetes. Assisted by clear moon light he managed to identify Omary Chalamanda and the appellants who stood at a distance of 20 meters. It was his testimony that he knew the appellants before at Nampungu. To rescue his life, he slipped silently to the bush. PW2 said further that he run away and subsequently, phoned PW1, the owner of cows. He did not return to the scene of crime until when PW1 had arrived.

In his testimony, PW1 confirmed to have received a call from PW2 on 21/1/2022 at 22:00hrs informing him that ten people had invaded his premises armed with machetes, touch and had entered in the kraal. PW1 confirmed theft of his cows when he got at the scene of crime. Following that situation, he engaged the militiamen to assist him search for his cows. They traced and found some at the bush with the appellants. On probing them, the appellants told them that those cows were found in the farms. Furthermore, they did not know where others were.

On his part, PW3 testified on how he was called and requested to assist PW1 to find his stolen cows. While tracing them, they were told by people that they chased them out of the farms. On further tracking cows, they found some with the appellants but 8 were missing. They arrested them and took them to police station. PW3 testified further that, on being interrogated, the appellants told them that they seized cows because they were destroying crops.

In the course of investigation, PW4 managed to arrest the appellants who were connected with the incident of stealing cows. In addition, PW4 testified to the effect that prior PW1 and PW3 had got at

his premisses, Ali Ndolanga had already reported to have seen wandering cows. On finding them, PW1 prayed to take them to his camp. Prior taking them, they were counted and were two. PW1 told him that 8 cows were missing. PW4 vindicated the appellants as the thieves.

The appellants (DW1 and DW2) denied stilling PW1's cows. They all informed the trial court that they seized cows which were destroying their crops.

This defence did not impress the learned trial Magistrate. He was satisfied that the condition prevailing was conducive for unmistakable identity. After the trial proceedings that saw the prosecution marshal attendance of five witnesses against two for the defence, the trial Court found the appellants guilty as charged, convicted them and sentenced them as introduced hereinabove.

This appeal is, therefore, preferred to challenge the conviction and sentence passed by the trial Court. Although the appellants' appeal is based on five grounds, in my view, its substantive part is the derision that the learned trial magistrate paid no or little attention to the fact that

the appellants were not properly identified at the scene of crime. This is the subject of the 5th ground of appeal.

When the appeal came for hearing, the appellants appeared in person (unrepresented) while Mr. Gaston Mapunda, learned State Attorney appeared for the Respondent Republic.

Kicking off the discussion were the appellants. Their contention is that identification could not go unmistaken on the fateful night. They fastened their argument on three points. **One**, the scene of crime was invaded by 10 bandits at 21:00hrs but Omary Chalamanda was identified. **Two**, PW2 was inside that night, thus, could not see properly people who were at a distance of 20 meters by help of the moonlight and identify them. **Three**, failure by PW2 to describe the window he peeped through to identify the perpetrators at the kraal.

Mr. Mapunda prefaced his reply submission by intimating his position of supporting the appeal. He stated further that this case is based on visual identification. Laughing off the manner in which PW2 identified the bandits, the learned counsel contended that source of light, to wit, moonlight was very weak. He added that only Omary Chalamanda was identified at the scene of crime. Mr. Mapunda

wondered why were the appellants arrested in the first place. He then reiterated the principles of visual identification explained superbly in the decisions of **Wambura Marwa Wambura v. Republic**, Criminal Appeal No. 115 of 2019 (unreported) at page 14 and **Ezron Ndone v Republic**, Criminal Appeal No. 263 of 2021(unreported), the CAT which include explaining the distance he stood to observe the bandit, the intensity of light and if he knew the suspect by name.

Having carefully considered the 5th grounds of complaint, the arguments of the parties and the record, I am at this juncture invited to determine whether the appeal has merit. But before doing so, it is crucial to state that, this being the first appeal, is in the form of re-hearing. Therefore, as the first appellate court, I am obliged to re-evaluate the entire evidence on record and subject it to a critical scrutiny and if warranted arrive at my own conclusion of facts. See **Iddi Shaban @ Hamis v R**, criminal Appeal No. 111 of 2006 and **Ngasa Sita @ Mabundu v R**, Criminal Appeal No. 254 of 2017.

Let me also join parties and comment that in my assessment of the record before me, the trial court did not go to the heart of the

principles governing visual identification. Thus, the complaint by appellants that PW2 did not properly identify them is triumphs.

Undeniably, there is strong evidence that the armed robbery incident occurred at about 22:00hrs on 21/1/2022. As acceptably submitted by Mr. Mapunda, the evidence must reveal that circumstances enabled unmistakable identity of the appellants among the ten bandits. Testifying how he identified the appellants, PW2 had this to say and I quote for readymade reference:

"PW1 On 21/1/2022 at night hours 22:00hrs I was at the scene of crime at Nambungu I was sleeping I was with my siblings. I heard people talking I woke up and peeped in the window and saw them talking. They were ten people other (sic) were in the kraal ... there was a clear moon light so I know only one Omary Chalamanda. The two are here in court ... I identified them by using balnmed (sic) from the window to the kraal it was 20 meters only."

This is the evidence that lured the trial Magistrate and finally led him to believe that the appellants were properly identified at the scene of crime.

On my part, I hold a different view and drift from his observation. This evidence has lingering doubts as follows. **One**, it is digested from PW2's evidence that when he heard people talking, he was inside though he did not say a house, tent or hut. He simply said he peeped via the window. Was that window open or closed. If closed, did he open it? Was it transparent or not? His evidence does not answer these questions. **Two**, PW2 was helped by clear moon light. It is sniffed from the above quoted evidence that he did not describe brightness of the light that aided him to visually identify the appellants. Chiefly, the witness was supposed to make a description pertaining to the intensity of that clear moon light. **Three**, I don't agree with the learned trial magistrate that those found with cows were the ones identified at the scene of crime. The reason is simple. Together with what I have endeavoured to explain above, PW2 stood at a distance of 20 meters to observe the bandits. He did not say the time he spent observing them, whether the appellants were at a separate place, whether he perfectly knew them prior the fateful night and how. Assuming that they were mingled in the group of ten people, PW2 had to state and demonstrate how he manage to single them out. **Four**, PW2 did not state when he

escaped from the scene of crime and called PW1. **Five**, PW2 failed to mention or describe the appellants to anyone after he had returned from the hiding. If it is true that he properly identified the appellants, why did he keep a secret to PW1, PW3 and PW4 and wait until they were arrested. Why was he late to mention the bandits immediately? His conduct was inconsistent with a long-established principle that the victim's credibility is credited when he mentions the suspect at the earliest opportunity. PW2's unexplained delay puts me to inquiry. This principle was promulgated in the case of Marwa **Wangiti Mwita and Another v. Republic** [2002] TLR 39 the court observed that:

"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent Court to inquiry." [Emphasis supplied].

A fair conclusion, therefore, deduces to seeing PW2 an incredible witness. His evidence on visual identification is tainted with lingering doubts which should be resolved in favour of the appellants.

In addition, where the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the trial magistrate should warn himself of the special need for caution before convicting the accused in reliance on the correct identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, that even a number of such witnesses can all be mistaken. The magistrate should then examine closely the circumstances the identification came to be made, particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced, but the poorer the quality the greater the danger. In the case of **Philipo Rukaiza @ Kicheche Mbogo v. Republic**, Criminal Appeal No. 25 of 1994 (unreported) quoted with approval in **Nyabohe Nyagwisi Nyagwis v R**, Criminal Appeal No. 243 of 2020 the Court of appeal stated that:

"The evidence in every case where visual identification is what is relied on must be subject to careful scrutiny, due regard being paid to all the prevailing conditions to see if in

all the circumstances there was really sure opportunity and convicting ability to identify the person correctly and that every reasonable possibility of error had dispelled. There could be mistake in identification notwithstanding the honest belief of an identifying witness."

All said and done, I find and hold that the prosecution failed to prove its case beyond reasonable doubt. Since ground five of the appeal disposes off the appeal, it will be superfluous to delve into other grounds of appeal. Consequently, I hereby quash and set aside the appellants' conviction. The sentence of 5 years and a compensation order passed by the trial court are also set aside. In fine, I allow the appeal in its entirety. The appellants are to be released from prison forthwith unless they are otherwise lawfully held.

It is so ordered.

DATED at SONGEA this 15th day of April, 2024



**J. M. KARAYEMAHA
JUDGE**

