

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 26 OF 2021

*(Originating from Tandahimba District Court in Criminal Case No.84 of
2020)*

JUMA HUSSEIN ULOWA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

*Date of Last Order:9/5/2022
Date of Judgment: 13/07/2022*

LALTAIKA, J.:

The appellant, **JUMA HUSSEIN ULOWA** and eight others who are not part to this appeal were arraigned in the District Court of Tandahimba charged with three counts: 1. Conspiracy contrary to section 384 of the Penal Code, [Cap. 16 R.E. 2019], 2. Armed robbery contrary to section 287A of the Penal Code and 3. Cattle theft contrary to section 268(1) of the Penal Code (an alternative to the second count)

The background of this case according to the evidence on record is that, on 12/12/2020 PW3 (Ismail Rashid) and PW6 (Steven Mohamed Kidiki- the son of PW2) as herders of cattle took about 300 herd of cattle belonging to PW2 (Mohamed Kidika) to Maundo Village near Ruvuma

River for grazing. PW6 was, allegedly, in the front line of the herds of cattle while PW3 was behind it. In the banks of the Ruvuma, PW3 and PW6 were invaded by bandits who relayed an information that they were needed by Maundo Ward Executive Officer. PW3 and PW6 allegedly responded very positively to the message and started going to the office of WEO. Suddenly, those bandits invaded PW3 and PW6. It is on the record of the trial court that the bandits were the accused who were in the dock at the trial court.

It is further alleged that it was the first accused who attacked PW6 and poured him petrol. However, PW6 slipped him and run away to the river for bathing and was assisted by one woman who gave him some water to bath. In addition, it was PW3 testimony that he identified the accused persons properly because he observed them by their physical appearance for almost half an hour. Moreover, PW6 told the trial court that he identified PW5 because he was very familiar to him before the event ensued. After the event, PW3 and PW6 realised that the accused persons had stolen 26 herds of cattle.

On tracing the whereabouts of 26 herd of cows, PW2 joined two young men (herders) and the militia men to trace the footprint of the stolen cows. PW2 and his company reached at Namkomela village where they allegedly saw the accused persons with the stolen cows. Seeing that, PW2 reported the matter to PW1(the chairman of Mkomolela village) for help. PW2 with the assistance of the police officers from Tandahimba Police Station managed to arrest nine (9) accused persons and 14 among of the 26 stolen cows which had special marks of PW2. It was further testified that the accused persons had slept in the house of Ismail Gisara. Also, the fourteen herds of cows were kept in the cowshed of Ismail Gisara.

Upon arresting the accused person and finding them with the part of stolen cows PW5 (H335 DC Andrew) prepared exhibit P1 which was filled and signed by Hon. Nasra Mwishehe, the Resident Magistrate before all accused persons.

In their defence, only the second accused person had called his witness one Layu Issa whose testimony was to the effect that does not know nothing about the case which is faced the second accused person. Both, accused persons denied to have committed the offences they were facing. However, they testified that they signed the document (exhibit P1) in the presence of the Magistrate because were either threatened, forced or tortured in admitting the allegation of the stealing a herd of cattle.

As to the appellant, he defended by testifying that on the fateful date he went to Namkomolela village and was accustomed by Juma. He slept at Juma's house. In the following morning was arrested by the police and brought to Tandahimba Police Station and kept in the police cell. While at the police, the appellant was recorded his cautioned statement before was brought to the trial court.

After a full trial, the trial court was satisfied that the prosecution proved the case against the seventh accused (the appellant) on the second count of armed robbery contrary to section 287A of the Penal Code. Whereas, the rest of the accused persons were found to be not guilty hence it acquitted them. Thereafter, the trial court meted a statutory sentence of thirty (30) years imprisonment. Dissatisfied and aggrieved, the appellant has come to this court and lodged his petition of appeal containing eight grounds of appeal which are as follows:

1. *That, there is no watertight evidence of the appellant identification.*
2. *That, the trial court erred in law and in facts by convicting and sentencing the appellant as it did, basing on unreliable evidence.*
3. *That the manner in which the proceedings at the trial court were conducted, was irregular or /and improper.*
4. *That, it was not put up an explanation as to whether PW3 and PW6 knew the appellant before the incident, his physique and/or attire put on at the material time.*
5. *That, the stages of admitting documents were not complied with, thereby causing serious injustice on the part of the appellant.*
6. *That, the weapon alleged to have been used in the commission of the offence in this case was not tendered in court as evidence.*
7. *That, the prosecution side didn't prove its case beyond reasonable doubt.*
8. *That, the doctrine of recent possession was wrongly invoked to implicate the appellant with the robbery.*

On 11.01.2022 the appellant filed two additional grounds which are as follows:

1. *The learned trial Magistrate erred in law and fact by convicting and sentencing the appellant while the prosecution side failed to prove their charge beyond any reasonable doubt as required by law.*
2. *The learned trial Magistrate erred in law and fact by convicting and sentencing the appellant relying on the exhibit P1 which was admitted unprocedurally.*

At the hearing of this appeal, the appellant appeared in person, unrepresented while the respondent Republic had the services of Mr. Enosh Kigoryo, learned State Attorney. The appellant submitted that what he wanted to submit had largely been covered by his additional grounds. He stressed that he is aggrieved by conviction and sentence of thirty (30) years meted on him by the trial court.

In response, Mr. Kigoryo submitted that the republic did not object the appeal. He went further and argued that he supported mainly the first and eighth grounds of appeal. The learned State Attorney argued that the appellant was convicted on evidence of identification and doctrine of recent possession. As to the evidence of identification, Mr. Kigoryo referred this court to page 14-16 of the typed proceedings of the trial court whereby PW3 had testified that during robbery he was attacked by the appellant with a panga. He stressed that since there were more than nine attackers, there was a need for evidence of identification to be watertight.

It is Mr. Kigoryo's submission that although the incident took place during the day, it involved many suspects thus there was a need for conducting an identification parade in order to corroborate the evidence. To buttress his argument, Mr. Kigoryo referred this court to section 166 of the Evidence Act, [Cap. 6 R.E. 2019]. The learned State Attorney cemented his argument further by referring this court to the case of **Waziri Amani v. R** [1980] TLR 250.

On the doctrine of recent possession, Mr. Kigoryo argued that PW2 had testified that he was the owner of the stolen cattle and when was accompanied by PW1 they found the appellant and his co accused

guarding the cattle in the market place. The learned State Attorney went on and argued that upon being asked on how the appellant and his co accused came into possession of the herd of cows no useful information was provided thus they were arrested. He stressed the appellant and his co accused were found with fourteen (14) cows out of twenty-six (26) cows allegedly stolen.

To that end, Mr. Kigoryo submitted that there was no evidence that supported that the stolen cows belonged to PW3. To fortify his argument, the learned State Attorney referred to the case of **Alex Nyambeho @ Fanta and Others vs R**, Criminal Appeal No.309 of 2013 CAT-Mwanza whereby the Apex Court, while referring the case of **Joseph Mkumbwa and Another vs R**, Criminal Appeal No.97 of 2007(unreported) stated that for the doctrine of recent possession to apply for the basis of conviction it must positively be proved first, that the property was found with the suspect, two the property is positively the property of the complainant.

Regarding the matter at hand, Mr. Kigoryo argued that the second ingredient of the doctrine is lacking because the cows were not proved to belong to the complainant. In line with that submission, the learned State Attorney submitted that the ground (ground eight) had merit. Mr. Kigoryo opined that, the eighth ground alone was able to dispose this appeal. Thus, he prayed that the appeal be allowed.

In a rejoinder, the appellant briefly submitted that he would rather leave this court to decide and set him free.

Having carefully considered the grounds of appeal, submissions advanced by the parties and the trial court record, it is imperative to state

that I am aware that the respondent has supported the appeal. Nevertheless, this court is not shielded from making its own findings in the light of or rather as a result of its own analysis of the facts pursuant to the grounds of appeal and the submissions which supported the appeal. It is not disputed that in the matter at hand, the offence was committed during the day and that PW3 and PW6 had testified to have identified the appellant and his co accused. This brings into our discussion an important aspect in criminal justice namely identification.

The Court of Appeal of Tanzania has on numerous occasions restated that evidence of visual identification is of the weakest kind and most unreliable. As such, courts must not act on visual identification alone for conviction unless and until all possibilities of mistaken identity are eliminated and the court is satisfied that such evidence is watertight. See, **John Balaziomwa, Hakizimana Zebedayo and Deo Mhididni vs Republic**, Criminal Appeal No. 56 of 2013 (unreported) which was referring to the case of Waziri Amani v. Republic (supra). In the present case the evidence of PW3 and PW6 on their identification of the appellant and his co-accused leaves important questions unanswered. I agree with the learned State Attorney that such evidence was in itself insufficient to convict the appellant.

In the event, I fault the findings of the trial court to the effect that the prosecution did not prove the case against the appellant on the required standard of proof of beyond reasonable doubt. Thus, I allow the appeal and, proceed to quash the conviction and set aside the sentence imposed

on the appellant. I order that the appellant be set at liberty forthwith unless held for lawful purposes.

It is so ordered.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E. I. Laltaika".

JUDGE

13.07.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 15th day of June, 2022 in the presence of Mr. Enosh Kigoryo, learned Senior State Attorney and appellant who has appeared unrepresented.



E. I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E. I. Laltaika".

JUDGE

13.07.2022