IN THE HIGH COURT OF TANZANIA

AT SONGEA

(DC) CRIMINAL APPEAL NO. 26 OF 2020

(Originating from Tunduru District Court in Criminal Case No. 200/2019)

RAJABU HAMIS @ MOHAMED.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of Last Order: 30/11/2020
Date of Judgment: 14/12/2020

BEFORE: S.C. MOSHI, J.:

In the District court of Tunduru the appellant was arraigned for Cattle theft C/S 268 (1) (2) of the Penal Code Cap. 16 R.E 2019. The particulars of offence are that **RAJABU HAMIS MOHAMED** on 6th October at Mnenje village within Tunduru district in Ruvuma Region did steal one head of cow valued at Tshs. 1,800,000/= the property of Songambele S/O Leleshi. The appellant denied the charge.

Upon the conduct of a full trial, in the end the appellant was convicted as charged and he was sentenced to serve five years imprisonment. Aggrieved by both conviction and sentence, the appellant has filed a

memorandum of appeal containing eight grounds of appeal which are as follows: -

1. *That, the trial Magistrate erred in law and facts by convicting and sentencing the appellant while the prosecution failed to prove its case beyond reasonable doubt.*
2. *That the trial court erred in law and facts in convicting the appellant without considering that the prosecution evidence adduced in court had massive contradictions and variances which did not reconcile and corroborate the charge sheet.*
3. *That, also when you pass through the copy of proceedings on date of 06/10/2020, the public prosecution said, I was at Minnie Village while on the same date Public prosecution said, I was at Mnenje Village stealing one head of cow which is not true and creating more doubts or it is fabricated/ a mere evidence to me because I just asking myself which kind of evidence did the trial court stood for until convicted and sentenced me.*
4. *That, also when you read over on prosecution case, you may find that the PW1, said he met with a woman informed her cow has been stolen by the person who has bush knife who invade and she don't know the one who took*

that cow by face. The same thing applies in judgment trial magistrate entered conviction and sentenced me by relied on the evidence of PW1 which he testified that the woman met with him stated that she knew the people stolen the cow by face not by their name which is contrary to the previously evidence adduced by him. This is just mere or cooked evidence in the eyes of the law.

5. *That, the trial magistrate erred in law and fact by convicting me based on circumstantial Evidence. There is no place showed there was a direct evidence as stated per section 62(1)(a) of the Law of Evidence Act, that such kind of evidence is admissible and is the best evidence than circumstantial Evidence. By this the trial magistrate erred in by convicting me, while there is no any prosecution witness who testified to saw me during the commission of offence, for my side the evidence of eye witness has value in convicting a suspect, that means a witness saw a suspect while stealing or when the stolen a head of cow was been found to me. But there is no any of it which has been proved.*
6. *That, the trial magistrate erred in law by convicting me, because all witness have suspicious and not the truth over me, it is better*

for "any Judge or Magistrate, he should not have doubts on his decisions". In this case the trial magistrate agreed that I was not found with stolen cow, but because I was named to be suspect he treated me as a guilty.

7. *That learned magistrate grossly failed to comply with Article 13(1)(b) of the Court 1977 which states that no person charged with criminal offence is treated guilty until proved guilty. In this issue learned magistrate convicted and sentenced without comply with mentioned article.*
8. *That, the trial Magistrate erred in law and fact by convicting and sentencing him without any written document which shows there was an agreement between him and complainant to pay the amount of Tshs. 1,500,000/=.*

At the hearing of the appeal, the appellant appeared in person whereas the respondent Republic had the services of Mr. Frank Chonja.

The appellant had nothing to add in his grounds of appeal.

On the first ground of appeal, Mr. Chonja submitted that the prosecution proved the case beyond reasonable doubt, there were two witnesses, hence this ground is meritless.

On the second ground, he said that the appellant complains that the evidence does not support the charge sheet, PW2's evidence was sufficient, the witness indicated the accused. The law demands that for criminal cases, the prosecution should prove the case beyond a reasonable doubt. He cited section 3 (2) (a) of Tanzania Evidence Act R.E 2019.

Regarding the third ground, he said that the referred date i.e. 6/10/2020 is not in the proceedings; hence it is not relevant.

On the fourth ground he submitted that the appellant states that the court considered PW1's testimony, that PW1 didn't know the accused. However, the court in its judgement considered both witnesses evidence. At no time did the court disregard PW2's testimony.

On the fifth and sixth ground he said that, the appellant complains that the court found him guilty whilst there was no direct evidence. The law of Evidence does not recognize direct evidence only, there are different types of evidence, each of them have its own threshold. However PW2 said that he saw the accused stealing a cow and that during stealing he threatened PW2 with a "Panga" hence Pw2's evidence is direct evidence.

On seventh ground he submitted that, the appellant said that he was treated as a guilty person by citing unknown law, this is not true as he was given all rights such as a right to plea on 6/11/2019 and the court

granted him bail, therefore he was presumed innocent until 14/9/2020 when he was found guilty.

On the eight ground, the appellant complained that the court had no written agreement that he would pay 1,800,000/=. He said that this complaint at the appellate stage is an afterthought because the accused did not dispute the same during cross examination of PW1. He didn't deny this fact even during his defence. He referred to the case of **Martin Misala V. R,** Criminal Appeal No. 428 of 2016, Court of Appeal sitting at Mbeya (unreported).

Mr. Chonja ended his submission by restating that the appellant committed the offence, therefore the appeal be dismissed in its entirety.

I have decided to discuss the 1st ground of appeal as it suffices to dispose the entire appeal.

The issue to be determined is whether PW2 properly identified the appellant as the culprit who stole the cow, as the trial court based its decision on identification of the appellant.

It is trite law that before an accused person's conviction is founded on identification evidence, that evidence must be watertight. It should only be acted upon when all possibilities of mistaken identity have been eliminated. In the celebrated case of **Waziri Amani V. R** (1980) TLR 250, the court held interalia thus:-

1.Evidence of visual identification is of the weakest kind and most unreliable

2.No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that evidence before it is absolutely watertight."

In the above case the court laid down some guidelines which are to be followed in order to establish whether or not identification evidence is water tight. The following factors must be established:-

(i) *The time the witness had the accused under observation.*

(ii) *The distance at which he observed him.*

(iii) *The conditions in which such observation occurred for instance, whether it was day or night time. Whether there was good or poor lighting at the scene.*

(iv) *Whether the witness knew or had seen the accused before or not.*

Also in the case of **Raymond Francis V. R** (1994) TLR 100, it was stated as here under;

".....it is elementary that in a criminal case where determination depends essentially on identification, evidence on condition favoring a correct identification, evidence on conditions favoring a correct identification is of the utmost importance."

Taking into consideration the settled position of the law and the evidence of identification as given by PW2, it is my view that the witness did not positively identify the appellant, she did not describe the circumstances of identification as enumerated in the case of **Waziri Amani** (supra). He did not give the description of the appellant; he did not give an explanation how she knew the appellant, such as his stature and the clothes he was wearing. Furthermore she did not state the time which the offence was committed. PW2 also said the assailants threatened her as they had a machete, however there was no description of the assailant at all. All in all she didn't say how she identified the appellant.

For the foregoing reasons, I allow the appeal, quash the conviction and set aside the sentence of five years imprisonment. The appellant is to be released forthwith unless otherwise lawfully held.

It is so ordered.

Right of appeal explained.

S. C. MOSHI

JUDGE

14/12/2020