

TANZANIA / JUDGMENT

CRIMINAL APPEAL 7171 JOASH MASIMBA

COURT
TANZLII

DECIDED
15 July 2024

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IN THE HIGH COURT OF TANZANIA MUSOMA DISTRICT REGISTRY AT MUSOMA CRIMINAL APPEAL 00007172 OF 2024 REFERENCE NO. 202403182000007172 (Arising from the Criminal Appeal No. 000039729 of 2023 of the District Court of Rorya at Rorya, Originating from Criminal Case No. 394 of 2023 at Shirati Primary Court) JOASH MASIMBA..... APPELLANT VERSUS LAZARO OLOO..... 1stRESPONDEN GEORGE PHILMON..... 2N0RESPONDEN NYANDIGA KANI..... 3rdRESPONDEN

JUDGMENT

08th & 15th July, 2024 M. L, KO MBA. J.: This is the decision against an appeal by the appellant who was dissatisfied by the decision of the District Court of Rorya (the first appellate court) where the Magistrate overturned the decision of the trial court on account that the offence was not proved to the required standard and ordered Page 1 of 10 release of all respondents from prison. Previous all respondents were convicted and sentenced to five (5) years imprisonment each of them for the offence of cattle theft contrary to section 258 and 268 (1) and (3) of the Penal Code, Cap 16 R.E 2022. It was alleged by the appellant (then complainant) that 31/08/2023 around 21:30 hours at Bukama village in Rorya District without bonafide claim of right respondents above named stole five (5) cows worth Tsh. 3,950,000/ the properties of the appellant herein, Joash Masimba. Cows were then left unattended after they (respondents) noticed a group of people was following them. When the charge was leveled against respondents, all respondents denied the offence hence full trial. Basing on complainant's case, the trial Magistrate convicted the respondents. Dissatisfied by conviction, respondents successful appeal to Rorya District Court (the first appellate court) with seven grounds of appeal where appellate Magistrate found the appeal had merit and allow it. Tireless the complainant, now appellant, knocked the door of this court with two grounds of appeal challenging the decision of the 1st appellate court which found the identification of respondents, then accused, was not in the Page 2 of 10 dictates of the law and therefore the offence was not proved to the required standard. The grounds of appeal reads;

1. That the trial Magistrate errored in law by ignoring the principle of reliability and credibility of a witness in matters of identification.

2. That the trial Magistrate errored in fact by not considering that the respondents were well known by the appellant. When the appeal was scheduled for hearing, Mr. Shadrak Belbembe Konje represented the appellant while Mr. Tumaini Kigombe appeared for respondents, both learned advocates. Mr. Belbembe dropped the second ground and submitted on only remaining ground number one focusing on reliability and credibility of the witness. It was his submission that first appellate Magistrate did not consider all this in his judgment. Referring the case of Toyidoto s/o Kosima vs Republic (Criminal Appeal No.525 of 2021)

[2023] TZCA 17305 (5th June, 2023) which recited Shabani Daudi vs Republic, Criminal Appeal No. 28 of 2001 where CAT at page 10 provided two principles which need to be considered in evidence adduced by witness. He went on submitting that in order to know that witness was Page 3 of 10 credible normally court look at coherence of the witness as was said in the cited case. If the 1st appellate Magistrate re-visited the testimony adduced at the trial court he said, he could see that there was no contradiction on identification of accused at the whole scenario of cattle theft as testimony of complainant and witnesses was collaborated in line with principle of Shabani Daudi vs Republic (supra). To him the evidence of complainant and witnesses were credible and reliable to convict accused. Suggesting the admission done by respondents, counsel submitted that accused did not object the evidence adduced rather they explain and faulted the way they were arrested. He prayed this court to read decision in Shabani Daudi vs Republic (supra) which provided principle of noting demeanor of witness and prayed this court to make a comparison of statement of respondents against complainant in order to find issues raised by the complainant was strong. Further in his submission counsel refer rule 9(1) Magistrates Courts (Rules of Evidence in Primary Courts) Regulations GN No. 22 of 1964 that the evidence of the appellant was relevant compared to the evidence of respondents and prayed the appeal to be found with merit, Page 4 of 10 nullify the decision of the district court and upheld the decision of the Primary court. Mr. Kigombe for respondents directed his submission on whether the appellant prove his case at the primary court. He said the record show respondents were convicted on cattle theft and the trial court relied on visual identification which he complained was not proved as it was weak evidence and was not in conformity with the law on visual identification. He went on complaining that some important issues were not pointed by witness/complainant. Referring the case of Waziri Amani vs Republic, 1980 TLR 250 together with Chacha Jeremia Mrimi and 3 Others vs Republic Criminal Appeal No. 551 of 2015 he said the two cases has established principle to be followed when court relied on visual identification. Importing the cited cases to the matter at hand, Mr. Kigombe submitted that proceedings of the trial court show all the conditions were not met. Starting with the light, he submitted that complaint managed to identified respondents basing on the moon light and torch flash without explaining the intensity of the light and last time they charge the chargeable torch. He complained that conditions were not met and there were supposed to be Page 5 of 10 met by appellant cumulatively and to him the appellant failed to prove his case against the respondents bearing in mind that visual identification is the weakest kind of identification. He

maintained that respondents were not correctly identified while referring to rule 5 (1) of the Magistrates Courts (Rules of Evidence in Primary Courts) Regulations GN No. 22 of 1964 that it is upon the complainant to prove the case beyond reasonable doubts. Mr. Kigombe contest the issue that respondents did not deny the offence while citing the proceedings and record of the case that it is clearly shown respondents denied the charge that's why they enter defense after the closure of complainant case. He prayed this court to find at the trial court the case was criminal case which the standard of proof is beyond reasonable doubt and not to the balance of probability as counsel for appellant submitted. To bolster his submission, he cited the case of Nathaniel Alphonse Mapunda and Benjamin Mapunda vs Republic, 2006 TLR 395. Finally, he prayed this court to find the appeal lacks merit and dismiss it. During rejoinder Mr. Belbembe explained that when they said respondents did not deny to commit the offence, he meant respondents did not Page 6 of 10 dispute their presence at the scene but they complained on the arrest. About the case of Waziri Amani (supra) he said it only lay down general rule and in every general rule there must be exception and in the case at hand exception is credibility and reliability of witnesses as complainant manage to name suspects on the earliest time. This is the second appeal as previously hinted the first appellate court overturned the findings of the trial court. Each lower court has different findings. The trial court was best placed to see and assess the demeanor of the witnesses (See Shaban Daudi vs Republic, Criminal Appeal No. 28 of 2001) while the first appellate court had a duty to re-assess the entire evidence and ultimately arrive to its own conclusion as was in Mwita Cornel Philimon @ Gaucho vs Republic (Criminal Appeal No. 306 of 2020) [2023] TZCA 17822 (10th November, 2023). The first appellate court is also the final court of facts. See Firmon Mlowe vs Republic (Criminal Appeal 504 of 2020) [2022] TZCA 694 (9th November, 2022). I am subjected to find if this appeal has merit or otherwise. Mr. Belbembe based his argument on reliability and credibility of appellant during trial. While he subscribes to the principle laid down in Waziri Amani Case Page 7 of 10 (supra) as I also do, he was of the opinion that in every rule there must be exception and among them is coherent of complainant during trial. Mr. Kigombe insisted on the conditions as laid down in Waziri Amani (supra) and Chacha Jeremia Mrimi (supra) that all conditions must cumulatively met. The case of Waziri Amani was celebrated in the year 1980, from that time the Court has been reiterate its decision on uncounted precedents throughout all years up to this year in Wolde Kaier & Others vs Republic (Criminal Appeal No. 686 of 2020) [2024] TZCA 324 (8th May,

2024) that principle in visual identification is the same that conditions must met. Further, I agree with submission by Mr. Belbembe that complainant might be consistent in his testimony and reliable but what about credibility. To mention a suspect is one thing and to see the suspect at the scene is another thing. The question to be addressed by now is how did the complainant manage to see suspects at the scene. Was there any source of light, what kind of light was that. From the testimony there was torch and moon light. There is no explanation on the intensity of the light from the torch and it was not known when last was charged. Page 8 of 10 Pertaining dependency of moonlight, in the case of Potian Joseph vs

Republic (Criminal Appeal No. 200 of 2015) [2015] TZCA 325 (15th October, 2015) the Court had this to say on general assertion by a witness that there was sufficient moon light or enough moonlight without describing its intensity": "Though under certain circumstances, identification by moonlight may be possible, it was imperative in the circumstances to explain the intensity of the moonlight, Whereas PW2 merely said there was moonlight, the complainant said there was enough moonlight: It is our considered view that it does not suffice to say there was moonlight or enough moonlight Its brightness had to be explained." By mentioning the name and by being consistency is not enough this is a criminal case. The principle of reliability and credibility has to be considered in line with proving the offence beyond reasonable doubt. The first appellate court did not ignore the principle of reliability and credibility rather he combined with other aspect of criminal law that offence has to be proved to the required standard as per rule 5 (1) of the Magistrates Courts (Rules of Evidence in Primary Courts) Regulations GN No. 22 of 1964. In the upshot I find the appeal lacks merit and is hereby dismissed. Page 9 of 10 DATED at MUSOMA this 15th day of July 2024. Judgment delivered in the presence of Mr. Mr. Shadrak Belbembe counsel for appellant and before Mr. Tumaini Kigombe counsel for respondents. M. L. KOMBA Judge 15th July, 2024 Page 10 of 10

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