

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE DISTRICT COURT OF LUSHOTO

AT LUSHOTO

CRIMINAL CASE NO. 100 OF 2017

THE REPUBLIC

VERSUS

VICENT WILLIAM KILUWASHA

DATE OF LAST ORDER: 18/7/2017

DATE OF JUDGMENT: 27/7/2017

BEFORE: J.E. MNGUTO – RMI

JUDGMENT

In this criminal case no. 100 of 2017, Vicent William @ Kiluwasha, the accused person is charged before this court with the offence of **CATTLE THEFT C/S 258 (1) and 268 (1) of the Penal Code Cap 16 R.E 2002.**

Facts of this case are so brief that, on 1st July 2017 the accused person stole one cow at Kitopeni Street in Lushoto, said cow worth TSHS. 1,000,000/= belonging to SARA GIFT.

The main issues for determination by this court are whether the accused person stole said cow.

Whether the prosecution side have proved their case in the standard required. Is the accused liable/guilty.

To begin with the first issue which is whether the accused person stole said cow.

To amount to any offence of theft under section 258 (1) of the Penal Code Cap 16 R.E 2002 the accused must have fraudulently and without a claim of right taken anything capable of being stolen.

In this case at hand it is said that the accused was found with that said cow said to have being stolen.

PW1 SARA GIFT said in her testimony that she lives at Kitopeni area Lushoto and that she owns a cow and pigs.

Said she on 1/7/2017 cared for his cow and closed it in the kitchen but when woke up on the next day did not find her cow in. Said that cow is a female cow with red and white colour/marks. PW1 stated that she looked for that said cow and heard it crying, followed up and found it at police. PW1 testified that she told police that she lost a cow and it is that one at police. It is PW1's testimony that she was told by the police that cow is sent at police by a subvillage leader called Pascal. It is her testimony that Pascal saw the accused with that cow in the night. PW1 said the accused asked Pascal that if no one appeared to identify the cow Pascal should send the cow to the accused. PW1 stated that the accused was arrested and sent to police station.

PW2 PASCAL JOACHIM a subvillage leader said he on the day of the incident while from a wedding party at Rosmin night hours saw accused holding a cow tied with rope near Lawns Hotel area. PW2 said as he was on a motorcycle asked the motorcycle driver to stop so that they can see where that person is going. PW2 said when they turned the one who was with the cow that is the accused in this case started running but as they had a motorcycle they caught him. PW2 said he identified the accused as Vicent as he is a boy he knows. PW2 said he asked the accused where he got that cow as that day which he found the accused with a cow is a Saturday so not a market day as accused told him that he got the cow at the market-commonly known as "Mnada".

Said he asked the accused which Mnada the accused said is from Mlalo and is given that cow by his father to go to sell as he has a case in court. PW2 said the accused changed his words. PW2 stated that he told the accused that they should go to police and if that cow is of his father it shall be known. While on the way to police the accused asked PW2 that he gives him TSHS. 100,000/= so that he leaves that issue. PW2 said he told the accused that they should go to police. Said while on the way to Police when they reached at Uwanjani area the accused tied that cow at a TTCL pole and told PW2 that will add them TSHS. 100,000/= but PW2 refused and said they should go to police and if the cow is of the accused he will remain with his money. He stated that the accused untied that cow and they were moving to police but when reached at CCM area

left that cow and ran away and said cannot go to police as his motorcycle was caught at police so he fears to go at police as if he goes will be remanded. PW2 said he opted to take the cow to police as if he chases the accused the cow could get lost. PW2 said he handed that cow to police. PW2 stated that on the next day was phoned by a son of one Pastor Mbwambo to go to police and explain where he got the cow. It is PW2's testimony that while on the way to police was phoned by the accused who asked him if the owner of the cow went there at PW2 said, the accused told him to go to take the cow and send it at the Anglican church area. Said while at police the accused phoned him again. PW2 said he informed the police on the accused's phone calls to him that accused want the cow and he will give PW2 TSHS. 200,000/=. As per PW2 the police said if they go with PW2 to send the cow accused may fear and run better that PW2 sends the cow to accused with militia men. PW2 stated that he took the cow to Anglican area and informed the accused that he should go thereat to take that cow and give him the money. Met with the accused who took that cow and tied it in a bush. PW2 said that he was told by the accused that the money will be sent thereat by one Issa. PW2 said the accused said will take a motorcycle and go for the money at Yoghoi. When he moved met with one Rama a militia man who told the accused and told accused that there is an RB that accused is needed at Police station. Said the accused told the militia man that he has an issue with PW2 let him finish and go to police. Went thereat another

militiaman and arrested the accused. PW2 said he knows Vicent, the accused person for a long time.

PW3 is ABEDI RAMADHANI KUPAZA a militia man who stated in his testimony that he was on 2/7/2017 phoned by the OCS and asked to go at Lushoto Police Station. When he reached thereat he was asked on the whereabouts of his fellow militia whom they do walk together. Said they were given a task of going to arrest a thief of a cow. Told his fellow to pass the Maguzoni road and he passed at Chakechake road near the home of one Singano the thief will be there PW3 stated that his fellow met the accused and arrested him and met them there. He said the accused wanted to run but they caught him. Said they sent the accused together with the cow stolen one at police.

When defending himself DW1 VICENT WILLIAM KULUWASHA said he is Vicent Wiliam Kiluwasha he has two children and he has a grand father who does not see/is a deaf. He has a family depending on him. He is serving a three years sentence. DW1 the accused said he is an orphan.

Said he has not committed offence he is accused of though he is suspected. The accused stated that if he committed the offence he could run away. It is the accused's defence that the offence he knows is of a motorcycle which he is sentenced to three years imprisonment. Ended by stating that he is saving a jail sentence.

In the case of **JONAS NKIZE v Republic (1992) TLR n 213** it was inter alia stated that:

(ii) The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution is part of our law, and forgetting or ignoring it is unforgivable and is a peril not worth taking.

As per the evidence in record by the prosecution, none of the prosecution witnesses said they saw the accused committing the offence he is charged with. But evidence by the prosecution is to the effect that (and this is especially evidence by PW2 one PASCAL JOACHIM a subvillage leader and PW3 ABEDI RAMADHANI KUPAZA a militia man who arrested the accused) the accused on the day of the incident was found in possession of the stolen cow. PW2 said while from a wedding party in night hours – 00:30 hrs met the accused with that cow at Lawns Hotel area. Said he asked accused where he got the cow accused said and bought it at a Mnada and later said he is given that cow by his father. PW2 took that cow to police and the accused ran away. On the next day as per PW2's testimony the accused asked PW2 if there is any one who identified the cow at police and if not PW2 should return that cow to the accused person and accused promised to give PW2 TSHS. 100,000/= PW2 agreed with the accused and they made a trap to accused as they took that cow at police and sent it to where accused is and the accused took it and tied it at a bush. When the accused was in the

process of going for money to give PW2 appeared thereat militia man and arrested the accused and they took the accused with that stolen cow again to police station Lushoto.

PW3 one ABED RAMADHANI KUPAZA is the one who arrested the accused and took him to police station Lushoto with that cow.

Therefore, as per the above testimony it is so plain that the accused person one **VICENT WILLIAM KILUWASHA** was found with the said stolen cow.

In the case of **DIRECTOR OF PUBLIC PROSECUTIONS v JOACHIM KOMBA (1984) TLR n 213** it was inter alia stated that:

“.....if a person is found in possession of recently stolen property and gives no explanation depending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or a guilty receiver.”

In **MICHAEL MHUTO V R (1975) LR.T 18** it was stated that:

“Where recent stolen property is found in possession of a person, the possessor of such property is deemed to have stolen or unlawfully obtained it unless he can give a reasonable explanation of innocent possession.”

Also in the case of **RAJABU NASORO @ RASTA VR. CRIMINAL APPEAL NO. 42/ 2006 COURT OF APPEAL OF TANZANIA (unreported) KILEO, (J.A)** as she then was had the following to say that:

“.....before a court can rely on the doctrine of recent possession as a basis of conviction in criminal case, the possession must be positively proved, that is, there must be positive proof that, first that the property was found with the accused, secondly that, the property is positively identified as the property of the complainant, thirdly that the property was stolen from the complainant and lastly that the property was recently stolen from the complainant.”

So as I said above it is so plain that the accused was found in possession of the stolen cow. It was also proved that said cow belong to the PW1 one SARA GIFT, it is also proved that property was stolen from PW1 and that the property was recently stolen from the complainant as it was stolen from the complainant on the 1st day of July 2017 and found with the accused on that same day.

In the case of **SULTAN SEIF NASSOR V R (2003) TLR n 231** it was stated that:

“It is trite law that where the accused person explain how he came into possession of the stolen goods, the doctrine of recent possession should not stand”.

The accused person when given time to defend himself has not given any reasonable explanation on how he came into possession said stolen cow. He at first said got that cow from a Mnada/local

markets and later said that said cow was given to him by his father but there was no tangible evidence to substantiate that.

As I said above in the above cited cases that :

"If a person is found in possession of recently stolen property and gives no explanation depending on the circumstances of the case, the court may legitimately infer that he is a thief....."

In the case of **MAGENDO PAUL & ANOTHER v R (1993) TLRn 219 (CAT)** it was stated that:

"If the evidence is so strong against an accused person as to leave a remote possibility in his favour which can easily be dismissed, the case is of radio which had been stolen during the night. So accused was found with a radio stolen during the night of that day it was held that:

"Under the doctrine of recent possession, in such circumstances, it is a fair inference.....that the appellant had either stolen (the radio) or received it knowing it to be stolen. The interval seems short enough to support the conclusion that he was the thief."

Accused convicted of stealing. This court having explained the above, is of the view that the evidence against the accused is so strong to leave no doubt that the accused stole said cow as he was found in possession of that stolen cow It is therefore, this court's

finding that the prosecution side have proved their case in the standard required.

Is the accused liable? As the prosecution side have proved their case beyond any reasonable doubt, the accused is found liable/guilty.

This court, therefore, convict the accused person VICENT WILLIAM KILUWASHA with the offence of Cattle Theft C/S 258 (1) and 268 (1) of the Penal Code Cap 16 R.E. 2002.

Sgd: J.E. Mnguto – RMI

27/7/2017

PREVIOUS CONVICTION

On 30/6/2017 in CC. 38/2017 in a case of stealing by lenient the accused was convicted and sentenced to pay a fine of 350,000/= or serve a term of imprisonment of 3 years. He has failed to pay the fine and is serving the jail sentence. I pray that as he is a repetitive offender let a strong sentence be given to him to be a lesson to him and other fees to convict like offences.

Sgd: J.E. Mnguto – RMI

27/7/2017

MITIGATION

I am an orphan I have no relatives so I pray for the court lenience.

Sgd: J.E. Mnguto – RMI

27/7/2017

Court: The accused person prayed for this court's lenience on reason that he is an orphan.

Looking at what the accused did, this court is of the view that a **deterrent** sentence be given to him to be a loss to him and others fee to commit like offences.

Sentence: The accused is sentenced as per section 268 (1) of the Penal Code Cap 16 R.E.2002 to a term of imprisonment of fifteen years (15).

Sgd: J.E. Mnguto – RMI

27/7/2017

Right of Appeal Explained.

Sgd: J.E. Mnguto – RMI

27/7/2017

Delivered in Open Court in the Presence of the Accused and the Public Prosecutor.

Sgd: J.E. Mnguto – RMI

27/7/2017