IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TABORA SUB-REGISTRY
AT TABORA
DC. CRIMINAL APPEAL NO. 53 OF 2023
(From the District Court of Tabora, Original Criminal Case No. 67 of 2021

HASSAN CHARLES ..... 1ST APPELLANT
SALUM MASANJA ..... 2ND APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 20/05/2024
Date of Judgment: 24/06/2024

KADILU, J.

The appellants herein were arraigned before the District Court of Tabora accused of cattle theft. They pleaded not guilty. The prosecution summoned three witnesses to prove that the appellants committed the charged offence. After hearing both sides, the trial court convicted the appellants as charged and sentenced each to fifteen (15) years imprisonment. Dissatisfied with both the conviction and sentence, they filed the instant appeal imploring the court to quash the conviction and set aside the sentence imposed upon them on the following grounds:

1. *That, the case for the prosecution was not proved against the appellants beyond reasonable doubt as required by the law.*
2. *That, Section 214 (1) of the Criminal Procedure Act was not complied with by the successor Magistrate.*
3. *That, the learned trial Magistrate erred in law and fact to invoke upon the appellants the doctrine of recent possession.*
4. *That, the trial Magistrate erred in law and fact for failure to address his mind to the material contradictions between PW1 and PW2 on the description of the donkeys allegedly stolen.*

5. *That, PW1 did not describe and identify the stolen donkeys properly both at the pre-trial and in trial stages.*
6. *That, PW1 did not establish ownership of the stolen properties and found in Shinyanga (allegedly in the hands of the appellants) to the standard required.*
7. *That, the person who arrested the appellants in the testimony of PW4 was not summoned to support the allegations that the appellants were found in possession of the allegedly stolen properties in Shinyanga.*
8. *That, the sentence imposed upon the appellants was manifestly excessive.*

During the hearing of the appeal, the appellants appeared in person without legal representation while Ms. Upendo Florian, the learned State Attorney, represented the respondent. As usual, the appellants requested the State Attorney to submit first. In opposing the appeal, Ms. Upendo prayed to start with the 2nd ground of appeal and argue the 4th and 5th grounds together. Concerning the 2nd ground, she submitted that Section 214 (1) of the CPA was complied with as shown on page 21 of the trial court's proceedings. She explained that the Hon. Magistrate who proceeded to hear the case after Hon. Nsana, RM explained that Hon. Nsana was transferred to another workstation so, Hon. Nyakunga would continue with the case. She cited the case of ***Hatwib Salim v. R.,*** Criminal Appeal No. 372 of 2016, Court of Appeal at Bukoba where Section 214 of the CPA was discussed.

Concerning the 3rd ground, Ms. Upendo submitted that the doctrine of recent possession was applied properly because the appellants were found in possession of stolen donkeys. She referred to Section 312 (1) (b) of the Penal Code in explaining that PW1 stated how the donkeys were stolen and

the appellants were found possessing them unlawfully. She supported her contention with the case of ***Mkubwa Mwakagenda v. R.***, Criminal Appeal No. 94 of 2007, and ***Julius Justine & 4 Others v. R.,*** Criminal Appeal No. 155 of 2005, Court of Appeal at Mwanza where the factors to be proved in applying the doctrine of recent possession were laid down. She argued that the factors were all complied with in the case at hand.

On the 4th and 5th grounds, Ms. Upendo submitted that PW1 and PW2 identified the stolen donkeys by colour and features/marks that were on their bodies as shown on pages 4, 8, and 12 of the trial court's proceedings. She argued that there were no serious contradictions as alleged by the appellants. She elaborated that PW1 referred to a "mark" on the donkeys while PW2 mentioned the said mark as "mark X". She opined that the contradictions if any, were minor and not affecting the substance of evidence adduced by PW1 and PW2. According to Ms. Upendo, minor inconsistencies are not supposed to affect the proceedings and decisions of the court. To buttress her stance, Ms. Upendo cited the case of ***Said Ally Ismail v. R.,*** Criminal Appeal. No. 241 of 2008, Court of Appeal at Mtwara.

On the 6th ground, she averred that ownership of the stolen donkeys was established properly by PW1 who was the owner, and PW2 who was the keeper/herdsperson of the said donkeys. Regarding the 7th ground, the learned State Attorney narrated that PW4 explained how he arrested the appellants in collaboration with the Police Officers in Shinyanga. In her view, it was not necessary to call the Police Officers as witnesses since their evidence would resemble that of PW4. She relied on Section 143 of the

Evidence Act in arguing that the prosecution was not bound to call any particular number of witnesses in proving the case against the appellants.

According to Upendo, the prosecution did not consider police officers as material witnesses in this case. She lastly submitted on the 8th ground that the sentence meted upon the appellants was according to the law because the punishment for the charged cattle theft is 15 years imprisonment. To her, there is nothing to fault the trial court in sentencing the appellants. Therefore, the case against them was proved beyond reasonable doubt. She cited the case of ***DPP v. Shishir Shyamsingh***, Criminal Appeal No. 141 of 2021, Court of Appeal at Kigoma in which the ingredients of theft were discussed. Ms. Upendo prayed for the appeal to be dismissed for lack of merit.

When the 1st appellant took the floor, he submitted on behalf of his co-appellant that they were found with the donkeys but they purchased them from one John Masanja who had permits showing that the donkeys were his. He told the court that they handed over the permits to the factory where they were selling the donkeys and when the police arrived, they took all the permits. The appellants explained that they failed to summon John Masanja in their defence since they were under custody. According to them, the investigator of their case promised to summon John the promise was never honoured.

They argued that the police officer to whom they handed the permits was not called to testify and assist them to get the said permits and exonerate themselves from allegations of theft. They informed the court that

they were arrested in Shinyanga and brought to Tabora where they failed to get most of their witnesses.

I have scanned the evidence by both sides as it appears on records, the grounds of appeal, and submissions by the parties. It is common ground that the appellants were found with donkeys when attempting to sell them to a meat factory located in Shinyanga. While the appellants assert that they purchased the donkeys from John Masanja, the prosecution alleged that they were stolen from the rightful owner, Paschal John. So, the issue for deliberation and determination in this appeal is whether the appellants stole the said donkeys as alleged.

I will start with the second ground of appeal in which the appellants claim that Section 214 (1) of the Criminal Procedure Act was not complied with by the successor Magistrate. This ground is baseless since the record is clear that the case was initially presided over by Hon. S.B. Nsana, RM but on 01/06/2022, Hon. D.S. Nyakunga addressed the parties as follows:

"The presiding Magistrate has got a transfer to Bahi District Court in Dodoma. This matter will now continue before me, Nyakunga, SRM."

Following that information, the appellants urged the trial court to proceed with the hearing without re-calling the witnesses already testified. Thus, I am unable to appreciate their concern that Section 214 (1) of the CPA was not complied with. The said provision provides that where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part of any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings

within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, re-summon the witnesses and recommence the trial or the committal proceedings.

The DPP v Seleman Juma Nyigo @ Mwanyigo, Criminal Appeal No. 363 of 2022, the Court of Appeal held that although Section 214 of the CPA does not give the accused the right to require witnesses to be recalled, it is in keeping with fair hearing that the magistrate should give reasons for deciding one way or the other. In the instant case, the learned trial Magistrate substantially complied with section 214 of the CPA by informing the appellants why he had taken over the trial and required him to state if he wished the witnesses to be recalled. As hinted, the appellants had no objection to the trial proceeding from where it had reached. Therefore, there is no merit in the 2nd ground of appeal and I dismiss it.

The next appellants' grievance is that the learned trial Magistrate erred in law and fact to invoke the doctrine of recent possession. Indeed, the appellants were charged under Sections 258 (1), 268 (1), and (3) of the Penal Code. The provisions are about theft, animal stealing, and the sentence thereof. There is nothing about the doctrine of recent procession in these sections. The same is provided for under Section 312 of the Penal Code. Notwithstanding, the trial Magistrate invoked the doctrine and relied on it in convicting the appellants as shown on page 8 of the judgment. Based on the foregoing, this court finds merit in the 3rd ground of appeal.

The appellants complain further in the 4th and 5th grounds of appeal that the trial Magistrate erred for not addressing his mind to the material contradictions between the testimony of PW1 and PW2 on the description of the donkeys allegedly stolen. They added that PW1 did not identify and describe the stolen donkeys properly at the pre-trial and in the trial stages. I have examined the records and observed that PW1 described his donkeys to be gray, and one had a 'V' mark on its right thigh, the other had an 'M' mark on the right foot whereas another one was cut on ears. He explained that the rest were still small so, they had no marks.

On the other hand, PW2 testified that the donkeys were in gray, two of them had an 'X' mark on their thighs, two were marked with an 'M' on their right thighs, one had a cutlass sign on the neck, and one was cut on its both ears and it was black. The appellants asserted that the donkeys were theirs as they bought them from John Masanja. Nevertheless, they were unable to present any evidence to substantiate the assertion. For these reasons, I dismiss the allegation that PW1 did not identify and describe the donkeys.

As for the contradictions, it is imperative to note that the appellants were accused of having stolen 11 donkeys but they were found in possession of 7 donkeys only. In the trial court, only 6 donkeys were tendered as exhibits while one donkey was reported to have died before the trial. After careful examination of the testimonial account reproduced above, I have established that there was a substantial resemblance in the description of the donkeys as stated by PW1 and PW2. For instance, they both informed the court that the donkeys were gray and had marks on the ears and thighs.

I am of the view that the variation in the marks ranging from 'M', 'V', and 'X' might have been caused by the fact that not all the stolen donkeys were found with the appellants. The trial court observed the same description of the donkeys and noted that there were no small donkeys.

I am conscious that where there are allegations of inconsistencies in the evidence, the court is obliged to address them and decide whether they are only minor or go to the root of the matter. In ***Metwii Pusindawa Lasilasi v R.,*** Criminal Appeal No. 431 of 2020, Court of Appeal at Arusha, it was held that:

"The general rule is that contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case and are healthy as they show that the witnesses were not rehearsed before testifying."

Thus, the inconsistencies between PW1 and PW2's testimonies concerning the marks on the donkeys, are in my view, inconsequential and they did not affect the substance of the case. Consequently, the 4th and 5th grounds of appeal have failed.

About the contention that PW1 did not establish ownership of the stolen properties to the standard required, I agree with the learned State Attorney that this ground of appeal is baseless because PW1 and PW2 elaborated in detail about how the donkeys belonged to PW1. They explained that PW1 owned cattle and donkeys at Ipuli under the care of PW2. They went further stating that on the fateful day, PW2 went to where the donkeys slept and found 11 of them missing and they started following up on the

matter until they managed to find the appellants with the said donkeys. This piece of evidence was not contradicted by the appellants in any way hence, I have no reason not to believe it. In ***Goodluck Kyando v. Republic***, [2006] TLR 363, the Court held that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness.

The appellants were also irritated that the person who arrested the appellants as stated in the testimony of PW4 was not summoned to support the allegations that the appellants were found in possession of the alleged stolen properties in Shinyanga. The learned State Attorney argued that the prosecution was not legally bound to summon any particular number of witnesses. She added that they did not consider the police officers who arrested the appellants as material witnesses in the case at hand. To buttress her stance, she referred to Section 143 of the Evidence Act.

In ***Azizi Abdallah v R.***, [1991] TLR 71, it was stated that:

"The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

In the instant case, PW4 informed the trial court that the appellants were arrested by the police officers in Shinyanga and brought to Tabora. Moreover, the appellants told the court that after having been transferred from Shinyanga to Tabora, they were unable to get their witnesses. In these circumstances, it cannot be said that the police officers who arrested the appellants were within reach but were not summoned without sufficient

reason. In the case of ***Wambura Marwa Wambura v. R.***, Criminal Appeal No. 115 of 2019 the Court of Appeal held that whether or not to call a certain person as a witness depends on the circumstances of each case and the relevance of the evidence of such witness to a case.

Lastly, the appellants lamented that the sentence imposed upon them was manifestly excessive. Section 268 (1) of the Penal Code stipulates that where the thing stolen is any of the animals to which the section applies, the offender becomes liable to imprisonment for fifteen years. In this regard, the trial court had wide discretion to impose any sentence on the appellants ranging from unconditional discharge to a maximum of fifteen years. Immediately after the conviction, the appellants prayed for a lenient punishment for the reasons that they were first-time offenders and they had young children and sick parents depending on them. Notwithstanding, the trial court imposed a maximum sentence on the appellants. I am aware of the case of ***DPP v. Shida Manyama @ Seleman Mabuba,*** Criminal Appeal No. 285 of 2012 in which it was held that an appellate court has a limited role in sentencing. However, I am also conscious that there are some exceptions to this rule.

In the case at hand, I am of a settled view that the trial court overlooked some material factors in sentencing the appellants. The prosecution side did not advance any aggravating factors. They indicated that they did not have any previous criminal record of the appellants. Therefore, the court was expected to consider these factors, and the appellants' mitigation along with other circumstances of the case. For not considering these, I allow the 8th ground of appeal by aligning myself with

the appellants' argument that the sentence imposed on them was excessive. Henceforth, the appeal is allowed in respect of the sentence meted out to the appellants. I alter the said sentence from 15 years imprisonment to three (3) years imprisonment. As the appellants have been in custody since the year 2021, I order their immediate release from custody unless held for other lawful cause. The right of appeal is fully explained to any party aggrieved by this decision.

Order accordingly.

KADILU, M.J.
JUDGE
24/06/2024.

Court:-

Judgment delivered in open court on the 24th Day of June, 2024 in presence of both appellants and Mr. Steven Mnzava (State Attorney) for the Respondent.

G.P. NGAEJE
AG. DEPUTY REGISTRAR
24/06/2024

Court:-

Right of appeal fully explained.

G.P. NGAEJE
AG. DEPUTY REGISTRAR
24/06/2024