

**IN THE COURT OF APPEAL OF TANZANIA  
AT DODOMA**

**(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)**

**CRIMINAL APPEAL NO. 592 OF 2015**

**FUNDISHA OMARY @ FUNDISHA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the Resident Magistrate Court of Singida  
at Singida)**

**(Lema, PRM Ext. J)**

**Dated 11<sup>th</sup> day of December, 2015**

**in**

**PRM Criminal Appeal No. 52 of 2015**

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18<sup>th</sup> & 20<sup>th</sup> April, 2016

**JUMA, J.A.:**

**REASONS FOR JUDGMENT OF THE COURT**

At the conclusion of the hearing of this appeal, we allowed the appeal, quashed the conviction and set aside the sentence. We issued an Order that the appellant be immediately released from prison, unless he was being held for lawful cause. We reserved our reasons which we now give.

The Appellant Fundisha Omary @ FUNDISHA was charged before the District Court of Manyoni with the offence of injuring animals contrary to

sections 325 and 326 (1) of the Penal Code, Cap. 16. The particulars of the offence alleged that at around 10:00 hours on 7/11/2013 at Mwanzi village in Manyoni District of Singida Region, he wilfully and unlawfully wounded six heads of cattle on several parts of those livestock using a bush knife. Those heads of cattle belonged to Hamisi s/o Langwe (PW1).

That morning, a sixteen-year old Kamunga Hamisi (PW3) claims that he and his siblings were out grazing their father's livestock when the appellant appeared and chased them away. Because the livestock remained behind, PW3 did not run far. He returned shortly after the chase to check on the livestock he left behind. PW3 claims that he found the appellant wielding a bush knife and slashing the animals. As he was trying to assemble the livestock which were now scattered, his siblings ran away while shouting for help.

The commotion attracted several people to the scene. Athumani Hamisi (PW2) was amongst those who rushed to the field after being informed by his siblings who had taken the livestock to graze. At the scene, PW2 found the injured livestock. He immediately used his mobile phone to call his father, Hamisi Langwe (PW1) and informed him that his six heads

of cattle had been slashed. His father asked PW2 to report to the Village Executive Officer (VEO). Soon thereafter, his father also arrived at the VEO's office. Yuda Yotam Yohana (PW5) the local area Chairman also visited the scene and saw for himself the state the injured heads of cattle were in. The photographs were apparently taken to capture the extent of the injuries to the livestock. PW3 was asked to identify the livestock in the photographs, and they were admitted and collectively marked as P1.

Meanwhile, Hamad Hussein Dossa (PW4) who introduced himself as a Veterinary Officer based at Manyoni was invited to visit the village to treat the injured livestock. He testified that by the time he arrived at the scene, the injured livestock had been moved. He and the Ward Executive Officer of Manyoni followed the blood trail which led up the appellant's farm. PW4 determined that the livestock were injured while in the appellant's farm. PW4 managed to treat and save five of the six heads of cattle. One cow died from its injuries.

After the closing of the prosecution's case, the appellant gave his evidence after being affirmed. He vehemently denied the claim that he injured the livestock. He recalled that morning when he reached his farm

which he used for cultivation during the dry season he saw livestock grazing. When the boys who were looking after the livestock saw him, they began driving the livestock away. By the time he reached the scene of crime he found the ridges in his farm which he had prepared for planting his crops, had been destroyed by the herd of livestock. He continued to cultivate on the part of his farm which had not been destroyed by livestock. He was surprised when later on; four people including the area Chairman arrived to inform him that he had injured the livestock.

The learned trial magistrate, A. E. Chilongola-RM convicted the appellant and sentenced him to serve four (4) years imprisonment and to pay compensation of Tshs. 300,000/= . Being aggrieved with his conviction and sentence, the appellant filed his first appeal in the High Court. The High Court invoked section 45 (2) of the Magistrates Court Act, Cap. 11 and transferred the hearing of the appeal to the Resident Magistrate's Court of Singida to be heard by W.E. Lema-PRM on extended jurisdiction. That first appeal was dismissed, prompting the appellant to prefer this second appeal.

At the hearing of the appeal, the appellant appeared before us in person while Ms. Judith Mwakyusa learned State Attorney appeared for the respondent Republic. The appellant preferred first to listen to what the learned State Attorney had to say on his grounds of appeal before offering his own response.

Ms. Mwakyusa supported the appellant's conviction but opposed the sentence, which she described as illegal. In support of the conviction, she submitted that there was strong direct evidence to prove that it was the appellant who injured the livestock, and trial court properly evaluated the evidence and arrived at the correct decision, which was affirmed by the first appellate court. She cited the testimony of the Veterinary Officer (PW4) which she described as expert evidence adding value to the testimonies of other prosecution witnesses. She conceded that the evidence of photographs should not have been admitted as evidence as exhibit P1. This is because the photographs were not certified in compliance with conditions set for preparation of photographic prints under section 202 (1) of the Criminal Procedure Act, Cap. 20 (CPA) which states:

*202.-(1) In any inquiry, trial or other proceeding under this Act a certificate in the form in the Third Schedule to this Act, given under the hand of an officer appointed by order of the Attorney-General for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film together with any photographic prints, photographic enlargements and any other annexures referred to therein, shall be evidence of all facts stated in the certificate.*

Ms. Mwakyusa was however quick to insist that even with the removal of the photographic evidence from the equation, the remaining evidence is sufficient to ground the conviction.

On the aspect of the punishment which the appellant received, the learned State Attorney was of the opinion that in the circumstances of this appeal where the appellant was sentenced to four years imprisonment, that was an illegal sentence. She attributed the illegality to the mistaken belief by the two courts below that section 326 (1) of the Penal Code provides appropriate punishment for the offence of injuring animals under section 325 (1). These provisions state:

**325.** *Any person who willfully and unlawfully kills, maims or wounds any animal capable of being stolen commits an offence.*

**326.-(1)** *Any person who willfully and unlawfully destroys or damages any property commits an offence, and except as otherwise provided in this section, is liable to imprisonment for seven years.*

She submitted that for offences in the Penal Code like injuring animals which do not provide for punishment within the same section that creates an offence, section 35 of the Penal Code as well as the FIRST SCHEDULE to the CPA must be consulted to discern the appropriate punishment. Section 35 of the Penal Code fills-up the sentencing gap by stating that:

**35.** *When in this Code no punishment is expressly provided for any offence, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both. [Emphasis added].*

On the other hand, the First Schedule has prescribed that upon conviction over the offence of injuring animals under section 325 of the Penal Code, the maximum legal sentence is imprisonment for two years.

The learned State Attorney urged us to invoke our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 and quash the illegal sentence and replace it with a legal sentence prescribed in the First Schedule to the CPA.

We need not belabour this issue of law concerning the sentence. We are in total agreement with the learned State Attorney that section 326 (1) of the Penal Code which was cited in the charge sheet alongside the offence of injuring animals (section 325 (1) of the Penal Code), is not relevant in so far as punishment which created the offence. The punishment for the offence of injuring animals is provided for in First Schedule to the CPA. On conviction of this offence, the maximum legal sentence is imprisonment for two years.

However, in his reaction to the position taken by the learned State Attorney, the appellant first wondered why when PW2 arrived at the farm where he was working; he failed to mention presence of blood which PW4 who came later claimed to have scene stains of blood. The appellant urged us to find that prosecution witnesses had fabricated evidence against him. Secondly he questioned the professional qualification of the Veterinary



Officer who failed to state his professional qualifications as a basis of his expertise over the matter. He urged us to regard PW4's evidence as part of the wider scheme to frame him up to an offence he did not commit. Thirdly, he urged us to look at the year (2011) appearing in one of the photographs, which suggests the photographs exhibited as evidence against him have no bearing with what happened and successfully misled the trial and the first appellate courts.

When Ms. Mwakyusa was given the chance to respond to the suggestion that the photographs were taken two years before the event, she explained that it is very probable that the camera that took the photographs had not been set so that its date would stay updated. And that is one of the reasons why, she pointed out, she had urged us earlier to disregard the photographic evidence for non-compliance with section 202 of the CPA. With regard to the Veterinary Officer, she conceded that he did not specify his professional qualifications and experience. All the same, she submitted that since this Veterinary Officer was brought by the Village Executive Officer, he should be taken to be appropriately qualified.

This being a second appeal, the Court should not interfere with concurrent findings of two courts below on matters of fact. Our role is restricted to consideration of points of law unless the concurrent findings of fact made by the lower courts were not based on evidence or are based on misapprehension of evidence. We think the issue of the photographs, probity of the evidence of PW4 who introduced himself as Veterinary Officer but failed to specify the basis of his expertise and experience, and the legality of the sentence; are matters of law warranting the attention of the Court on second appeal.

PW4 who before being affirmed introduced himself as "*Veterinary Officer, Manyoni*" claimed that he discovered six injured cows, and that he saw wounds, and he also saw exhibits of pictures taken of those wounded cows. He finally "*certified that the wounded cows were six as he saw them by his own eyes*". Although he used the word "*certify*", PW4 said nothing about his qualifications, training and basis of his ability to certify. He did not tender in evidence any medical report because he prepared none. For the cows that survived and one that died, PW4 did not explain on which part of the cattle those injuries were inflicted.

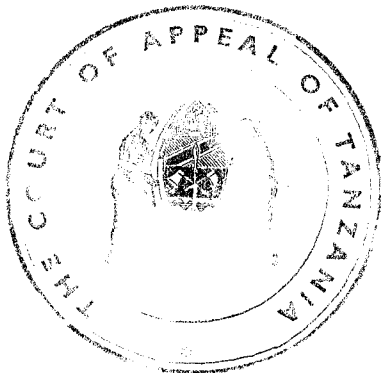
With respect to photographs of the injured heads of cattle which were admitted as exhibit P1, we noted that Ms. Mwakyusa urged us to disregard these photographs on the reason that they were admitted because their photographic print-outs were not certified by an officer appointed by order of the Attorney-General as prescribed by section 202 of the Criminal Procedure Act, Cap 20 (CPA).

With respect, it is rather belated to discard these photographs which were exhibited as evidence and were an integral part of the evidence which the trial court used in convicting the appellant. Even the learned Principal Resident Magistrate on extended jurisdiction who heard the first appeal, readily concluded that these photographs which we are urged to discard, corroborated what PW3 and PW4 had testified on. One of the six photographs is dated electronically to show that the photographs were taken in 2011 which was more than two years before 7/11/2013 when the appellant allegedly committed the offence. Ms. Mwakyusa has explained that the apparent mistaken date on the photograph has more to do with the Camera, which in her surmise, was not properly set, and had nothing to do with deliberate attempt to mislead.

the year of their taking, raise some possibilities that the photographs may not have any bearing to the offence. Similarly the failure of the "*Veterinary Officer*" to state the basis of his qualifications, training and expertise, has created doubt whether the conviction of the appellant was influenced by tainted evidence. The appellant is entitled to benefit from such lingering doubt.

In the upshot of the foregoing doubts, the conviction of the appellant cannot therefore be left to stand. The appeal is allowed. The appellant shall be set free forthwith unless detained for any lawful cause.

**DATED at DODOMA** this 19<sup>th</sup> day of April, 2016.



E.A.KILEO  
**JUSTICE OF APPEAL**

K.K. ORIYO  
**JUSTICE OF APPEAL**

I.H. JUMA  
**JUSTICE OF APPEAL**

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

E.F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**