IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC CRIMINAL APPEAL NO. 87 OF 2022

(Originating from the Judgment of District Court of Bahi at Bahi in Criminal Case No. 01 of 2022)

1. BAKARI LEMBOTO KAPELA
2. ELIUD STEPHANO NDIMBE ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 1/11/2023

Date of Judgment: 13/11/2023

LONGOPA, J:

The Appellants, Bakari Lemboto Kapela and Eliud Stephano Ndimbe stood charged for three offences, namely conspiracy to commit an offence c/s 284 of the Penal Code for both, stealing of cattle c/s 265 and 268 and being found in possession c/s 312 of the Penal Code for the 1st Appellant. The District Court of Bahi found the 1st and 2nd Appellant guilty and they were both sentenced to seven (7) years imprisonment for offence of conspiracy and the 1st Appellant was sentenced to fifteen (15) years

imprisonment for offence of stealing cattle. These penalties for the 1st Appellant were to run concurrently.

The Appellant being dissatisfied by both conviction and sentence, appeal to this Court challenging the findings by the District Court on the following grounds: -

1. *That the learned trial magistrate grossly erred in law and in fact when totally misapprehending the nature and quality of the prosecution evidence against the Appellant which did not prove the charge beyond all reasonable doubts.*
2. *That the trial learned magistrate grossly erred in law and in fact by acting on uncorroborated evidence from other independent witness since there was no evidence showing that the appellants were communicating through mobile phone from the registered authority may be from Vodacom, Tigo, Airtel and Halotel, depending on the said numbers used to communicate during the material time.*
3. *That the trial learned magistrate grossly erred in law and in fact by acting on the evidence of seizure note which was obtained not in accordance with the law.*
4. *That the trail learned magistrate grossly erred in law and in fact by acting on the evidence of caution statement which was not obtained voluntarily not only that but also the said caution statements were taken not within the*

requirement of section 50 and 51 of the Criminal Procedure Act [Cap 20 RE 2019].

5. *That trial learned magistrate if she could think in deeply, she could discover that the case at hand was cooked and fabricated against the appellants since there were no evidence from other people who gathered on the locus quo so as to come and adduce evidence in corroboration with the evidence of the prosecution case and there were no reasons as to why such witness was not summoned since it was alleged that the head (sic) of cattle was arrested in the other village.*
6. *That the trial learned magistrate grossly erred in law and in facts by acting on evidence of prosecution side without considering also the evidence of the defence.*
7. *That the trial court grossly erred in law and in facts when failed to notice that there was no evidence of establishing the chain of custody of the alleged stolen head of cattle since its arrest until brought in court as exhibits.*

The Appellant prayed that on strengths of these grounds of appeal the Court be pleased to allow the appeal by quashing a conviction and setting aside sentence imposed upon the accused persons by the lower court thereat to set the Appellant at liberty. On date set for hearing, that is, 1st November 2023, the Appellant appeared in person while the Respondent was represented by Ms. Prisca Kipagile, State Attorney.

In support of the appeal, both Appellants adopted the grounds of appeal as set forth in the Petition of Appeal. 1st Appellant added that he was arrested lonely without any village authorities being informed regarding his arrest. He insisted that there were no exhibits regarding his participation in the commission of alleged offence.

Regarding the herd of cattle, the 1st Appellant argued that the same was produced in court after lapse of eight (8) months since his arrest and there was no evidence adduced to establish chain of custody. There were discrepancies as it is the Village Chairman who brought the herds of cattle to Court while arresting officers stated to have handed over to owner after arrest.

Further, in respect of cautioned statement, 1st Appellant argued that he only admitted that he committed the offence due to severe beating from members of public during arrest and the police officers during interrogation at the police station on third day of arrest. He prayed for the Court to allow the appeal.

The 2nd Appellant argued that it was alleged that he participated in the commission of the offence by facilitating transport. He insisted that the mode of transport he had is a Bajaj that cannot in ordinary sense be able to carry the five herds of cattle that 1st Appellant is alleged to have stolen. He further argued that the only reason to join 2nd Appellant is

that he facilitated the 1st Appellant with transport of the stolen herds of cattle.

It was 2nd Appellant's averment that there were no voice notes produced in trial court to support allegations that 1st and 2nd Appellant were communicating regarding the alleged offence of conspiracy. It is his argument that absence of such evidence against him is a clear indicating that there was no sufficient evidence to convict and sentence him on the alleged offence.

Regarding a Seizure Certificate/Note, 2nd Appellant argued that he was beaten by the police officers. He insisted that if it was not for pain inflicted on him by beatings, he would have not agreed to sign the seizure certificate as he did not participate in commission of the offence. To cement his arguments, 2nd Respondent informed this Court that he tendered Police Form No. 3 (PF3) in the trial court to prove beatings by the Police officers. The 2nd Appellant urged this Court to allow the appeal.

In reply, Ms. Kipagile learned State Attorney, objected the appeal. Submitting on the first and fifth ground of appeal, she said that two offences namely cattle theft contrary to section 265 and 268 of the Penal Code, Cap. 16 R.E 2019 and Conspiracy contrary to section 384 of the Penal Code Cap. 16 were proved by the prosecution to the required standard. The prosecution witnesses testified that the cattle were found

red-handed in possession of the first appellant. In fortification of her submission, she cited the case of **Ibrahim Ally Mwadau vs. Republic**, Criminal Appeal No. 11 of 2018 [2020] TZCA 358 (TanzLII).

With regard to the conspiracy, she said the prosecution proved that there were communications between the first appellant and second appellant as the second appellant arrived at the scene of crime by using a Bajaj after being called by the first appellant. It was her further submission that PW1, PW2 and PW5 testified on how the appellants were arrested. PW 3 recorded the cautioned statement. PW 4 on the other hand participated in arresting the appellant and preparation of seizure certificate and PW6 was the exhibit keeper who testified to have kept the Bajaj that was found at the crime scene. She added that section 143 of the Evidence Act Cap. 6 R.E 2019 does not require specific number of witnesses to establish a case. Since the prosecution proved its case by using six witnesses to her view there was no need of calling other witnesses.

On the third ground, it submitted that the provision of section 38 of the Criminal Procedure Act on certificate of seizure was complied with, she referred the court at pages 40 and 41 of the typed proceedings. The section requires the certificate to be filed and signed at the scene of crime on the same day the exhibit was seized. It must be signed by the suspect and the arresting officer. It was Prisca's submission that all these were done.

On the fourth ground regarding cautioned statement of the first appellant, the learned State Attorney argued that procedures in recording it were followed. She added that when the first appellant objected its admission in trial court, said the trial court conducted an inquiry and found the same was made voluntarily in accordance with the law.

In respect to ground six of appeal, Ms. Kipagile stated that the defence evidence was considered by the trial court to arrive at the verdict. She referred the court at pages 12 to 13 of the typed proceeding. The PF3 tendered by the appellants were admitted and the court considered them in in its decision.

On the last ground of appeal in which the appellant complained about the chain of custody, the learned State Attorney submitted that this ground has no merit since it was established and proved that PW4 seized the cattle and returned them to PW2 the owner of the herds of cattle. Therefore, she prayed the court to dismiss the appeal.

In rejoinder, it was the second appellant who rejoined briefly that there was contradiction on the transport facility that is Bajaj which cannot transport five herds of cattle. He also submitted that he did not record cautioned statement at the police station to admit participation in commission f any alleged offence.

To determine this appeal, I have considered grounds of appeal, the submission made by the parties in support and in opposition to the appeal respectively and the trial court's record. The task ahead of me is essentially a re-assessment of the evidence on the record to ascertain whether, in the light of the grounds of appeal the prosecution proved its case to the required standards.

As the position of law stands in our country, in criminal law the burden to prove a criminal charge lies to the prosecution, and it never shift to the accused. In the case of **Maliki George Ngendamkumana vs. Republic,** Criminal Appeal No. 353 of 2014 [2015] TZCA 295 TanzLII, the Court of Appeal held that:

> It is a principle of law that, in criminal cases the duty is two folds, one to prove that the offence was committed and two, that it is the accused person who committed the offence.

However, the standard of proof in criminal case is beyond reasonable doubt. Section 3 (2) (a) of the Evidence Act Cap. 6 R.E 2019 provides:

> A fact is said to be proved in criminal matters except where any statute or any law provides otherwise the court is satisfied by the prosecution beyond reasonable doubt that the fact exist.

The burden never shifts to the accused as he need not prove his innocence. All what the accused needs to do is to raise reasonable doubts

on the prosecution case. See **Mohamed Haruna @ Mtupeni & Another v. Republic**, Criminal Appeal No. 25 of 2007, [2010] TZCA 141 TanzLII and **Mwita and Others v. Republic** [1977] TLR 54).

As pointed out earlier, the appellants jointly were charged with the offence of conspiracy in first count. It presupposes that the accused person did form a common intention to commit unlawful act. The Court of Appeal in the case of **John Paul @Shida and Another vs. Republic,** Criminal Appeal No. 335 of 2009 [2011] TZCA 114 (24 March 2011), the Court of Appeal, at pages 4-6, held that and I quote:

> Conspiracy is an offence in its own right, it has own ingredients which must be proved, these are an agreement of more than one person to do unlawful act by unlawful means and the person charged must be part of that agreement. All ingredients must exist in order to prove a charge of conspiracy.

See also the case of **Republic vs Halfan Bwire Hassan and 3 Others** (Economic Case 16 of 2021) [2021] TZHCCED 6686 (6 September 2021). From the above of authorities, it is the trite law that for the offence of conspiracy to be proved two ingredients must be proved: first, there must be an agreement by two or more persons and second, the agreement must be for doing an unlawful act or doing lawful act by unlawful means.

Having underscored the principle above, there is no evidence at all establishing that the appellants sat, met or communicated together somewhere and conspired to commit the offence of stealing cattle. The fact that the first appellant phoned the second appellant is not enough to prove that the offence of conspiracy was committed. This evidence is wanting.

It was expected that the prosecution would tender and tell the trial court the number the two were communication, the mobile phone used since they were found with them the same were to be used in assisting the prosecution to track all the communication the two made in respect to the commission of the offence. This could have included even the voice notes/call logs the two accused made or short messages if there was one.

Given that under the laws of Tanzania electronic evidence is admissible in Court of law including in criminal matters, the evidence related to communication would establish important element of the offence of conspiracy. Since no explanations were given on account of all these fact raises reasonable doubts that may be there was no communication between the appellant in relation to the commission of the offence prior to the arrest of the two evidencing that the appellants conspired to commit the offence.

In the case **John Paulo @ Shida vs Republic** (Criminal Appeal 335 of 2009) [2011] TZCA 114 (24 March 2011), the Court of Appeal held that:

> From the above definition it follows that conspiracy is an offence consisting in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. **So, unless two or more persons are found to have combined to do the act there can be no conviction**.

As there was no scintilla of evidence to establish existence of any agreement of the Appellants to commit the offence, I am of the view that conviction on this offence can not stand for both 1st and 2nd Appellants.

Participation of the 2nd Appellant (2nd accused) was also intimated by the fact that he is allegedly went to the scene of crime to transport the stolen herds of cattle. The means he had was a Bajaj. In cross examination of PW 4, it was stated that this mode of transport was intended to carry herds of cattle from that place to another. This testimony raised a clear reasonable doubt on whether arrival of the 2nd accused at a place where 1st accused person was held is in accomplishment of the common intention, that is, agreement to commit unlawful act or lawful act by unlawful means.

In fact, these doubts were noted by the trial court. The trial magistrate stated that the 2nd accused person raised a doubt as to how Bajaj which is used to carry passengers was to manage to carry five herds of cattle. It was the opinion of the trial magistrate that this doubt was answered by the PW 6 that it was upon himself (2nd Appellant) to know how he would do it,

either by trips or by any means. It was the finding of trial court that question was not negating the truth that 2nd Appellant knew what he went to do and how he was to do it. This is on **page 11 of the judgment**.

I am of the settled view that this approach by trial court was not proper. First, it tends to shift the burden on the side of the 2nd accused person to prove his innocence. Second, this evidence dented the prosecution's case by raising a reasonable doubt that it might be improbable for the 2nd accused to have gone there to accomplish a common intention. This testimony would have been used by trial court to find out that participation of the 2nd Accused (2nd Appellant) in conspiracy was wanting.

Moreover, the fact that the first appellant confessed to have conspired with the second appellant to transport the stolen herds of cattle is not in itself satisfactory. It needed corroborating evidence including the voice notes or messages from the appellants' mobile phones. Absence of tangible corroborating evidence makes conviction of the 2nd appellant on offence of conspiracy unsubstantiated. That being the position, I do not think that the offence of conspiracy to commit an offence can be established in this case against the 2nd Appellant.

There is no tangible evidence to establish that the 1st Appellant met, sat and communicated with anybody else, a common intention to commit an unlawful act or lawful act using unlawful means. The existence of

agreement to that effect is lacking. Thus, I am of the view that offence of conspiracy was not proved.

On the other hand, the offence of stealing of the five herds of cattle against the 1st Appellant paints a different picture. Evidence of PW 1 indicated that on 18/01/ 2022 upon imploring efforts to find the stolen herds of cattle at Mpamantwa bushes they found the stolen cattle and the 1st Appellant who admitted that he stole the cattle, he apologized and arrested. He did introduce himself as one Bakari.

It was PW 2 evidence that indeed when they went to Mpamantwa arrested the 1st Appellant with herds of stolen cattle. On arrival of police officers, the 1st Appellant and 2nd Appellant were taken to Bahi Police Station. PW 3 stated that when he went to scene of crime, he found the Appellants were surrounded by the group of people. It was the PW 3 testimony that he interrogated the 1st Appellant who confessed to have committed the offence of stealing five herds of cattle.

PW 4 testified to have found the accused persons with five herds of cattle and filled in seizure certificate in presence of accused persons and other witnesses. It was PW 4 statement that he entrusted the stolen herds of cattle in hands of PW 2. PW 5 stated to have got the information about cattle stealing at 0500hrs and they suspects were sent to Mkola village and they called the police officers.

A common theme in PW1, PW 2, PW 3, PW 4 and PW 5 testimonies reflect the participation of 1st Appellant in the commission of offence of stealing. They provide an account of what happened from the moment the stealing event was noticed. PW 1 and PW 2 evidence is to the effect that they were at the crime scene when the 1st Appellant was found with five herds of stolen cattle. **Exhibit P1** which was a cautioned statement of the 1st Appellant admitting that he committed the offence and **Exhibit P4** which are the stolen cattle whose chain of custody was explained corroborate the involvement of the 1st Appellant in the offence.

Available evidence links the 1st Appellant to the offence of stealing five herds of cattle. The identification of the herds of cattle in testimonies tallied with **Exhibit P 4**.

The prosecution evidence that 1st Appellant was found in possession of stolen herds of cattle on that material date tends to prove that 1st Appellant did commit the offence of stealing as charged.

I concur with submission of the learned State Attorney that circumstances of the matter point out to one direction that it is the 1st Appellant who stole five herds of cattle. It is the 1st Appellant who was found on that fateful night at the scene where stolen herds of cattle were found is material to substantiate 1st Appellant's participation in the commission of the crime. This is corroborated with **Exhibit P1** which is a cautioned statement of the 1st Appellant where he admitted to have committed the offence.

In the case of **Ibrahim Ally Mwadau vs Republic** (Criminal Appeal 11 of 2018) [2020] TZCA 358 (23 July 2020), the Court of Appeal, at page 11, observed that:

> We, again, entirely agree with the learned Senior State Attorney that, given the fact that the offence was committed during a broad daylight and the appellant was allegedly arrested at the scene of crime, the issue of identification does not arise. **The Court has on a number of times held that where an accused is arrested at the scene of crime his assertion that he was not sufficiently identified should be rejected.** [See **Bahati Robert Vs. Republic** (supra) and **Joseph Safari Massay Vs. Republic**, Criminal Appeal No. 125 of 2012 (unreported)]. In the latter case, the case of **Abdalla Bakari Vs, Republic**, Criminal Appeal No. 268 of 2011 (unreported) was cited in which the appellant was overpowered and arrested at the scene of crime and his assertion on appeal that he was not sufficiently identified was rejected. **The Court has also always considered the evidence of finding somebody red handed committing an offence to be conclusive.**

It is on record that PW 1 and PW 2 testimonies are to the effect that 1st Appellant was found at the scene of crime where stolen herds of cattle were found. It was their further evidence that 1st Appellant admitted having

stolen the cattle and apologized. Also, **Exhibit P1** reflects admission by the 1st Appellant to have committed the offence od stealing the 5 herds of cattle.

The position of the law that evidence of prosecution witness that the accused being found at the scene of crime while committing the offence is sufficient to establish the offence was reiterated in the case of **Pantaleo Teresphory vs Republic** (Criminal Appeal No. 515 of 2019) [2023] TZCA 47 (23 February 2023), where the Court of Appeal at pages 12-13 stated that:

> She argued that according to the record, upon the victim missing from the place she was playing with other children, both PW1 and PW4 mounted search of her whereabouts and **PW1 was first to hear the victim crying in the forest where she went and found both the victim and the appellant naked and she shouted for help which call was responded to by many people including PW4 who went to the scene of crime and the appellant was pursued and arrested as he attempted to run away**. She contended that PW1's evidence was evaluated by the judge. We entirely agree with her...Besides, she reconsidered her testimony at page 96 of the record and held that she had no interest to serve because **she testified on what she witnessed at the scene of crime and was satisfied that the appellant and the victim were found naked**

and as a result of a hot pursuit the appellant was arrested. This complaint has no merit and we dismiss it.

It is evident that where the accused is found at the scene of crime that evidence is taken seriously to be sufficient evidence against the accused in respect of commission of the said offence by that accused person. As I have pointed out, the 1st Appellant was caught by PW 1 and PW 2 at the scene of crime. As such, the evidence is abundant to establish the commission of offence of stealing against the 1st Appellant.

Regarding the Exhibit P1 being recorded in contravention of the provisions of section 50 and 51 of the Criminal Procedure Act, Cap 20 R.E. 2019, I am satisfied that the cautioned statement complied with the legal requirements. The reasons for so holding are simple and straightforward. First, the admission of this exhibit was upon trial court's satisfaction that it was made voluntarily by the 1st Appellant. The Court arrived at such finding after conducting an inquiry. Record indicates on pages 26-36 that on 10/5/2022 an inquiry was conducted thus satisfactorily the Prosecution proved the same to have obtained on voluntary basis. Second, it is indicated that 1st Appellant was afforded an opportunity to call a lawyer or relative of his own choice. He opted not and it was so recorded. Third, evidence of PW 5 and DW 2 that police officers arrived at 1600 hours to take 1st and 2nd Appellant to Bahi Police Station. The Cautioned Statement indicates to have been recorded at 1800hours which is within the

prescribed hours for interrogation of a suspect upon restraint by police officers.

I am satisfied that the prosecution successfully proved that 1st Appellant did participate in commission of offence of stealing five herds of cattle contrary to provisions of section 265 and 268(1) of the Penal Code, Cap 16 R.E. 2019. The offence of stealing in the circumstances of this appeal involved five herds of cattle which were stolen from one village and transported to another village. It is the 1st Appellant who was found at the scene of the crime. This is the place where stolen herds of cattle were found on that fateful night.

Given the circumstances surrounding the commission of the alleged offence and weighing available evidence on record, it points that it is the 1st Respondent who did steal the herds of cattle. The evidence available is sufficient to prove the commission of the offence by the 1st Appellant. I concur with submission made by the Respondent that once caught red-handed, one cannot deny his participation in commission of alleged offence. I, therefore, reject grounds 1, 3, 4, 5, 6 and 7 for lack of merits.

This appeal should partly be allowed in respect of upholding second ground of appeal. As such, both the 1st and 2nd Appellants are exonerated from the offence of conspiracy for lack of cogent evidence to establish existence of this offence. The rest of the grounds are dismissed for being destitute of merits.

In the final analysis, I partly allow the appeal, quash the conviction, and set aside the sentence imposed against 1st and 2nd Appellants on offence of conspiracy. The 2nd appellant be set at liberty unless held on some other lawful cause. The 1st Appellant conviction and sentence in respect of offence of stealing is upheld.

It is so ordered.

DATED and **DELIVERED** at **DODOMA** this 13th day of November 2023.

E.E. LONGOPA

JUDGE

13/11/2023.