

**IN THE HIGH COURT OF TANZANIA  
TANGA SUB-REGISTRY  
AT TANGA**

**CRIMINAL APPEAL NO. 81 OF 2023**

*(Arising from the Judgment in Criminal Case No 28 of 2023 of Pangani District Court)*

**HARIDI YUSUPH .....**

**APPELLANT**

**VERSUS**

**THE REPUBLIC.....**

**RESPONDENT**

**JUDGMENT**

**K. R. Mteule, J**

**16/4/2024 & 18/4/2024**

The Appellant herein is aggrieved by the decision of the District Court of Pangani, hereinafter referred to as the trial Court, in **Criminal Case No. 28 of 2023** issued on 31<sup>st</sup> July 2023. In the trial Court, the Appellant was charged with the offence of Cattle Theft contrary to **Section 258 and 268 (1) of the Penal Code [Cap 16 RE 2022]** hereinafter referred to as Penal Code.

It is alleged in the charge sheet that on 8<sup>th</sup> day of April 2023 at about 0500hrs at Kimang'a Village within Pangani District in Tanga Region, the appellant did steal one cow valued at **TZS 1,500,000.00** the property of one Kilo Nzige.

The facts leading to this Appeal arises from an incident of cattle theft which happened at Kimang'a area withing Pangani Distrtict in Tanga Region. The information was spread across the area and people started looking around for the thief. Later on, the accused person was found with a meat and the villagers suspected it to be from the stolen cow. The accused person was arrested and arraigned before the District Court of Pangani where he was charged with the offence of cattle theft as stated above.

In the District Court the accused person was convicted and sentenced to serve 5 years imprisonment in jail. Being dissatisfied by the conviction and sentence, the accused person preferred this appeal basing on the following grounds:

1. That, the learned trial magistrate erred in law and in fact by acting upon doubtful, contradictory and unreliable evidence of the prosecution witnesses.
2. That, the learned trial magistrate erred in law and in fact by convicting the appellant as there is no watertight evidence to connect the appellant with the offence.
3. That, the case against the appellant was not proved beyond reasonable doubt.



The Republic being represented by Mr. Nathaniel Chagama who drew the submission, supported the appeal in all the 3 grounds. Mr. Chagama, SA opted to submit on the third ground of appeal that "the case against the appellant was not proved beyond reasonable doubt." Generally, this ground engulfs all the three grounds of appeal since they all challenge the sufficiency of evidence and its evaluation.

Mr. Chagama referred to exhibit P1 which was the remains left at the place believed to have been used to slaughter the stolen cow. He submitted that the said remains were not identified by the complainant (PW1) to tally them with his stolen cow.

Referring to page 5 of the written proceedings, Mr Chagama, SA noted PW1 stating to have gone to the valley after having received a phone call by PW2 who asked him to go to identify the said remains which constituted a head, bones, legs, a tail and skin cut in pieces. Mr Chagama, SA explained that PW1 claimed the remains to be of his stolen cow, but he did not point out any indication or sign or specific mark unique to identify his cow. It is Mr. Chagama's submission that in law, for the identification of exhibit of this nature to be proper, it is the duty of the owner of the property alleged to have been stolen to show a special mark established by the claimant/owner to explain the details of the stolen item. He cited the case of **Hashim Atwash Rashid And**

**3 Others Vs Republic, Criminal Appeal No. 5 of 2021 High Court at Dar es Salaam** quoting page 5 thus;

*"..... that identification done only by colour is not enough according to her, PW5 failed to prove beyond reasonable doubt."*

He further cited the case of **Ramadhan Hamis @ Joti Vs Republic, Criminal Appeal No. 513 Of 2016 CAT at Tabora** relying on the position in **David Chacha and 8 Others Vs Republic, Criminal Appeal No. 12 OF 1997** (Unreported) where the Court of Appeal stated;

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

Mr. Chagama SA further identified contradiction between prosecution witnesses concerning the point of discovery of the exhibit. He referred to the evidence of PW3 the police officer, who testified at page 13 of the proceedings that when they reached at the scene being led by the complainant, they found the exhibits of a head of a cow black in colour,



and a piece of skin black in colour. He compared this evidence with that of PW1 (the alleged owner of the stolen cow) and PW2 at page 6 and 10 of the written proceedings where the witnesses stated that they went to the place where the cow was slaughtered, being led by the accused person. In his view, this is doubtful, contradictory and unreliable evidence by the prosecution as it is not clear as to who led the police officers to the crime scene between the appellant and the complainant.

He added that the respondent failed to call material witnesses. He referred to pages 12 and 13 of the trial proceedings as testified by PW3 who was the arresting officer that the accused person was under restraint even before he re-arrested him, which in Chagama's view, indicates that there were some witnesses who were at the scene of crime who arrested the appellant but not called to testify about what happened before the arrival of the police. Thus, in Mr. Chagama's view, it is not known what was the source of information that the appellant had some remains of a cow, and it is not stated what were the reasons that made them to arrest the appellant. In his view, this confirms further that the respondent failed to call material witnesses who were present during the arrest.

Mr. Chagama challenged the way the exhibit was destroyed where the appellant was not involved during the destruction of the remains which constitutes **exhibit P2**. He submitted that in the evidence, PW3 failed to clarify as to who witnessed the destruction process, where and how the said destruction took place something which leaves a doubt as to whether the remains were actually there or not.

Mr. Chagama challenged the chain of custody which in his view was left broken. He referred to pages 13 paragraph 3 of the written trial proceedings, where PW3 stated how he handled the Exhibits seized from the accused person (Bajaji) to the exhibit keeper but failed to state the manner how or where the remains of the cows were kept and to whom were vested to keep them at Pangani Police station before its destruction. He added that even the exhibit keeper was not called to clarify which creates doubts as far as the chain of custody is concern. Basing on the above witnesses, Mr. Chagama submitted that the case against the Appellant was not proved beyond reasonable doubt hence the Respondent is supporting the appeal.

Having considered the grounds of appeal and the appellant's submissions it appears that all the three grounds of appeal revolve around ground No. one that, the case in the trial court was not proved



beyond reasonable doubt. Therefore, determination of this ground will automatically answer all the grounds as I hereunder do.

I have gone through the lower court proceedings. As stated by Mr. Chagama, the evidence of PW1 and PW2 who stated that the accused person led the police officers to the scene where the alleged slaughtered cow remains were found there contradicted that of PW3 who stated that he was led to the place by the complainant. In my view, clarity on who led to the discovery of the scene of crime is a crucial aspect in a criminal trial to ascertain linkage of the knowledge of the incident with the accused person. If prosecution succeeds to establish that it is the accused who led to the discovery of the scene then chances of linking the accused person with the commission of the offence becomes higher. This variation in evidence on who led to the discovery of the crime scene creates a doubt which is further intensified by the defence evidence that the appellant was hired by a passenger for his Bajaji to take the luggage from Kigombe and that when the civilians stopped his Bajaji, the said passenger run away. That people run after that passenger unsuccessfully. There is a chance that the appellant could have been a bona fide driver who was offering service to the culprit.

The trial magistrate employed the rule of recent possession from the case of **Bulungu Nzungu vs. R, Criminal Appeal No 39 of 2018 CAT at Shinyanga**. The trial Magistrate was cognisant that for the doctrine of recent possession to apply, there must be a condition that the property is positively proved to be the property of the complainant as one of criteria stated in Bulungu's case cited supra. It is apparent that that prove was not established taking into account the contradictions found in the prosecution evidence as submitted by Mr. Chagama for the Respondent and being apparent in the evidence on record. It is apparent that there is so much doubt as to whether what was found was actually the remains of the cow stolen from the complainant.

The defence of the appellant intensified the doubt as he claimed to have been just a driver hired by the real owner of the luggage who run away after the tricycle (Bajaji) having been stopped by the civilian. From the aforesaid, it is my view that the doctrine of recent possession was not established sufficiently to be reliable for the conviction of the appellant due to the fact that was not sufficiently proved that what was found in possession of the appellant was actually the property of the complainant.



Therefore, the appeal is found to have merits and it is allowed. The Judgment of the District Court of Pangani in **Criminal Case No. 28 of 2023** together with the conviction and sentence are hereby quashed and set aside. The appellant is acquitted and set free unless held for another offence. It is so ordered.



Dated at Tanga this 18<sup>th</sup> Day of April 2024

A handwritten signature in blue ink, appearing to be "Ks", written over the judge's name.

**KATARINA REVOCATI MTEULE**

**JUDGE**

**18<sup>TH</sup> DAY OF APRIL 2024**

**Court:**

Judgment delivered this 18<sup>th</sup> Day of April 2024 in the presence of the Appellant and Mr. Wilfred Mbilinyi State Attorney for the Respondent. Right to further appeal is explained.



A handwritten signature in blue ink, appearing to be "Ks", written over the judge's name.

**KATARINA REVOCATI MTEULE**

**JUDGE**

**18<sup>th</sup> Day of April 2024**