

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 31 OF 2017**

*(an appeal from the judgment of Kilosa District Court delivered by Hon. Khamsini RM  
on 19<sup>th</sup> October, 2016 in Criminal Case No. 164 of 2016)*

**PHILIPO KITALAWETA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**7 and 19 June, 2018**

**BANZI, J.:**

The appellant was charged with the offence of Cattle Theft contrary to section 268 of the Penal Code [Cap. 16 R.E. 2002] in the District Court of Kilosa. After a full trial, the appellant was found guilty, convicted and sentenced to six (6) years imprisonment. Dissatisfied, he preferred an appeal to this Court.

The factual background behind the conviction of the appellant run as follows: On the night of 18<sup>th</sup> June, 2016 Antonia Kibua (PW1) while asleep she heard her dog barking. However, she kept on sleeping until

0500 hours when she woke up and went to the place where she is keeping her cattle whereby she found seven of them were stolen. She informed the police and her fellow villagers. PW1 with the assistance of her fellow villagers kept on looking for the stolen cattle and on 20<sup>th</sup> June, 2016 she received information that three cattle were found at Mikumi area. The ones who found them were Peter Jeremiah Kobero (PW2) and Shabani Selemeni (PW3). PW2 and PW3 took the three cattle back to PW1 while the appellant went at large. Eventually, the appellant was arrested and arraigned before the court.

In his defence, the appellant had nothing much to say. He claimed to be summoned from prison to court to answer his charge which he did not understand anything.

The appellant lodged petition of appeal comprising seven (7) grounds and later he added six (6) supplementary grounds of appeal. Having carefully read all thirteen (13) grounds of appeal, I am of the considered view that the main ground raise in this appeal which will

dispose of the appeal is whether the evidence in the prosecution side is strong to ground a conviction as found by the trial court.

At the hearing, the appellant fended for himself, unrepresented, while the respondent Republic was represented by Mr. Bryson Ngidos, the learned State Attorney. When given opportunity to beef up his grounds, the appellant being a layman had nothing useful to add and prayed that he be set free. On his part, Mr. Ngidos rightly stated his stance that he was not supporting the conviction. He preferred to make his submission by relying on one ground that; the prosecution failed to prove their case beyond reasonable doubt.

To strengthen his stance, Mr. Ngidos submitted that, the persons who claimed to see the appellant at the crime scene were not called upon to testify, hence the evidence of PW1 to that effect remains as hearsay. The learned State Attorney also faulted the trial court decision on the issue of identification of stolen property. According to him, PW1 failed to describe peculiar marks of her cattle before PW2 and PW3 recovered them at Mikumi. He contended further that, PW2 and PW3 failed to state

the peculiar marks of the stolen cattle that enabled them to identify the cattle found with the appellant.

Mr. Ngidos added that, the trial court erred by treating the inventory (Exhibit P1) as conclusive evidence without satisfying itself whether the cattle described on exhibit P1 were the ones stolen from PW1. Lastly, he submitted that, PW4 being the investigator failed to establish how the appellant was arrested in connection with the alleged offence while the appellant claimed that he was already in prison when they summoned him to court.

Having gone through the trial court records, the grounds of appeal and the submission made by Mr. Ngidos, I inclined to agree with the learned State Attorney that, the prosecution evidence was not strong to ground conviction of the appellant.

It is on record that, none among the four prosecution witnesses managed to identify the appellant at the crime scene. The contention by PW1 that the appellant was seen stealing the cattle on the night of event

remains to be hearsay as the persons who claim to have seen him were not called to testify.

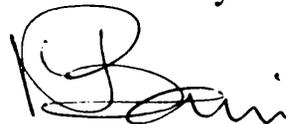
Traversing the judgment of the trial court, it is clear that, the learned trial Magistrate convicted the appellant basing on the evidence of PW2 and PW3 that, he was found with the stolen cattle. However, their evidence is silent as to how they managed to identify the stolen cattle which were purported to be found with the appellant. There is no evidence on record to establish that PW1 gave description of stolen cattle to PW2 and PW3 before they departed to a search party.

It is now a settled principle that, a detailed description by giving special marks of the alleged stolen items has to be made before such exhibits are tendered in court. See the decisions of Court of Appeal in the case of **Gwisu Nkanoli and three others v Republic**, Criminal Appeal No. 359 of 2014 (unreported) and **Mustapha Darajani v Republic**, Criminal Appeal No. 242 of 2005.

In the instant case, PW1 failed to give description before the stolen cattle were recovered by PW2 and PW3 at Mikumi area. It was necessary

for PW1 first to give special marks of her stolen cattle before they were recovered. Moreover, the stolen cattle were not brought to court for the purpose of being identified by PW1. Instead, the prosecution tendered inventory of unclaimed property (exhibit P1) as substitute of the stolen cattle which does not show the special marks of the stolen cattle. In the case of **Tayai Miseyeki v Republic**, Criminal Appeal No. 60 of 2013, CAT (unreported) the court discussed and lucidly made it clear that identification and admission of the stolen heads of sheep in court as exhibit was essential. In the instant case, the stolen cattle were not produced and identified in court. Such failure is a fatal omission in the prosecution case.

For the reasons stated above, the appellant's conviction cannot be sustained. I accordingly allow the appeal, quash the conviction and set aside the sentence imposed on him. I order the release of the appellant forthwith from prison, unless otherwise lawfully held.



**I.K. BANZI**  
**JUDGE**  
**19/06/2018**

Delivered this 19<sup>th</sup> day of June, 2018 in the presence of Bryson Ngidos  
(State Attorney) for the respondent and the appellant in person.



**I.K. BANZI**  
**JUDGE**  
**19/06/2018**

Right of appeal explained



**I.K. BANZI**  
**JUDGE**  
**19/06/2018**