

IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 24 OF 2023

(Originating from Criminal Case No. 23 of 2022 at Nkasi District Court)

PHILIPO JISENGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

23/10/2023 & 27/11/2023

MWENEMPAZI, J.

The appellant herein and another who is not part of this appeal were charged at the District Court at Nkasi (trial court) with the offence of stealing animals contrary to Section 258 (1) and Section 268 (1) and (3) of the Penal Code [Cap 16 R.E 2019 (now 2022)].

It was the prosecution's case that, on the 15th day of March, 2022 at Mkangale village within Nkasi District in Rukwa Region, the appellant and another person did steal one cow valued at Tshs. 500,000/= the property of **Emmanuel Robati** (PW3).

On the 29th of June, 2022, the charges were read to them and in turns they both denied the charges not to be true. However, a prima facie case was not established against the other person, and so he was acquitted and unfortunately, at the end of a full trial, the appellant was found guilty, and was convicted and sentenced to serve a period of five (5) years imprisonment.

Aggrieved by that decision, the appellant filed a petition of appeal to this court which consists of four (4) grounds of appeal which are as reconstructed hereunder;

- 1. That, the lower court erred in law and fact as the stolen cow was found in someone's else kraal to which the appellant does not know the owner.*
- 2. That, the prosecution side did not bring any exhibit neither the village leader to prove before the court.*
- 3. That, the prosecution witnesses differed each other in explanation regarding to where the stolen cow was found.*
- 4. That, the trial court erred in law and fact to convict the appellant without giving him time to cross examine the prosecution witnesses.*

Depending on his grounds of appeal, the appellant prays for this honourable court to allow this appeal and quash the conviction meted on him, set aside the sentence thereof and set him free from prison.

During the hearing of this appeal, the appellant had no legal representation and so he appeared for himself while the respondent, Republic was represented by Mr. Mathias Joseph learned State Attorney.

The appellant submitted generally in support of his grounds of appeal that, he prays his grounds of appeal be received and considered by this court and that this court should proceed to allow this appeal by quashing the conviction meted to him and set aside the sentence and he be set at liberty.

On the other hand, Mr. Mathias learned State Attorney submitted against the grounds of appeal by firstly stating that his side does not support this appeal and that the trial court was correct in the determination of the original case. He further prayed to argue generally the grounds whereas, he insisted that the impugned case's evidence leans on the circumstantial evidence, and that the appellant was convicted based on the doctrine of recent possession, and therefore the prosecution proved the charges against the appellant.

He added further that, at the trial Court, the Court relied on recent possession, whereas the ingredients are, **one**, the property must be found with the accused, **two**, the complainant must be found to be owner and **three**, the property must have been stolen. The learned counsel then referred me to the case of **Joseph Mkubwa & Another vs Republic**, Criminal Appeal No. 94 of 2017, Court of Appeal of Tanzania at Mbeya at page 7 -8.

The learned Counsel proceeded that, the evidence adduced in the typed proceeding at page 13 – 14, PW2, PW3 and PW4 described the circumstances the cow was found. He further submitted that, after the cow was stolen, on 16/03/2022 the complainant reported and on 17/03/2022 they passed at the kraal owned by Dr. Ndenje PW3, and they were able to find the stolen cow. That, as they inquired about the stolen cow's presence at the kraal, they were told that the cow was taken there by the appellant. That, they waited and the appellant came with a customer (PW2) who wanted to buy the stolen cow.

The counsel then insisted that, the circumstances and conduct of the appellant, showed that he is responsible. That, the appellant also failed to explain how he acquired the cow and there is no evidence that he

explained how he acquired ownership of the cow, the counsel referred me to the case of **Pascal Kitigwa vs Republic [1994] TLR 1** where the Court of Appeal held that: -

"Conduct of the accused person may be acted upon as corroborating evidence that he is guilty".

Mr. Mathias stressed on the holding above that, the conduct of running shows that the appellant is guilty for stealing the cow. However, it was in his submission that PW3 was able to identify the stolen cow to be his, as seen at page 18 – 20, 23 where it shows that the complainant was able to recognize the distinctive marks. Whereas, the ear rings had a tag Numbered 005916 on it and the cow was red in color in which these facts were corroborated by PW4 and PW5 whereas the latter was the seizing officer who filled-in the certificate of seizure and the same was admitted in evidence without objection as exhibit P2.

Parallel to that, Mr. Mathias added that it is obvious the property was stolen from the complainant. That, this fact is demonstrated in the testimonies of PW1, PW2, PW3, PW4 and PW5, as they all adduced the evidence on the event of stealing of the cow.

The learned counsel did not end there as he submitted even more that, it is their stand that the prosecution was able to prove the case beyond all reasonable doubt and that the trial Court was right in convicting and sentencing the appellant. That, the appellant was given all the rights even the right to cross examine witnesses, and that all the testimonies of the witnesses corroborated the event and there were no any contradictions. And that, even if there was any discrepancy, it did not touch the roots of the case. He insisted by citing the case of **Deus Josias Kitala @ Deo vs Republic**, Criminal Appeal No. 191 of 2018, Court of Appeal of Tanzania at Dar es Salaam at page 10. In which the court was of the view that, in tendering evidence contradictions would be there due to lapse of time and memory and other factors.

Similarly, the learned counsel submitted that, the prosecution brought all necessary witnesses and in proving cases, only the weight of evidence is what is considered. He again referred the case of **Abdallah Kondo vs Republic**, Criminal Appeal No. 322 of 2015, Court of Appeal of Tanzania at Dar es Salaam at page 23, where the Court had the view that the prosecution has the right to know the proper witness.

In conclusion, Mr. Mathias submitted that, failure of the appellant to cross examine the witnesses in vital issues which would contradict the prosecution evidence, shows that all the evidence tendered was true. And therefore, he insists that this appeal has no merits and should be dismissed, the decision of the trial court be upheld.

The appellant had no any rejoinder whatsoever, and only prayed for his grounds of appeal be considered.

After going through the entire records of the trial court, grounds of appeal to this court and the submissions made before me, I am of the considered view that the only determinant issue here is ***whether this appeal is meritorious before this court.***

This court being the first court of appeal it is obligated to re-appraise the evidence on record and draw its own inferences and findings of fact subject, having regard to the fact that the trial court had the advantage of watching and assessing the witnesses as they gave evidence. See, **Jamal A. Tamim vs. Felix Francis Mkosamali & the Attorney General, Civil Appeal No. 110 of 2012** (unreported).

The appellant was arraigned for cow theft on the 15th of March, 2022 during the night hours. PW1, Luwasa Sili was the only witness who was to testify in support of the charges against the appellant, as he claimed to have seen the appellant that night. Shockingly, his testimony is too shallow to even understand why is the appellant concerned with the allegedly stolen cow.

I will reproduce the testimony in emphasizing my point. After being sworn, PW1 testified that

".....on the fateful night I saw cow running from the kraal, I managed to see the 1st accused (appellant), I caught the appellant who was in possession of the cows. On the following day, the appellant came with another person, it is very unfortunate that the appellant and the accused person ran away....."

In my analysis of PW1's testimony, I failed to understand to which fateful night was he referring to, and he did not tell the Court what happened to the other cows which he saw running out of the kraal, and at that night how did he see the appellant by the aid of which tool, and after catching him, how was it possible that the next day the appellant came to him with

another person and what made the appellant and the other accused person run away? To me, this testimony was too lacking to support the charges against the appellant.

Similarly, the testimonies of PW2 (the buyer), PW3 (Complainant) and PW4 were too contradictory to suffice conviction of the appellant. PW2 testified that the appellant approached him to buy his cow which was at the kraal of a person known as Mwanandenje. As they went to the said kraal, the appellant was suspected to have stolen the cow and therefore he was arrested.

Meanwhile, PW3 and PW4 testified that on the night of the 15th of March, 2022 at around 2300 hours, their cows broke the kraal and ran to a farm, as they heard their dogs barking, they woke up and saw the cows had broken the kraal and ran to the farm, they went after them and brought them back to the kraal and repaired it and thereafter counted the cows and noticed one cow is missing. On the 16th of March, 2022, PW3 reported the incidence to the police station that his cow has been stolen, and thereafter he went to Mnadani area to search for it. As he did not find it, on the 17th he was with PW4 and as they were looking for it they came across it in the Kraal of Dr. Ndenje and the guard to it told them that it

was brought by the appellant. Not long, the appellant appeared with PW2 as he wanted to sell it to him, then PW3 told them that the cow belongs to him and that is when the appellant ran away. Thereafter, they took the cow to the police station where they met with PW5 who they told him everything and he started searching for the appellant and he was tipped by some business men that he is at mnadani area and so he went to arrest him.

It is in my perusal of the records that, the purported stolen cow could also have been lost its way and not stolen because the complainant and his witnesses (PW1 & PW4) did testify that, that night the cows broke the kraal and ran to the farm. I am also convinced that the prosecution evidence leaves too many loop holes to complete the story that the appellant did steal the cow and at the same time the testimonies are way too contradictory to convince me that the appellant was found guilty of the offence he was charged with.

In the case of **Mohamed Said Matula vs Republic [1995] TLR 3** the Court of Appeal held that: -

"In his evaluation of the evidence the learned judge made not a single reference to these inconsistencies and contradictions.

*Nor did he make any mention of them in his summing up to the assessors. He merely accepted the evidence of the two children at its face value. **That was clearly wrong. He had a duty to consider the inconsistencies and contradictions and try to resolve them if he could. Else he had to decide whether the inconsistencies and contradictions were only minor or whether they were such as did go to the root of the matter.***"

Emphasis added

Nevertheless, the learned State Attorney did submit before me that the contradictions of the witnesses did not go to the root of the case, this is typically the opposite of what I have found within the records and I firmly hold that the contradictions of the witnesses could not grant conviction of the appellant as they go to the root of the matter.

In addition to that, the conviction of the appellant at the trial court as submitted by Mr. Mathias was based on circumstantial evidence and the doctrine of recent possession. Again, as I perused the entire records, the circumstantial evidence purported to be relied upon is too wanting to grant conviction of the appellant. The only witness who claimed to have

seen the appellant is PW1, and when one reads his testimony, it would be noticed that he testified as if words were put in his mouth for, he did not know what to say and what not to say. I have reproduced his testimony above for ease of reference. Now, the testimony of PW2 did not at any point suggest that the appellant was the thief and neither were the testimonies of the remaining witnesses. Therefore, to convict the appellant depending on the testimony of PW1 as circumstantial, I say it is typical prejudice of justice.

The learned State Attorney rightly rephrased the ingredients of doctrine of recent possession as found in the case of **Joseph Mkubwa & Another vs Republic** (*supra*), that **one**, the property must be found with the accused, **two**, the complainant must be found to be the owner and **three**, the property must have been stolen.

I do agree with these ingredients, but I am in total denial with their implication to the case at hand. Firstly, the cow was not found with the appellant, the testimonies of PW1, PW2, PW3 and PW4 do prove this. PW1 is a guard to a kraal which he did not mention the owner but the purported stolen cow was found in it. PW2 testified that the stolen cow was at a kraal which belongs to Mwanandenje, while PW3 and PW4

testified that their stolen cow was found at Dr. Ndenje's kraal. In law, these are two distinct people and both are not the appellant.

Secondly, it is not doubted that the complainant is the owner of the purportedly stolen cow, but thirdly, who stole the cow? PW1, PW3 and PW4 testified that the cows belonging to PW3 broke the kraal and ran to the farm, thereafter their testimony are too contradictory to complete a scenario that the appellant is the culprit. I am fortified that this doctrine was wrongly used to convict the appellant.

To put icing on the cake, PW5 testified that on the 17th of March, 2022 while he was at his work station, PW3 and PW4 came to him with a cow, and they told him that the cow was stolen but unfortunately the culprit ran away. Then, PW5 went to the scene of crime, I believe it was the kraal where the cow was, and he filled in the certificate of seizure. My question is, what was PW5 seizing if the cow was taken to him at the police station, and when did the accused person sign the seizure certificate if he had run away?

In criminal cases, the burden of proof lies on the prosecution and it never shifts to the accused, in this appeal, the appellant. Under section 3 (2) of the Evidence Act, it is provided that the burden never shifts.

For the reasons discussed above, it is my view that had the trial court properly directed its attention to the evidence adduced by the prosecution, it would have reached at a different conclusion that the evidence was not water tight to find the appellant guilty as charged warranting the conviction and sentence. It ought to have acquitted the appellant.

It is my firm holding that the prosecution has not established the offence beyond reasonable doubt against the appellant. Cumulatively, all the defects in the evidence lead to the conclusion that the appellant's appeal has merit.

I therefore proceed to allow this appeal and consequently quash the judgment of the trial Court and conviction set aside the sentence meted against him and I order his immediate release from prison unless he is otherwise lawfully held.

It is so ordered.

Dated at **Sumbawanga** this 27th day of November, 2023.


T. M. MWENEMPAZI
JUDGE

Judgment delivered in Court in the presence of the appellant and Mr.
Jackson Komba and Ms. Scolastica Mwacha, Learned State Attorneys.




T. M. MWENEMPAZI

JUDGE

27/11/2023

ORIGINAL