IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LUBUVA, J.A., NSEKELA, J.A., And KAJI, J.A.)

CRIMINAL APPEAL NO. 80 OF 1994

BETWEEN

1. DEEMAY DAATI]
2. HAWA DURBAI]..... APPELLANTS
3. NADA DAATI]

AND

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Munuo, J.)

dated the 18th day of December, 1992
in
Criminal Appeal No. 74 of 1992

JUDGMENT OF THE COURT

LUBUVA, J.A.:

This is a second appeal. In the first appeal to the High Court by the Director of Public Prosecutions, Munuo, J. as she then was reversed the decision of the District Court at Babati acquitting the appellants, Deemay Daati, Hawa Durbai and Nada Daati. The appellants were therefore found by the High Court guilty of the offence of cattle theft contrary to sections 268 and 265 of the Penal Code. They were each sentenced to a term of five (5) years

imprisonment and were further ordered to pay 75,000/= compensation for the stolen two bulls.

Briefly stated, the prosecution case was as follows. On 4.7.1990, at Utwari Village in Babati, the appellants collected three head of cattle from Faustin Cyril (PW2), the son of Cyril Baha (PW1) on the pretex that PW1 had sent them to collect the cattle. PW2, believing that PW1 had sent the appellants for the bulls released the same. The three head of cattle were driven by the appellants and were never recovered. At the time the appellants made the presentation to PW2 until the time of the release of the cattle, Humri Tatok was present, he witnessed the incident. Faustin Cyril (PW2) had no difficulty in believing that the appellants had been sent for the cattle by his father (PW1) because the first and third appellants were his uncles and the second appellant was a neighbour. The evidence of PW2 who was then ten years old was supported by the evidence of Humri Tatok (PW3).

The trial District Court was not satisfied with the evidence of PW1, PW2 and PW3. The magistrate doubted the credibility of these

principal witnesses. In the case of PW2 the magistrate found him unbelievable because he had not reported the matter to his sister one Yasinta or to his grand mother. As for the complainant (PW1), the trial magistrate took the view that his evidence was fabricated in revenge for the desertion from the matrimonial home of PW1 by one Fabiola, a sister of the first and second appellants. As said before, on the basis of such doubt, the trial magistrate acquitted the appellants. The Director of Public Prosecutions appealed to the High Court against the decision of the trial Court.

Dealing with the appeal, the learned judge on first appeal was of the settled view that the trial magistrate misdirected himself in evaluating the evidence of PW2 and PW3, the eye witnesses to the incident. The learned judge also faulted the trial magistrate for according undue weight to the alleged marital discord between PW1, the complainant, and Fabiola, the sister of first and third appellants. According to the learned judge, the evidence of the young boy, PW2, was pertinent and straight forward. The first and third appellants as uncles and the second appellant, a neighbour, were well known to PW2. In that situation, the learned judge further held that as the

three head of cattle were driven in broad day light witnessed by Humri Tatok (PW3), the question of mistaken identity of the appellants did not arise. Consequently, as already shown, the appeal was allowed, the appellants were found guilty as charged. Aggrieved the appellants have therefore preferred this appeal.

In this appeal Mr. Chadha, learned counsel advocated for the appellant. He filed a five-point memorandum of appeal the sum total of which is to the following effect: First, that under ground five (5) the complaint is that as the trial court did not comply with the mandatory provisions of section 225 (4) and (5) the proceedings were rendered a nullity. Second, that it was improper for the High Court as first appellate court to evaluate afresh the evidence of witnesses whom it had not seen or heard. Third, that the trial magistrate's omission to conduct *voire dire* examination of PW2, a child of tender years was a violation of section 127 (1) of the Evidene Act, 1967.

Regarding the first ground of complaint, Mr. Chadha vigorously criticized the learned judge on first appeal for not addressing the

issue pertaining to the violation of the provisions of section 225 (4) and (5) of the Criminal Procedure Act, 1985. He stated that under the provisions of section 225 (4) (5) of the Criminal Procedure Act, 1985, for specified offences such as this, subject of the case, it shall not be lawful for a court to adjourn the case for an aggregate of 60 days after the institution of the case unless a certificate is filed by the Regional Crime Officer, the State Attorney or the Director of Public Prosecutions.

In this, he further submitted, as no such certificate was filed and the case was adjourned for a period beyond 60 days, the breach of the mandatory provisions of the section vitiated the whole proceedings of the case. To hold otherwise, Mr. Chadha urged, renders the provisions of section 225 (4) and (5) meaningless. He also pointed out that when the application for bail pending appeal was heard in this matter in the High Court, both the judge and the Principal State Attorney had conceded on this point.

For the respondent/Republic, Mrs. Ntilatwa, leaned Senior State Attorney, strongly opposed these submissions. While she conceded

that there was no certificate filed in this case, she firmly maintained that the proceedings were nonetheless not vitiated. In her view, it had not been shown that the appellant had been prejudiced in any way by such adjournment. In support of her submission, she referred to the decision of the Court in **Director of Public Prosecutions V. Fonja Mathayo** (1995) TLR 23 and **John Joseph Onenge And Julius Senene V. Republic** (1993) TLR 131.

With respect, we agree with Chadha, learned counsel that the provisions of section 225 (4) (5) of the Criminal Procedure Act, 1985 were breached. This is so for the reason that the case was adjourned beyond the aggregate of 60 days without the requisite certificate being filed. However, we do not agree with him that the granting of adjournment beyond the aggregate of 60 days vitiated the whole proceedings. It is common knowledge that the objective behind the enactment of Act No. 9 of 1985 which introduced the provisions of section 225 (4) and (5) was to expedite fair trial of criminal cases. We do not however, think that in achieving this objective, it was also intended to throttle the cases in the process. To do so, we also think would defeat the whole purpose of initiating

prosecution in cases which may be throttled in this way even where there may well be plausible reasons for failure to file the certificate. It is to be pointed out at once that where there is no certificate filed under sub-section (4) of section 225, the only option open for the court is to proceed with the hearing of the case or to discharge the accused.

Otherwise, it is our view that contrary to Mr. Chadha's submissions, unless the accused is prejudiced, the proceedings are not vitiated by adjournment granted beyond the aggregate of 60 days. In **Director of Public Prosecutions V. Fonja Mathayo** (supra) the Court held *inter alia*:

> Breach of the provisions of section 225 (4) and (5) of the Criminal Procedure Ac, 1985, does not necessarily vitiate the trial unless it is shown that the accused person has been prejudiced in his defence or that the adjournments did affect the substance of the conduct of the trial.

In **Joseph Onenge** (supra) the Court held similar views. In the instant case, neither has it been shown that the appellant was prejudiced in his defence nor that the adjournments did affect the substance of the conduct of the trial. We therefore find no merit in ground five regarding section 225 (4) and (5) of the Criminal Procedure Act, 1985. It is dismissed.

Mr. Chadha, learned counsel, also strongly attacked the learned judge on first appeal for evaluating the evidence afresh and coming to its own conclusion. He submitted that it was improper for the learned judge to interfere with the findings of fact with regard to the credibility of the witnesses PW1 and PW3 who the trial magistrate had the advantage of hearing and seeing their demeanour.

Responding to these submissions, Mr. Ntilatwa, learned Senior State Attorney briefly stated that the learned judge properly re-evaluated the evidence of PW2 and PW3. She said the High Court as the first appellate court and the Court of Appeal on second appeal, have power to re-evaluate the evidence afresh and come to their own conclusion.

We need not be delayed in this ground of complaint. It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact. In **Peters V. Sunday Post Ltd.** (1958) E.A. 424, the Court of Appeal for East Africa set out the principles in which an appellate court can act in appreciating and evaluating the evidence: Among other things, it was held:

> Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.

This principle had been reiterated eleven years (11) before in England in the case of **Watt V. Thomas** (1947) 1 All E.R. 582. Within the jurisdiction of the Court, in **Salum Mhando V. Republic** (1993) T.L.R. 170, the Court observed *inter alia*:

> Where there are misdirections and non-directions on the evidence a court of second appeal is entitled to look at the relevant evidence and make its own findings of fact.

In the instant case, all the more so for a first appellate court, the High Court, we think the learned judge was justified in interfering with the findings of the trial court with regard to the evidence of PW2 and PW3. From our perusal of the evidence on record it is clear that the trial magistrate cast doubt on the evidence of these witnesses on what seems to us fanciful grounds. The evidence of PW2, a ten year old boy, is, to our minds, clear and straight forward. He knew the appellants as his uncles (1st and 3rd appellants) and neighbour (second appellant). It was broad day time when the appellants made the representation to PW2 was made within sight and hearing of PW3 who fully corroborated the evidence of PW2.

Furthermore, the evidence of PW1, the complainant was, in our view, discredited on what seems to us extraneous reasons. In the event, we are satisfied that the learned judge on first appeal was entitled to re-evaluate afresh the evidence and come to the conclusion that the appellants were improperly acquitted by the trial court.

With respect, we do not accept the novel point made by Mr. Chadha that PW3 was a chance witness, and so, his evidence was unreliable. Whatever is meant by chance witness, it is plain truth that PW3 was at the scene of crime when the appellants made the representation to PW2. In his evidence (PW3), he stated what he heard and saw the appellants drive away the cattle. We can see no ground for discrediting the evidence of this witness. On the whole, therefore, upon proper evaluation of the evidence as the learned judge did, we agree with Mrs. Ntilatwa that there was ample evidence to justify the appellants' conviction.

Finally, we wish to deal briefly with the complaint regarding the evidence of PW2. We agree with Mr. Chadha that the evidence of PW2 was that of a child of tender years. We also agree that it is apparent that the trial magistrate did not comply with the provisions of section 127 (1) of the Evidence Act, 1967. From the record at page 20 of the proceedings it is apparent that when PW2 was called on to testify, it is indicated: "Examined and satisfied the court that can give a sworn evidence; sworn and states." Section 127 (1) of the Evidence Act, 1967 provides to the effect that in a criminal case where a child of tender years is called as a witness does not, in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath or affirmation, if in the opinion of the court to be recorded in the proceedings – he is possessed of sufficient intelligence --------- (underscoring provided).

From this extract in the proceedings, it is not clear that *voire dire* examination was conducted. It seems to us that this aspect was scantly dealt within this manner. In that situation, we agree with Mr. Chadha that the provisions of section 127 (2) of the Evidence Act, 1967 was breached. With respect, this aspect was not also

addressed by the learned judge. The effect of the omission is the issue for consideration in this appeal.

It is settled law that the omission to conduct *voire dire* examination of a child of tender years brings such evidence to the level of unsworn evidence of a child which requires corroboration. Decided cases on this are numerous. See for instance:

1. Kilengeny Arap Kolil V R (1959) EA 92
2. Kisiriri Mwita s/o Kisiriri V R (1981) T.L.R. 218
3. Dahiri Aly V R (1989) T.L.R. 27.

If we understood Mr. Chadha, he seemed to take the view that as a result of such omission, the evidence of PW2 was rendered worthless. With respect, this is not the correct position of the law. Under sub-section (2) of section 127 of the Evidence Act, 1967, the evidence of a child of tender years who, in the opinion of the court does not understand the nature of an oath, the evidence may be

received like the evidence of any other unsworn witness. Such evidence however, requires corroboration.

In this case, even if it is accepted that PW2 was such a witness, namely that he did not understand the nature of an oath, his unsworn evidence was fully corroborated by PW3. As a result, with the evidence of PW2 corroborated by PW3, we are satisfied that upon consideration and evaluation of the evidence as the learned judge, did, the appellants would still be found guilty of the offence as charged.

All in all therefore, on the evidence on record, we are satisfied that the learned judge was entitled to the conclusion that the case against the appellants had been proved conclusively.

In the event, we find no merit in the appeal, it is dismissed in its entirety.

DATED at ARUSHA this 5th day of October, 2004.

D. Z. LUBUVA
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DEPUTY REGISTRAR