

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA SUB-REGISTRY
AT MUSOMA
CRIMINAL APPEAL NO. 37737 OF 2023

MSUBI MARWA@ MAGINGA.....1ST APPELLANT
WEITANGO CHACHA MAKURI.....2ND APPELLANT

VERSUS

THE REPUBLIC

JUDGMENT OF THE COURT

02/05/2024 & 23/05/2024

Kafanabo, J.:

This appeal originates from the decision of the District Court of Tarime in Criminal Case No. 38 of 2022 dated 30th October 2023, (Hon. S.J. Mwakihaba, SRM).

The Appellants herein were arraigned in the District Court of Tarime charged with an offence of stealing certain animals contrary to section 258(1) and section 268(1) of the **Penal Code, Cap. 16 R.E.2022** in respect of the first count. The particulars of the offence, as per the charge sheet, indicate that the Appellants on 14th October, 2022 at Matongo Village within Tarime District in the Mara Region fraudulently and without bonafide claim of right stole twenty (20) head of cattle worth 18,800,000/= Tanzania Shillings, the property of Ryoba Ilondo Sangarya.

The Appellants were not the only accused persons arraigned in court in respect of the above mentioned criminal case. On the second count, the other three persons, not part of this appeal, were charged with an offence of being found in possession of property suspected to have been stolen or unlawfully acquired contrary to section 312(1)(b) of the **Penal Code, Cap. 16 R.E.2022**. The particulars of the offence indicate that Chacha Laurent Nyonyo, Adam Mmambya Mohabe and Weisiro Nyahucho Mtiba (hereinafter DW3, DW4 and DW5) on 14th October 2022, at Kemakorere Village within Tarime District in the Mara Region, were found by the police officers in possession of two head of cattle worthy 1,200,000/= Tanzania Shillings which, in all reasonable circumstances, were believed to be stolen or unlawfully acquired.

The Appellants and DW3, DW4 and DW5, pleaded not guilty to the charges levelled against them which necessitated a full trial. Upon conclusion of a trial, the Appellants were convicted of the offence of stealing certain animals contrary to section 258(1) and section 268(1) of the Penal Code, Cap. 16 R.E.2022. However, DW3, DW4 and DW5 were acquitted.

Thereafter, the Appellants were sentenced to serve five (05) years imprisonment, and ordered to compensate the victim of theft, Ryoba Ilondo Sangarya, twenty (20) head of cattle that they stole from him. The Appellants were aggrieved by the said decision and thus preferred an appeal. They lodged their notice of intention to appeal on 6th November 2023 and on 22nd November 2023 they lodged their petition of appeal marshalling six grounds of appeal.

The grounds of appeal as set forth by the Appellants in their petition of appeal are as follows:

- 1. That the trial Magistrate erred in law and facts by convicting and sentencing the appellants by (sic) relying on the testimony of PW6 who claimed that the appellants admitted to him that were the ones who sold the two cattle to the 3rd, 4th and 5th accused persons who released(sic) by the trial court while in the trial court(sic) the appellants denied to have committed the alleged offence but the trial court did not conduct inquiry(sic) to find out the truth.*
- 2. That the trial Magistrate erred in law and facts to convict and sentence the appellants by admitting the prosecution evidence which failed to prove the mens rea and act(sic) reus against appellants in relation to the alleged offence.*
- 3. That the evidence produced by prosecution witnesses was inconstant(sic) and contradictory since PW3 claimed to have been informed by PW1 that the stolen cattle were only four, later on he notify(sic) PW3 that the stolen cattle were twenty (20), if not enough PW5 after discovered(sic) that the four cattle were missing he decided to keep quite till when he realized again that sixteen cattle were missing is where(sic) he decided inform the incidence to Mkami who lives nearby PW1's home and not PW1 who claimed to be the owner of the alleged cattle. So it is not clear even on the number of cattle stolen, so their evidence leaves doubt as they contradicted themselves, in addition to that, the cattle claimed to be arrested with 3rd, 4th and 5th accused persons were only two.*

- 4. That, PW1 who claimed and reported the matter that the alleged cattle belongs to him failed to prove his ownership by describing within the trial court on how he came to possess that cattle rather relied only on a mark of CCC which is not sufficient to prove his ownership.*
- 5. That the trial magistrate misdirected himself in law and fact by sentencing and convicting the appellant without giving sufficient consideration and weight to the defense which produced by the appellants.*
- 6. That, the trial court erred in law and fact to convict and sentence the appellants basing on incredible and insufficient prosecution evidence which failed to prove the case at hand beyond all reasonable doubt as no any witness who witnessed the appellants committing the alleged offence.*

When the appeal was called for hearing, the Appellants had no legal representation, but attended the hearing via Virtual Court System (video conferencing) from Tarime Prison under the care of B5869 Sgt. Yohana. The Respondent was duly represented by Mr. Tawabu Yahya Issa, the learned State Attorney.

In support of their appeal, the Appellants had a very brief submission. They simply submitted that they appealed to this court, they filed the petition of appeal, and thus prayed that the grounds of appeal contained in the petition of appeal be considered by the court as their submission in support of the appeal.

Opposing the appeal, the learned State Attorney, the foremost, notified the court that the 2nd and 6th grounds of appeal will be addressed as one because they are about the same issue.

As regards the 1st ground of appeal, the learned State Attorney submitted that the Appellants fault the trial court that it erred in law and facts by convicting them based on testimony of PW6 without conducting an inquiry. He submitted that the trial court did not err in convicting the Appellants based on the evidence of PW6 because every witness is entitled to be treated as a credible witness, unless there are cogent reasons for not doing so. It was also submitted that the law does not prescribe a particular number of witnesses to prove a fact, and thus the court properly convicted the Appellants based on evidence of PW6. It was also submitted that the Appellants did not cross examine PW6 on the fact they confessed to him that they committed the offence.

In determining this ground of appeal, and the appeal as a whole, it is important to have an understanding of the offence that the Appellants were charged with in the trial court. The Appellants were charged with the offence of stealing certain animals contrary to sections 258(1) and 268(1) of the **Penal Code, Cap. 16 R.E.2022**. The said section 258(1) provides that:

***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.*

Moreover, section 268(1) provides that:

'Where the thing stolen is any of the animals to which this section applies the offender shall be liable to imprisonment for fifteen years.'

In light of the provisions above, for the offence of stealing certain animals to be proved, it should be proved that the Appellants *fraudulently and without claim of right* took the animals complained to have been stolen from the victims of theft.

Now, therefore, the Appellants, as noted above, fault their conviction and allege that the trial court relied only on the evidence of PW6. However, it should be noted that conviction of the Appellants was not only based on the testimony of PW6. The testimony of PW6 was corroborated by the testimonies of DW3, DW4, and DW5 all of whom testified that the Appellants sold the cattle to them. The Appellants also did not claim ownership of the cattle they sold to DW3, DW4, and DW5.

Moreover, DW6 and DW7 also testified that it was the Appellants who took the two cattle to the market and sold the same to DW3, DW4, and DW5. The evidence also found support in the testimony of PW1 and PW2 who testified that the cattle were stolen from their byre/cowshed.

Under the circumstances, this court cannot arrive at a conclusion other than the Appellants sold the two cattle to DW3, DW4, and DW5 whilst knowing that the same were obtained fraudulently and without any claim of right.

It follows that the evidence of PW6, and as corroborated by defence witnesses, was properly acted upon by the learned trial Magistrate, whilst taking into account the position of the law on number of witnesses that may

be called to prove a particular fact. Section 143 of the **Evidence Act, Cap. 6 R.E. 2022** provides that:

Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact.

This means that if the court is satisfied that the witness is credible, even a single witness may prove a fact. In the case of **Mathias Bundala vs Republic (Criminal Appeal 62 of 2004) [2007] TZCA 16** (16 March 2007) the Court of Appeal held that:

*"In our considered judgment if a witness is not an infant and has normal mental capacity.....**the primary measure of his/her credibility is whether his or her testimony is probable or improbable when judged by the common experience of mankind.** The assumption will always be that the testimony is true unless the witness's character for veracity has been assailed some motive on his or her part to misrepresent the facts has been established, his or her bias or prejudice has been demonstrated and he or she has given fundamentally contradictory, or improbable evidence or has been irreconcilably contradicted by another witness or witnesses. In short, as this Court held in GOODLUCK KYANDO V. R., Criminal Appeal No. 118 of 2003 (Unreported), **"it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness"**.*

Guided by the above understanding, it is clear that the trial court was satisfied with the credence, character and veracity of PW6 and other witnesses. This court finds no reason to fault the trial court in that respect given that, in this case, testimonies of several witnesses, whose testimony was not shaken by the Appellants' defense, cemented the case against the Appellants.

Moreover, it is a trite law that if a party fails to cross examine the witness on a particular fact then it will be taken, cautiously, that the party so failing

to cross examine has accepted the relevant fact. However, this should take into account circumstances of the case and the conduct of the parties in general. In page 32 of the trial court proceedings, the Appellants were invited to cross examine PW6, but did not cross examine PW6 on confessing to committing the crime to him when they were arrested and no question was asked that discredited the testimony of PW6. The Appellants also did not discredit the testimonies of DW3, DW4, DW5, DW6 and DW7. Therefore, the Appellants were properly convicted as testimony of PW6 was credible. See **Nyerere Nyague vs Republic (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 (21 May 2012)**.

However, it is important to categorically state that this court, before considering the fact that the Appellants did not cross examine PW6 and other witnesses on key facts of their testimonies, has warned itself that not every moment when a party chooses not to cross-examine a witness on a particular fact, or exhibit then it should be ruled that it amounts to accepting the same. The Court of Appeal cases of See **Zakaria Jackson Magayo vs Republic (Criminal Appeal 411 of 2018) [2021] TZCA 207 (19 May 2021)**.

Moreover, this court took into account the principle that extra care is needed when the court handles a case that involves unrepresented layperson, especially when the court wants to rely on the fact that a party did not cross examine a particular witness, or a particular fact/testimony of a witness. The Court of Appeal decision in **Noel Paulo @ Kizungu vs Republic (Criminal Appeal No. 377 of 2020) [2024] TZCA 194** (19 March 2024) is relevant.

Under the circumstances, and in light of the foregoing, the first ground of appeal is dismissed for want of merits.

Submitting in opposition to the 3rd Ground of Appeal, the learned State Attorney submitted that the inconsistency of the testimony of the prosecution witnesses complained by the Appellants did not go to the root of the case. The District Court noted the inconsistency and elaborated its decision on page 20 of the judgment. The court considered the principle that not every inconsistency goes to the root of the matter as held by the Court of Appeal in the case of Joseph **Thobias & Others vs Republic (Criminal Appeal No. 296 of 2019) [2023] TZCA 105** (13 March 2023).

It was further submitted that, in the present case, the Appellants were charged with theft. The differences in number of stolen cattle as explained by witnesses did not exonerate them from the liability in committing the offence. What is important was that the evidence of the two stolen cattle was tendered and admitted as an exhibit in court. It was the learned State Attorney's view that the trial court was right in convicting the Appellants as there was proof of theft as per the law.

This court agrees with the Respondent that the inconsistency on number of cattle stolen as far as proving the offence of theft is concerned did not go to the root of the case. This is because it was proved beyond doubt that the Appellants sold two of the stolen cattle to the DW3, DW4, and DW5.

It is also taken into the consideration that there was no any other explanation from the Appellants as to how they came into possession of the

cattle that were reported to have been stolen from the owner's byre. Therefore, the guidance on the inconsistency of evidence provided by the Court of appeal in the cases of **Joseph Thobias & Others vs Republic (Criminal Appeal No. 296 of 2019) [2023] TZCA 105** (13 March 2023) and **Dickson Elia Nsamba Shapwata and Another vs Republic (Criminal Appeal 92 of 2007) [2008] TZCA 17** is relevant on this aspect of appeal.

It is also important to record it here that even though no one, at least as per the record, saw the Appellants stealing the cattle the exact number of the cattle stolen by the Appellants and/or any other person is irrelevant as theft of cattle may be proven even by stealing a bull or cow. In the present case, it was proven that the Appellants were in possession of the two stolen cattle before selling the same to DW3, DW4, and DW5.

However, the issue of number of cattle stolen would be relevant in determining how many cattle were stolen by the Appellants as it has bearing on the compensation aspect of their sentence. The trial court ordered the Appellants to compensate the victim of theft twenty (20) cattle, or the value thereof. However, since the Appellants were found only with two (02) cattle, the compensation should reflect the number of cattle which it has been proved beyond a reasonable doubt that they were stolen by them. This takes into account the varying number of cattle stolen from the victims as gathered from the testimonies of witnesses. This also leaves open the fact that the other eighteen (18) head of cattle might have been stolen by other persons at various times of the fateful night, taking into account the testimonies of PW3 and PW5. The later testified that he noted four head of cattle were

missing on 14/10/2022 at 1.00 a.m., and in the morning, upon recounting the cattle, he noted that 16 head of cattle were missing. This means that the theft of cattle took place more than once on that particular night.

Given the above, this court finds that the Respondent managed to prove that the Appellants stole two head of cattle and not twenty head of cattle as found by the trial court, as there is no proof that the Appellants stole twenty head cattle from the victims.

Regarding the 4th ground of appeal, the Appellants argued that PW1 (the owner of the stolen cattle) failed to prove ownership of the cattle, and the reliance on 'CCC' marks on the legs of the cattle, according to the Appellants, was insufficient to prove ownership of the cattle. The learned State Attorney submitted that this ground of appeal has no merits because there was no dispute of ownership of the stolen cattle. Moreover, PW1 on page 12 of the trial court proceedings, identified the mark on the hind right legs of the cattle. The testimony was not disputed by the Appellants, and the Appellants did not cross examine PW1 on the issue of ownership of cattle. The mark CCC was also explained by PW2 in page 14 of the proceedings. This means that the witnesses were owners of the cattle and marked their cattle as such for identification.

This court agrees with the Respondent's counsel and find no reason to fault the trial court because the issue of ownership did not arise in the trial court and even the Appellants did not raise it in their defence. Since the victims' evidence on the fact that the cattle were stolen from them (from their cowshed), and that they were owners went unchallenged even by way

of cross examination, the Appellants cannot be heard at this hour challenging the same. Therefore, this ground of appeal is dismissed for want of merit.

In the 5th ground of appeal, the Appellants complains that their defence was not accorded weight by the trial court. The learned State Attorney submitted that on pages 17 to 18 of the judgment of the trial court, the trial Magistrate clearly indicated how the Appellants' defence was taken into account. Line 18 of page 18 indicates that the defense was duly considered. The analysis of evidence was considered as indicated in page 19 of the judgment.

After a thorough review of the judgment, this court finds the Appellants' fifth ground of appeal is misconceived because, contrary to the Appellants' submission, their defence was clearly considered on page 18 of the Judgment of the trial court. It is also noted that the Appellants' defence was very brief as they generally denied committing the offence. Therefore, this court finds that Appellants' defence was duly considered before they were convicted and sentenced by the trial court. It follows that the fifth ground of appeal lacks merit and is thus dismissed.

Grounds two and six of the appeal advance the argument that the prosecution failed to prove their case beyond reasonable doubt. The Respondent's counsel submitted that it is true that no one saw the Appellants stealing the cattle. But there is circumstantial evidence pointing out clearly that the Appellants stole the two cattle from the victim; taking into account testimonies of both prosecution and defence witnesses.

A thorough review of evidence on record convinces this court to agree with the learned State Attorney that the Respondent proved the case against the Appellants beyond a reasonable doubt. The said inclination to agree that the case against the Appellants was proved beyond a reasonable doubt is based on the following:

1. PW1 reported that 4, and later 16, of his cattle were stolen from his byre, the matter was reported to PW3 the hamlet chairman of Kigonga, Nyamongo in the Tarime District. The matter was also reported to the Nyamwaga Police Station in the Tarime District.
2. Amongst the cattle stolen, two cattle were found with DW3, DW4, and DW5 at the Nyarero Local Market in the Kemakorere Village, within Nyarero Ward in the Tarime District.
3. The said DW3, DW4, and DW5 confessed upon arrest, and later testified that the cattle were sold to them by the Appellants.
4. DW7, the agricultural and livestock officer at Nyarero Ward who was in-charge of the local market where and when the two cattle were sold, also testified that DW3, DW4, and DW5 bought the cattle at Nyarero Local Market and that the Appellants are the ones who took the cattle to Nyarero local market and sold the same to the Appellants. That was after the Appellants had submitted the livestock sale permit to DW7 with the name Wiliamu Wiliamu Wankyo which was kept in the DW7's office and admitted by the trial court as Exhibit PE3.
5. Also DW6 testified that he was at Kemakorere market and that the Appellants sold the cattle to the DW3, DW4, and DW5 after he (DW6) had failed to buy the same from the Appellants for pricing reasons. He

also testified that he knew the sellers (the Appellants) before that date.

6. PW6 testified to have arrested the Appellants who confessed to him that they stole the cattle which they sold to DW3, DW4, and DW5. The witness also tendered the seizure certificate (Exhibit PE1) and the two stolen cattle (Exhibit PE2).

The above facts and circumstances, considered cumulatively, fall squarely within the sphere under which circumstantial evidence is considered cogent and adequate on proving a fact. In the case of **Mathias Bundala vs Republic (Criminal Appeal 62 of 2004) [2007] TZCA 16 (16 March 2007)** the Court of appeal held that:

*'As was aptly observed in TAPER V. R. [1952] A. C. 480, **circumstantial evidence should not be considered as a chain and each piece of evidence as a link in the chain, for if one link breaks the chain would fall. Rather as shown on page 489:***

"... it is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight but these stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion but the three taken together may create a conclusion of guilt with as much certainty as human affair can require or admit of", per Pollock, C.B. in R. V. EXALL (1886), cited with approval in THOMAS V. R. [1972] N.Z.L.R. 34.

In short, a case depending conclusively on circumstantial evidence, the court must before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty.

Therefore, in light of the above position as regards circumstantial evidence, and as submitted by the Respondent's learned counsel, even though no one

saw the Appellants stealing the cattle, the evidence adduced by prosecution and defence witnesses indicate that there was adequate circumstantial evidence which proved that the Appellants stole the cattle that they sold to DW3, DW4, and DW5.

Therefore, it is a finding of this court that the Appellants were properly convicted of stealing certain animals contrary to section 258(1) and section 268(1) of the Penal Code, Cap. 16 R.E.2022 by the trial court and properly sentenced to serve five years' imprisonment.

However, since the number of cattle proved beyond reasonable doubt to have been stolen by the Appellants is two, and not twenty, as proved by Exhibits PE1 and PE2, the order of compensation of twenty head of cattle as ordered by the trial court is hereby vacated and set aside. The reason being that the number of cattle proved to have been stolen by the Appellants was two, and the same as per the proceedings dated 10/08/2023, on page 29 of the trial court proceedings, were ordered to be kept by the Respondent. This means that the cattle are there and same should be handed over to the lawful owner (the victim of theft).

Therefore, this court settles for the following orders:

1. The Appeal is partly allowed.
2. The Appellants shall continue to serve the term of imprisonment as ordered by the trial court.
3. The order of compensation is vacated and set aside for the reasons stated herein above.

4. The Respondent should handover the two head of cattle, admitted as Exhibit PE2 in the trial court, to the lawful owner (victim of theft).

It is so ordered.

Dated and Signed at Musoma this 23rd day of May 2024.



K. I. Kafanabo
Judge

The Judgement was delivered in the attendance of the Appellants through Virtual Court System from Tarime and in the presence of Ms. Natujwa Bakari, State Attorney, for the Respondent.

K. I. Kafanabo
Judge
23/05/2024