

TANZANIA / JUDGMENT

MASUNGA MASAKA MWATIJA Cattle Theft Bariadi

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB - REGISTRY OF SHINYANGA AT SHINYANGA CRIMINAL APPEAL REF. NO. 202407182000020179 MASUNGA MASAKA @ MWATIJA @SALASINI APPELLANT VERSUS
REPUBLIC..... RESPONDENT [Appeal from the Decision of Bariadi District Court at Bariadi] (Hon. C.E. KILIWA PRM) dated the 2nd day of July, 2024 in Criminal Case No. 49 of 2023

JUDGMENT

27th September & 29th November, 2024. S.M. KULITA, J. This is an appeal from Bariadi District Court. The Appellant herein, namely, Masunga Masaka Mwatija @ Salasini was convicted and sentenced to the imprisonment term of 15 (fifteen) years for Cattle Theft, contrary to the provisions of sections 258(1)(2)(a) and 268(1) of the Penal Code [Cap 16 RE 2022]. 1 Brief history of the case as it can be gathered from the record is that, on the 14th day of October, 2023 at about 0300 hours at Gagabali Street, within Bariadi District in Simiyu Region, the victim, one James John Kitwala went out to check his cows in the shed but he found the door open and 7 (seven) cows missing. That, on the 17th day of October, 2023 one MAGEMBE ILANGA @ SHENYE and MATONDO MBOJE who have not preferred to appeal were found holding the said cattle at Kidinda Cattle Auction Centre in Bariadi. Upon been asked on the ownership of those said cattle, they said that they had purchased them from the appellant herein, MASUNGA MASAKA @MWATIJA @SALASINI. All 3 (three) persons were arraigned to Bariadi District Court for “Cattle Theft”, contrary to the provision of section 258(1)(2)(a) and 268(1) of the Penal Code [Cap 16 RE 2022]. Upon the matter being heard, the Appellant herein was found guilty of that offence, hence convicted and sentenced to the imprisonment term of 15 (fifteen) years. The 2nd and 3rd Accused persons, who were alleged to have purchased the cattle from the Appellant, were found guilty of “Being in Possession of Goods 2 Suspected to have been Stolen”, contrary to section 312(1)(b) of the Penal Code [Cap 16 RE 2022]. Each of them was sentenced to pay a fine of Tsh. 500,000/= or to serve the imprisonment of 3 (three) years in alternative. According to the record, the said two persons opted to pay the said fine. I can see the receipts in the record for the said payments. Aggrieved with both conviction and sentence, the Appellant herein lodged this appeal with 5

(five) grounds which can be summarized into 4 (four) as follows;

1. That, the trial court erred to convict him while he was not arrested with exhibits.
2. That, the trial court was wrong to convict him while the people who attended the alarm (mwano) upon him being arrested were not called to testify.
3. That, the testimony of the purported owner of the cow collides with that of a Police Officer on a number of persons who had been arrested at the auction premise, whether it was 2 (two) or 3 (three).
4. That, the case at the trial court was not proved beyond reasonable doubt. 3 The matter was argued through oral submissions. The Respondent (Republic) is represented by Ms. Rose Kimaro, Learned State Attorney while the Appellant is unrepresented. In his oral submission in support of appeal the appellant prayed for the grounds of appeal in his Petition to be adopted as the submission for his appeal. He concluded by praying for the appeal to be allowed and he, accordingly be acquitted. In the reply thereto the Learned State Attorney resisted the appeal. Replying the 1st and 4th grounds of appeal collectively, the State Attorney, Ms. Rose Kimaro, stated that the case at the trial court was proved beyond all reasonable doubts. She said that there is no dispute that the victim's (PW2's) cows were stolen. She said that the record transpires that, in his efforts to trace the 7 (seven) cows stolen from his father's (PW2's) shed on 14th October, 2023, PW1 went to the Cattle Auction Centre at Kidinda on the 17th October, 2023. The Counsel said that, while there the said PW1 managed to find the said cows in possession of Magembe Ilanga Shenye and Matondo Mboje. She further submitted that the said PW1 consulted the Police, consequently, the said cows were seized by PW5, a Police Officer who 4 also detained the said Magembe Ilanga Shenye and Matondo Mboje. The said Police Officer (PW5) also filled a certificate of seizure (exhibit P3) for the said cattle. The said document was signed by him as well as the said 3 (three) suspects including the Appellant. The Counsel further submitted that, upon being interrogated by police Magembe Ilanga Shenye and Matondo Mboje stated that they had purchased the said cattle from Masunga Masaka, the Appellant herein, at a very cheap price of Tsh. 1,000,000/=. The State Attorney further stated that, the said two persons had later on taken those cattle to the said auction premise for the purpose of selling them. It was 17th October, 2023. The Counsel added that the record further shows that the appellant herein, Masunga Masaka Mwatija @ Salani was arrested at the same auction premise. He, however denied to have sold those animals to Magembe Ilanga Shenye and Matondo Mboje. It is the submission of the State Attorney that the Appellant is the one who had sold the said cattle to Magembe Ilanga Shenye and Matondo Mboje as it was so alleged by themselves (DW2 and DW3), during trial. The Counsel said that the trial court was right to use the evidence of the said co-accused persons to convict the appellant who was their fellow accused during trial at the District Court. The Counsel cited the 5 case of GIFT MARIKI & 2 OTHERS V. R, Criminal Appeal No. 289 of 2015, CAT at Arusha, to cement her argument. The Counsel added that PW1 and his father who is the owner of the cattle identified the special marks that the said cattle had, and that there was no mistaken identity. On this ground, the Counsel concluded

that the case at the trial court was proved at the required standard. Replying the 2nd ground, that, the persons who attended the alarm (mwano) had not been called to testify before the trial court, the State Attorney submitted that, during trial, the Prosecution side found it unnecessary for proof of their case. She added that there is no particular number of witnesses required for a proof of a particular fact in a case. She cited the case of YOHANIS MSIGWA V. R [1990] TLR 148 to support her argument. She thus prayed for this ground of appeal to be dismissed for lack of merit. For the reasons that I am going to state later, I reserve the State Attorney's submission on the 3rd ground of appeal. There was no rejoinder from the Appellant, hence the submissions ended up there. 6 From the above submissions, the issue to be determined is whether the appeal is meritorious. I start my analysis with the issue of proof of the case at the District Court, whether it was beyond reasonable doubt. Upon going through the record and the State Attorney's submission I have noticed that there is no dispute that Magembe Ilanga Shenye and Matondo Mboje, who were the 2nd and 3rd Accused Persons at the District Court, admitted to have been found in possession of the 7 (seven) cattle which were stolen from PW2, but they allege that they had purchased them from the appellant herein. However, the appellant denied to have sold the said cattle to those two persons. My observation in the trial court's record is that, apart from their oral testimonies before the said court, the said persons who are purported to have purchased the alleged cattle, have nothing more to prove that they did purchase the said cattle from the Appellant herein. Their oral testimonies on that evidence ought to have been corroborated with other evidence like sales document or testimony from a person(s) who witnessed the said business. Generally, there is no proof that the said Magembe Ilanga Shenye and Matondo Mboje who were the 2nd and 3rd Accused Persons at the District Court, purchased the said cattle from the Appellant. 7 In her submission before this court the State Attorney came up with the argument that, the appellant, who was the co-accused with the said Magembe Ilanga Shenye and Matondo Mboje, the 1st and 2nd Accused persons at the trial court, was mentioned by the said persons as the one from whom they did purchase those said cattle. But, it is unsafe to rely on the evidence of the co-accused to convict his fellow accused person. That's why even the cited the case of GIFT MARIKI & 2 OTHERS V. R, Criminal Appeal No. 289 of 2015, CAT at Arusha, at page 7, which was quoted by the State Attorney, shows the court to have used the term "may" in coaching the situation where the evidence of one accused can be used to incriminate his co-accused. It therefore means that, it is not mandatory. That, its application should depend on the circumstances of each case. Another thing to note is that, the fact that those two Accused persons opted to pay fine as they had been so penalized by the trial court, the implication is that they knew that they had acquired the said cattle through unlawful means, mostly like, by purchasing them from a person who had stolen them from PW2, or else, they themselves stole the said cattle from PW2. It means the matter was rightly decided against them. That's why they didn't even prefer to appeal against the said decision. 8 Another thing that I wish to state is just the academic issue on legal aspect, that, basically, the law forbids the accused person to be convicted for the offence that he had not charged with, unless it is cognate to the charged offence or an attempt to commit the said offence. Section 306 of the Criminal Procedure Act

[Cap 20 RE 2022] empowers the trial court to convict the accused person of “Stealing” on the offence of “Being in Possession of Goods Suspected to have been Stolen”, contrary to section 312(1)(b) of the Penal Code [Cap 16 RE 2022] as an alternative verdict. Thus, the District Court was right to convict Magembe Ilanga Shenye and Matondo Mboje who were the 2nd and 3rd Accused Persons before that trial court for that offence of “Being in Possession of Goods Suspected to have been Stolen” though they were not charged with it. As narrated herein before, the said offence is cognate to the charged offence, ie. Cattle Theft. Though the thief has not been known, a good thing is that the victim (PW2) managed to identify his cattle and that he has taken them upon been given back to him by the trial court. In addition to that, apart from PW2, there is nobody else claims for ownership of the said cattle, and that the record shows that the persons who were found possessing the cattle in dispute had no evidence to prove that they had acquired them lawfully. They failed to 9 prove that they had purchased them from the Appellant. That being the case, the Appellant ought not to be convicted. It is trite law that the criminal case should be proved beyond all reasonable doubts. Failure of that, leads to the acquittal of the Accused Person. From what I have endeavored to explain herein above, I find it unnecessary to make analysis on the remaining grounds of appeal, as the ones that I have analyzed are sufficient to dispose of the matter in its entirety. In upshot, I find the case of Cattle Theft against the Appellant was not proved beyond all reasonable doubts. The appeal is therefore allowed. The Appellant should thus be released from the Prison house, unless he is held for any other lawful cause. S.M. KULITA JUDGE 29/11/2024 DATED at SHINYANGA this 29th day of November, 2024. 10 S.M. KULITA JUDGE 29/11/2024 11

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