

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MWARIJA, J.A. And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 349 OF 2015

1. JOSHUA SENGONDO
2. BAKARI ALLY**APPELLANTS**

VERSUS

DAUDI KAULA.....**RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania
at Dar es Salaam)**

(Muruke, J.)

**dated the 08th day of November, 2011
in
HC. PC. Criminal Appeal No. 3 of 2009**

RULING OF THE COURT

14th February, & 6th April, 2018

MUSSA, J.A.:

This matter was prompted by Civil Case No. 127 of 2005 which was instituted by the appellants against a certain Weloce Kaula in the Primary court of Chakwale, Kilosa District. At the end of the proceeding, the appellants emerged successful and the referred Weloce Kaula was ordered to pay them a sum of shs. 2,000,000/=.

For some obscure cause, during the execution exercise, a court broker seized and sold five heads of cattle which were the property of the respondent who happens to be a brother of Weloce Kaula. The

respondent was dissatisfied and his immediate response was to initiate Criminal Case No. 123 against the appellants for cattle theft contrary to section 268 of the Penal Code, Chapter 16 of the Revised Laws (the Penal Code) and criminal trespass, contrary to section 299 of the Penal Code. The criminal proceedings which are the ones giving rise to this appeal were, again, instituted at Chakwale Primary Court. At the end of the trial, the court found that the evidence in support of the charge fell short and, accordingly, the appellants were found not guilty and acquitted.

Aggrieved by the decision of the primary court, the respondent preferred Criminal Appeal No. 150 of 2008 at Kilosa District Court. In its deliberations, the first appellate court did not fault the trial court's finding of not guilty in favour of the appellants. But the court went further and ordered the appellants to refund the respondent the proceeds of the sale resulting from the execution process.

The appellants were dissatisfied, more specifically, by the order requiring them to refund the respondent and, in response, they preferred PC Criminal Appeal No. 3 of 2009 in the High Court. As it were, the High Court (Aboud, J.) found no cause to fault the refund order of the District Court which was upheld.

Still aggrieved, the appellants presently seek to impugn the decisions of the two courts below by way of a memorandum of appeal which is comprised of six points of grievance. At a certain stage, the Republic was joined in the appeal as a necessary party by an Order of the Court dated the 17th May, 2012.

When, eventually, the appeal was placed before us for hearing, the necessary party entered appearance through Ms. Jennifer Masue who was being assisted by Ms. Neema Mbwana, both learned State Attorneys. The first appellant defaulted appearance despite the fact that he was duly served with a notice of hearing on the 25th January, 2018. As for the second appellant as well as the respondent, there are entries to the effect that both have died.

On account of the absence of the first appellant who was duly served, Ms. Masue urged us to dismiss his appeal under Rule 80(4) of the Tanzania Court of Appeal Rules, 2009 (the Rules). We entirely agree and, in the result, the appeal by the first appellant is hereby, accordingly, dismissed. Upon showing sufficient cause, the first appellant may wish to impress on the Court to restore the appeal.

As regards the second appellant and the respondent who are reportedly dead, the learned State Attorney advised us that the appeal

has abated upon the death of the second appellant and that we should, accordingly, mark it as such.

With respect, we found ourselves reluctant to accommodate Ms. Masue's advise partly on account of the fact that the appeal is, in the main, directed against the order to have the appellants refund the respondent of the proceeds of the sale resulting from the execution exercise. In this regard, Rule 78(2) of the Rules provides thus: -

"Upon the death of the appellant or the respondent, as the case may be, in an appeal against a sentence of fine, or an order for costs, compensation or forfeiture, the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in the place of the deceased."

The appeal at hand is directed against the refund order which is akin to an order for compensation which is contemplated by the extracted Rule. It follows, therefore, that the appeal does not automatically abate upon the death of the second appellant; rather, it may survive in the event a legal representative of the deceased is made a party.

The crunch is, however, as to what is the fitting order in the circumstances of the case at hand. It is noteworthy that the

prescription under the extracted rule avails at the option of an interested party and, for that matter, it will be inadvisable to put the appeal in abeyance in wait for an option that may not be taken, in the first place. To that end, for the purpose of better meeting the ends of justice, we are constrained to invoke Rule 4(2) (b) of the Rules and strike out the appeal whilst we leave it open, to whoever is interested to restore the appeal for the purpose of substituting the legal representative of the deceased person as a party. Order accordingly.

DATED at **DAR ES SALAAM** this 3rd day of April, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL