

IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 103 OF 2022

(Originating from Nkasi District Court at Namanyere in Criminal Case No. 09 of 2022)

MATHIAS KULWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

25/10/2023 & 23/01/2024

MWENEMPAZI, J.

The appellant herein was aggrieved by the decision of the District Court of Nkasi (Trial Court) where he was charged with the offence of Stealing animals contrary to Section 258 (1) and Section 268 (1) and (3) of the Penal Code Cap 16 R. E. 2019 now **On** 2022 and was sentenced to serve five (5) years imprisonment.

It was alleged by the prosecution side that on the 16th day of January, 2022 at Mpata village within Nkasi District in Rukwa Region, the appellant did steal five (5) cows valued at Tshs. 3,900,000/= the property of

MASUMBUKO JOHN.

On the 21st day of January, 2022, the appellant was taken to the trial court where the charge was read and explained before him in the language best known to him and as he was asked to plea thereto, he entered the plea of not guilty. However, at the end of a full trial, the appellant was found guilty, hence convicted and sentenced to serve five years imprisonment. He was also ordered to compensate the victim five head of cattle or pay Tshs. 3,900,000/= in which it is the value of the stolen cows.

Aggrieved by that decision, the appellant filed this appeal to this court which consists of three grounds, in which I find best to reproduce them as hereunder;

i. That, the trial Magistrate did not provide the chance to cross examine the prosecution witness as per Section 157 of the Evidence Act Cap. 6 R. E. 2022.

ii. That, the confession was involuntary as due to the result threat from the Police Officers as per Section 29 of the Evidence Act, refer the case of Tuwamoi vs Uganda, EA 84 of 1987.

iii. That, the trial Magistrate erred in law and fact to convict the appellant basing in hearsay evidence from the prosecution witness.

On the date of hearing this appeal, the appellant had no legal representation while the respondent, Republic represented by Mr. Mathias Joseph, Mr. Mzanile Jam^{er}inus and Mr. Frank Mwigune, all are learned State Attorneys.

As the appellant was invited to submit for his grounds of appeal, he only prayed for this Court to consider the grounds of appeal and allow this appeal.

Responding to appellant's submission, Mr. Frank Mwigune submitted that his side does not have any objection against this appeal. That, his side supports this appeal as they failed to prove the case against the appellant beyond reasonable doubt.

He submitted that; the evidence relied by the prosecution at the trial against the appellant was circumstantial and the doctrine of recent possession. He added that, in proving the offence under the said doctrine, three factors must be proved:

1. The accused must be found with stolen property.

2. The property must be properly identified.

3. The property must have been stolen recently.

The learned State Attorney then referred me to the case of **Joseph Mkubwa & Another vs Republic**, Criminal Appeal No. 94 of 2007, Court of Appeal of Tanzania at Mbeya at page 7 – 8.

Mr. Mwigune added that, at the trial the prosecution evidence failed to prove the second element, that the property was identified to belong to the complainant. He submitted that, in this case, PW1 at (page 9) described the stolen cows to have a mark of a semi-circle and another. Mr. Mwigune then insisted that, it is a trite law that proper identification must show a peculiar mark; and where the person has identified the stolen property. That, it should not to be theoretically but rather physically and it should be tendered in court.

The learned State Attorney referred me to the case of **Emmanuel Saguda @ Sulukuka & Another vs Republic**, Criminal Appeal No. 422 "B" of 2013, Court of Appeal of Tanzania at Tabora, where the witness identified theoretically and did not tender it in evidence in which it was deficient.

He submitted further that, although the cows were seized, but they were tendered by PW5 without proper identification as seen at page 20 of the

typed proceedings where the witness just stated, "I can recall the said cows"

Mr. Mwigune insisted that, there are decisions that have stated identification by color is not proper identification. In that regard, Mr. Mwigune submitted that the evidence of PW5 contradicts that of PW1 who said the peculiar mark was a semi-circle.

He then cited the case of **Fai Juma Bayonga vs Republic**, Criminal Appeal No. 1 of 2021, High Court of Tanzania at Songea at page 16 where the case of **Boniface Sichone & 3 Others vs Republic**, Criminal Appeal No. 180 of 2019, Court of Appeal of Tanzania at Mbeya was referred to, in which, it was emphasized that colours of animals cannot form peculiar marks since they are common features in many other animals.

In conclusion, the learned State Attorney submitted that, PW1 identified the cows by peculiar marks, but the seized cows had no distinctive marks as mentioned by the complainant. That, it is on this ground that they opine to the appellant's claim that the case was not proved without leaving any doubt, and in so doing, his side supports the appeal.

In his rejoinder, the appellant had nothing to add, so that leaves this court with ample time to analyse the records before it and determine to its finality.

After reading the grounds of appeal and the submissions made by the learned State Attorney, and also reading the records of the trial court before me, I am fortified that the only issue to be dealt with in this appeal is **whether the charge against the appellant was proved beyond the required standards of the law.**

Despite the fact that the respondent herein had supported this appeal, still this court is obligated to analyse the validity of the support. To start with, the records of the trial court reveals that the conviction of the appellant based on the doctrine of recent possession.

In the case of **Abdi Julius @ Mollel & Another vs Republic**, Criminal Appeal No. 107 of 2009 (unreported) discussed the case of **Joseph Mkumbwa & Samson Mwakagenda vs Republic**, Criminal Appeal No. 94 of 2007 (unreported) which stated the position of the law in regard to the doctrine of recent possession in the following terms, that:-

"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place

*wherefrom the property was obtained. For the doctrine to apply as a basis of conviction, it must be proved, **first**, that the property was found with the suspect, **second** that the property is positively proved to be the property of the complainant, **third**, that the property was recently stolen from the complainant, and **lastly**, that the stolen thing constitutes the subject of the charge against the accused. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements...."*

As hinted earlier by the learned State Attorney, I too read between the lines the trial court's proceedings, and indeed PW1 and PW2 (victim) testified that, the stolen cows possess a semi-circle mark, see pages 9 and 10. On the contrary, PW5 the seizing officer testified that he seized the stolen cows as they were five in number, one female (red), two (red and white), the other with long horn (red) and the last one is white in colour and that is how he recognise them as he prayed to tender them in evidence and they were admitted and marked as P.1 collectively.

Considering the testimony of the complainant (PW2) and the testimony of the seizing officer (PW5), the cows purported to be stolen by th appellant were not positively proved to be the properties of the complainant.

This analysis is being supported by the holding made in the case of David Chacha & 8 Others vs Republic, Criminal Appeal No. 12 of 1997 (unreported), that:-

"It is a trite principle of law that, properties suspected to have been found in possession of an accused person should be identified by the complainant conclusively. In a criminal charge it is not enough to give generalized description of the property."

In addition to that, in my perusal of the trial court's proceedings, I did notice that although PW1 and PW2 testified that the stolen cows had a semi-circle mark, they never specified on which part of the body of the cows was the semi-circle put. Generalizing that the cows just had a semi-circle mark was not enough. Nevertheless, the seized cows were not described by the semi-circle mark by the seizing officer but rather they were identified by their colours. As rightly submitted by the learned State Attorney that, colours of animals cannot form peculiar marks since they are common features in many other animals.

Depending on the records before, I am fortified that the charge against the appellant was not proved beyond reasonable doubt as rightly submitted by the learned State Attorney, and I do find his support of this appeal to be valid in that this appeal deserves to be allowed as the offence

laid against the appellant was not proved beyond reasonable doubt required by the law.

Consequently, this appeal is hereby allowed. The conviction meted against the appellant is quashed and the sentence thereto and the order of paying compensation of TShs. 3,900,000/= are hereby set aside. I proceed to order the appellant's immediate release from custody unless he is held therein for other lawful cause.

It is so ordered.

Dated at Sumbawanga this 23rd day of January, 2024.




T. M. MWENEMPAZI

JUDGE