Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO 267 of 2007 – COURT OF APPEAL OF TANZANIA AT IRINGA. Coram: RAMADHANI C.J, LUBUVA, J.A AND MBAROUK J.A	**STAYOO KUNDAI VS THE REPUBLIC** (Appeal from the decision of the High Court of Tanzania at Iringa- **DC criminal appeal No 20 of 2007**. (Werema, J)	Standard required in proving a case in a criminal charge. See Hussein Idd and another Vs Republic [1998] TLR 166.

IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: RAMADHANI, C.J., LUBUVA, J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 267 OF 2007

STAYOO KUNDAI ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Werema, J.)

dated the 29th day of June, 2007
in
DC Criminal Appeal No. 20 of 2007

JUDGMENT OF THE COURT

23 & 25 July 2008

LUBUVA, J.A.:

This is a second appeal. It arises from the decision of the High Court (Werema, J.) in (DC) Criminal Appeal No. 20 of 2006. In Iringa District Court Criminal Case No. 229 of 2002, the appellant, together with others, not subject of this appeal were charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 R.E. 2002. The appellant together with two others who, apparently, jumped bail were convicted and sentenced to 30 years term of imprisonment.

The case for the prosecution was that on 28.5.2002, at midnight, the cowshed of Augustino Nyalusi (PW1) was invaded by thieves. In the process, 18 head of cattle and 22 goats were stolen. Responding to the alarm raised by the owner (PW1), neighbours including the Village Executive Officer, Titus Mbilinyi (PW3) mounted a search for the stolen livestock. In the course of the search, the appellant together with his father, **Kundai Kisambara** were apprehended on the ground that they were found with two cows out of the livestock alleged to have been stolen.

It was also alleged that the father of the appellant, **Kundai Kisambara** disclosed that the appellant was an accomplice to the theft. It was further alleged that upon his arrest, the appellant admitted to the Village Executive Officer (PW3) his involvement in the theft and that he led to the arrest of the other two accused persons who absconded (1st and 2nd accused at the trial). According to the prosecution, the 1st accused, Shepei Ninginingi also implicated the appellant as his accomplice to the alleged offence charged.

As already stated, on these facts and the evidence as adduced at the trial, the trial magistrate convicted the appellant and the other two who absconded and are still at large. On appeal to the High Court, the respondent Republic, did not support the conviction against the appellant. From the record, it appears that the Republic did not support the conviction because first, the identity of the appellant was not satisfactory. Second, that the story of the father of the appellant to the investigating police officer, Henry (PW6) admitting his involvement in the alleged offence was hearsay, he was not called to testify at the trial.

The learned judge on first appeal accepted the position taken by the respondent Republic and the counsel for the appellant that the identification of the appellant was unsatisfactory. However, he sustained the conviction because according to him, the conviction of the appellant was not based solely on identification. Based on what the learned judge considered as accomplice evidence, the appeal was dismissed. Dissatisfied, the appellant has preferred this second appeal.

In this appeal, the appellant had the services of Mr. Justinian Mushokorwa, learned counsel who had also represented the appellant in the High Court. For the respondent Republic, Mr. Ponziano Lukosi, learned State Attorney appeared. Mr. Mushokorwa's first ground of complaint was that the learned judge on first appeal erred in holding that there was circumstantial evidence from the conduct and statements of the appellant which provided corroboration to the evidence of an accomplice.

In elaboration, Mr. Mushokorwa referred to the finding of the learned judge at page 20 of the record that the evidence of PW4, had not been "discredited, it was glaring evidence, it corroborates, consistently the statement of **Shepei".** Making further reference to the judgment of the learned judge, Mr. Mushokorwa maintained that it was erroneous on the part of the learned judge to hold that the evidence of PW4, one of the villagers who accompanied the Village Executive Officer (PW3) shows that the appellant admitted involvement in the theft of the cattle. First, Mr. Mushokorwa, submitted, it was not PW3, the Village Executive Officer, who

interrogated the appellant, it was the police investigating officer (PW6) Inspector Henry. PW3 merely provided the facility in his office. Second, from the evidence of PW4 it is not shown anywhere that the appellant admitted his involvement in the crime. Mr. Mushokorwa stated that what PW4 had said was that he was away from where the appellant was being interrogated, so, he could not hear the alleged admission by the appellant. Third, counsel submitted that when the appellant was interrogated at the pombe shop in the presence of PW3, he said the cattle were with **Matobo** and **Selemani** who are not accomplices or co-accused as held by the learned judge. The first accused, **Shepei** was not mentioned by the appellant as his accomplice in the commission of the alleged offence.

In view of such deficiencies in the evidence, Mr. Mushokorwa submitted that the learned judge on first appeal erred in holding that the appellant was sufficiently linked with the offence by accomplice evidence. Such evidence was not forthcoming from the record and if any, it was not sufficient to ground the conviction. He reiterated the principle that the evidence which in itself is deficient requiring

corroboration cannot be taken as corroborative evidence. Such was the case in this case in which the judge considered the evidence as corroborative of PW4's evidence. He referred to the case of **Aziz Abdallah v.R** (1991) TLR 71 among others.

On this submission, Mr. Lukosi, learned State Attorney, was in agreement with Mr. Mushokorwa. He said the respondent Republic maintains the same position as was the case in the High Court. That he did not support the conviction against the appellant. He said, on the evidence as a whole, it was doubtful that the case against the appellant had been proved conclusively. First, the father of the appellant, **Kundai Kisambara,** who was the source of the appellant's implication and apprehension, was not only called as a witness at the trial but his statement was also not availed. This, the State Attorney further contended, was a serious deficiency in the evidence for the prosecution. Second, the learned judge misdirected himself in holding that the appellant had admitted to PW4 his involvement in the offence as corroborative of **Shepei,** the absconded 1st accused at the trial when in fact Shepei's statement is

not there. Likewise, the holding by the learned judge that PW4/PW3 heard the appellant admitting commission of the offence is not borne out from the evidence, Mr. Lukosi observed. Therefore, there was no corroborative evidence by co-accused against the appellant as held by the learned judge, the State Attorney stressed.

The determination of this appeal in our view, depends to a large extent on this ground. We think it can be disposed of within a narrow compass. The issue is whether there was credible accomplice evidence against the appellant as held by the learned judge. From the record, there is no denying the fact that the judge relied on the provisions of section 142 of the Evidence Act, Cap. 6 R.E. 2002. The section provides:

> 142. An accomplice shall be competent witness against an accused person; and conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

In this case, as stated earlier, the central and serious issue of contention is that the learned judge misdirected himself in holding that the appellant had admitted to PW4 his participation in the commission of the offence and that the evidence had not been discredited or objected. Mr. Mushokorwa had taken us through various parts of the record to illustrate the misdirection. For instance, at page 120 of the record, the learned judge *inter alia* stated:

> There is the evidence of Chelestino Nziri (PW4) ... According to his evidence, the appellant had admitted to have been involved in the theft and that they had sold the cattle to one person identified by one name only MATOBO. This evidence has not been discredited. It is a glaring evidence. It corroborates, consistently the statement of **Shepei.**

We have glanced through the record as urged by Mr. Mushokorwa. From such scrutiny, we are of the settled view that the evidence on this issue was discredited and objected against by the

defence at various stages of the trial. The record loudly speaks for itself showing objection raised by Mr. Mushokorwa, learned counsel who also represented appellant at the trial. It was therefore a misdirection on the part of the learned judge on first appeal to hold that the evidence of PW4 had not been discredited.

Next is the consideration whether there was accomplice evidence corroborating the statement of **Shepei** as held by the learned judge. It will be recalled that the learned judge took the view that a statement by an accused person admitting commission of an offence amounts to corroboration of an accomplice evidence. In the instant case, it was the learned judge's view that the appellant's admission before PW4 corroborated the statement of **Shepei,** the 1st accused at the trial a co-accused of the appellant.

With respect, we do not think that the learned judge was correct in this aspect. From our perusal of the evidence of PW4, the following aspects emerge: First, that Kundai, the father of the appellant admitted that his son Stayoo, the appellant, might be

responsible for the cattle theft; second, that on interrogation, the appellant said that he had surrendered the cattle, subject of the theft, in conjunction with **Matobo Selemani** and **Patrick Mpogole** and thirdly, that the appellant had said that the firearm used in the theft belonged to the 4th accused (Patrick s/o Martin) and one Malabuhi. From this evidence, it is clear that **Shepei,** a co-accused with the appellant who absconded, was not mentioned or implicated.

Furthermore, there is the holding by the learned judge that there were two sets of evidence. One, the evidence of PW3 that the appellant had admitted commission of the offence. Two, that there was the evidence of **Shepei Nin'gining'ngi.** We have already stated that the record does not bear out that the appellant made such an admission to PW3. It is also apparent from the record that there is no statement by **Shepei** either.

With regard to PW4, as **Shepei,** who was the co-accused with the appellant before he absconded, was not mentioned to PW4; and there was no statement of Shepei available, there was therefore no

corroborative evidence by an accomplice within the meaning as provided under section 142 of the Evidence Act, 1967 Cap 6 R.E. 2002.

In the case of **Azizi Abdallah v.R** (1991) TLR 71, this Court held to the effect that deficient, suspect or incredible evidence could not be corroborated. In this case, where there was no such evidence by way of Shepei's statement, a co-accused, the situation is worse. As there was no such statement by Shepei the learned judge erroneously held that it was corroborative accomplice evidence and that PW3 and PW4 said what in fact they did not say in their evidence. With due respect, it seems to us that the learned judge got mixed up in his view of confession by co-accused implicating each other and confession to witnesses. Here, PW3 and PW4 were witnesses and not co-accused. In the circumstances, we may even go further in stating that not even the provisions of section 33 of the Evidence Act, would apply.

There is also the aspect regarding the unsatisfactory identification of the two head of cattle which it was alleged were found with Kundai, the father of the appellant. PW1, the complainant was unable to identify the specific marks showing that the two cows and the goats were among those stolen from him. This, again as correctly urged by Mr. Mushokorwa and Mr. Lukosi, further rendered the case against the appellant even weaker. In more or less similar situation, in the case of **Ally Bakari v.R** [1992] TLR 10, the complainant could not identify the sewing machine as his, the Court held that the guilt of the appellant had not been proved beyond reasonable doubt. In similar vein, in this case on this ground alone, it is highly doubtful that the guilt of the appellant could be said to have been proved conclusively.

Finally and briefly, we wish to deal with the ground that the defence of the appellant was not considered. Mr. Mushokorwa, referred to the defence of the appellant at the trial in which the appellant expressly denied before the villagers his involvement in the cattle theft or that he mentioned the 1st accused, Shepei. This,

according to the counsel, was not considered by the trial judge in assessing the prosecution case against the defence. It was a misdirection, Mr. Mushokorwa submitted. Mr. Lukosi, learned State Attorney supported Mr. Mushokorwa on this ground.

From our cursory scrutiny of the record, we have no hesitation in agreeing with Mr. Mushokorwa and Mr. Lukosi on this point. It is not apparent from the judgment that the learned judge considered the defence of the appellant on this issue when arriving at the conclusion. Neither is aspect also reflected from the trial court's decision. It is trite principle that it is a serious misdirection on the part of the court to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence. See for instance **Hussein Idd And Another v. Republic** [1986] TLR 166. Apparently, this is what happened in this case, as urged by Mr. Mushokorwa. With respect, we think it was a misdirection on the part of the learned judge. The complaint in this ground has merit.

In the event, for the foregoing reasons, we are satisfied that had the learned judge properly analysed and directed himself on the evidence adduced for the prosecution and the defence, he would have come to the conclusion that what he considered as corroborative accomplice evidence was not there. In the upshot, he would have found that the case against the appellant had not been proved to the standard required in criminal charge.

Consequently, the appeal is allowed, conviction quashed and sentence set aside. The appellant is to be released from custody forthwith unless otherwise lawfully held.

DATED at IRINGA this 25th day of July, 2008.

A.S.L. RAMADHANI
CHIEF JUSTICE

D.Z. LUBUVA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR