

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**

CORAM: KILEO, J.A., MBAROUK, J.A., And MASSATI, J.A.

CRIMINAL APPEAL NO. 359 OF 2014

1. GWISU NKONOLI
2. HAMISI MZIWA
3. SWED JUMA MWINYIHERI
4. TANO MBAMBE

}APPELLANTS

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the decision of the Resident Magistrate
At Dodoma)**

(Rutatinisibwa PRM Ext. J.)

Dated 5th day of October, 2012

in

Criminal Appeal No. 26 of 2012

JUDGMENT OF THE COURT

28th May & 1st June, 2015

MBAROUK, J.A.:

In the District Court of Manyoni at Manyoni, the appellant with six others were charged with two counts, **one** armed robbery contrary to sections 285 and 286 of the Penal Code and **two** cattle theft contrary sections 265 and 268 of the Penal Code Cap. 16 R.E. 2002. The appellants were the only ones who were convicted and sentenced to thirty (30)

years imprisonment for the count of armed robbery and two (2) years imprisonment for cattle theft. The sentences were ordered to run concurrently. They were also ordered to pay compensation of T.shs. 200,000/=. Unsatisfied, the appellants unsuccessfully preferred their appeal to the High Court of Tanzania at Dodoma. Undaunted they have lodged this second appeal.

In this appeal, the appellants fended for themselves, whereas Mr. Marcelino Mwamnyange, learned Senior State Attorney represented the respondent/Republic.

Each appellant lodged a separate memorandum of appeal, but in essence the common grounds of complaint centre on the following grounds:-

- 1. That, the complainant (PW1) failed to give description of the appellants before an identification/parade was conducted.*
- 2. That, the case was not proved beyond reasonable doubt.*

3. That, there was double standard when the trial court acquitted the 5th accused as he was the one found with the stolen cows.

Before examining the merits or otherwise of this appeal, we have found it useful to look at the facts of the prosecution's case as presented before the trial court. They are as follows: - the record shows that on 20-07-2009 at 12:30 a.m., Joel Chota (PW1) who was a farmer and pastoralist was grazing fifty heads of cattle and thirty goats. PW1 said, some of those cattle were owned by him, some were owned by his friends and six of them were owned by Paulo (PW2). While he was grazing, four people approached him. He testified to have identified them, but failed to know their names. Initially, he said that he was beaten by the 1st and 2nd appellant by using sticks and swords and later he was beaten by the 3rd and 4th appellants. PW1 further testified that the 1st and 2nd appellants removed his shirt and tied his hands and legs. He was then left in the bush and the appellants went away with the cattle. He remained there at the bush until 4:00p.m. without shouting as he was afraid

the bandits may return and kill him. Thereafter, he shouted for help and one Laurent Magereka came and managed to cut the ropes tied on him. As PW1 was unable to walk, the said Laurent went to report the matter at PW1's residence. Some youths came with a bicycle and took PW1 to Kilimatinde Hospital. He was admitted for one week at the hospital and when he was released, he was called at Manyoni Police Station and managed to identify the 1st and 2nd appellants.

On his part, Paulo Stephano (PW2) testified that on 20-07-2009 at 5:00p.m. while at his residence at Chibumagwa, he received a telephone call informing him that his cattle which were kept by PW1 were stolen. He then took his bicycle and went to Solya and later to Mbwasa Village to follow the foot prints of the bandits and cattle, but failed to locate them.

Next day on 21-07-2009 PW2, reached at Bahi and was informed that the stolen cattles were at that place. It was Mahona s/o Sauda Mahona who was the 5th accused (later released by the trial court) who told him that he knew the

place where those cattle were hidden. The said 5th accused demanded T.shs. 1,000,000/=, and PW1 managed to be shown fourteen heads of cattle only. After the intervention made by policeman, the 5th accused was arrested and interrogated leading the appellants to be mentioned. After the 5th accused was arrested he was later charged with other accused persons.

Stephen Chitalita (PW3) and Dominic Mnyaroge Mbushuu (PW4) testified the same facts concerning the involvement of the 5th accused who was later released by the trial court.

In their defence, all the appellants denied to have committed the offences charged against them. For example, the 1st appellant claimed that on 22-07-2009 while at Bahi, he went at a certain hotel to find food to eat, after he finished eating, he was arrested by a police officer of Kintinku for stealing six heads of cattle. Whereas the 2nd appellant told the trial court, that on 23-07-2009, he was at Bahi stand he was arrested by a certain policeman. On his part, the 3rd appellant claimed that on 20-07-2009 he went to visit his

sister called Mwajuma Juma at Bahi District. Thereafter on 23-07-2009, while still in Bahi, he was arrested by a certain policeman for the reason that he committed an offence at Manyoni on 19-07-2009. He was then taken to Manyoni Police Station from Bahi. On 28-07-2009, the 3rd appellant claimed to have been sent to court and charged for stealing cattle and goats. As for the 4th appellant, he testified that on 05-08-2009 at 2:00 a.m. while at his home at Itigi came a policeman called George and arrested him for the allegations of stealing six heads of cattle at Mantoli area. He further testified that on 10-08-2009, he was sent to court and accordingly charged.

At the hearing all the appellants opted to allow the learned Senior State Attorney to submit first to their grounds of appeal and wished to respond thereafter.

On his part, Mr. Mwamnyange from the outset indicated to support the appeal. He gave three reasons in his move to support the appeal. **Firstly**, he said, even if the incident of robbery occurred at day time, but PW1 failed to give

description of the appellants before an identification parade was conducted. The learned Senior State Attorney emphatically urged us to find that it was not proper for the identification parade to be conducted without PW1 giving the description of the appellants beforehand. In support of his argument he cited to us the decision of this Court in the case of **Mulangalukije Augustino v. The Republic**, Criminal Appeal No. 318 of 2010 (unreported).

Secondly, Mr. Mwamnyange joined hands with the appellants' complaint that the prosecution has failed to prove their case beyond reasonable doubt. He said, PW1 as a complainant failed to give the description of the alleged stolen cattle. He further contended that it was necessary for PW1 first to give special marks of his cattle which were allegedly stolen but this was not done. Such a failure Mr. Mwamnyange said leads a case not to be proved beyond reasonable doubt.

Thirdly, the learned Senior State Attorney submitted that he agrees with the appellants that as the 5th accused

was acquitted without adducing his evidence, and as he was the one who was found with the stolen cattle, that created doubt and makes the prosecution's evidence weak in finding the appellants guilty as charged.

Finally, Mr. Mwamunyange urged us to find this appeal with merit.

On our part, we join hands with the learned Senior State Attorney that this appeal is meritorious. **First**, we fully agree with both, the learned Senior State Attorney and the appellants that it necessary to give a detailed description of a suspect before an identification parade is conducted. In support of that contention, this Court in the case of **Adriano s/o Ayondo v. Republic** Criminal Appeal No. 29 Of 2009 (unreported) stated as follows:-

".....it is settled law that for any identification parade to be of any value, the identifying witnesses must have earlier given a detailed description of the suspects."(Emphasis added)

(Also See: **Ahmad Hassan Marwa v. The Republic**, Criminal Appeal No. 265 of 2005 and **Athuman Buji V. Republic**, Criminal Appeal No. 118 of 2008 (both unreported) to name a few.)

As pointed out earlier, in the instant case the pre-requisite condition of giving a detailed description of the appellants before the identification parade was conducted was not complied with by PW1. For such non-compliance with such a vital one, we are constrained to find the identification parade was devoid of any value.

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. See the decisions of this Court in the

case of **Bundala s/o Mahona v. Republic** Criminal Appeal No. 224 of 2013, **Mustapha Darajani v. Republic**, Criminal Appeal No. 242 of 2005 and **Godfrey Lucas V. Republic**, Criminal Appeal No. 151 of 2014 (all unreported). In the case of **Mustapha Darajani** (supra), this Court held as follows:-

"... In such cases description of specific mark to any property alleged stolen should always be given first by the alleged owner before being shown and allowed to tender them as exhibits."

In the instant case, no special marks were given by PW1 before those cattle were tendered at the trial court as exhibits. We are of the considered opinion that such a failure is a fatal omission in the prosecution case.

Third, according to the facts on record, there is no doubt that the 5th accused who was a very important witness would have helped the prosecution's case against the appellants. Having been acquitted without adducing his evidence that has weakened the prosecution case.

All said and done, having examined the shortfalls stated above, we find the appellants' appeal with merit. In the result, we allow the appeal, quash the convictions and set aside the sentences. The order of compensation is similarly set aside. The appellants should be released from custody forthwith unless they are held for any other lawful cause.

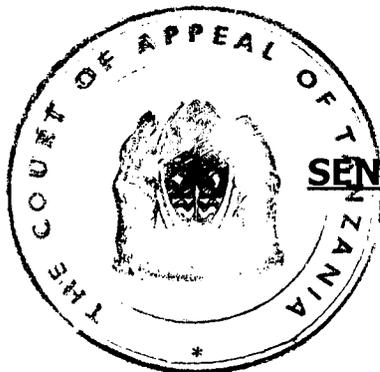
DATED at **DODOMA** this 29th day of May, 2015.

E.A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL