

IN THE HIGH COURT OF TANZANIA

AT SONGEA

CRIMINAL APPEAL NO. 9 OF 2004

(ORIGINAL SONGEA D/COURT CRIMINAL

CASE NO. 442 OF 2003)

GEOFFREY MNENUKA ..... APPELLANT

VERSUS:

THE REPUBLIC ..... RESPONDENT

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J U D G M E N T:

KAGANDA, J.

The appellant Geoffrey Mnenuka was jointly and together charged with two others, Augustino Mhenge and Cosmas Rungu of cattle theft contrary to section 265 of the Penal Code Cap. 16 volume I as repealed by Act. No. 13 of 1984 section 63 of the Economic and Organized Crime. Section 265 of the Penal Code.

The trial Court Convicted the first and second accused, the third accused was acquitted for lack of sufficient evidence. The appellant has advanced five grounds of appeal and did not wish to appear before the appellate court.

In response the learned State Attorney declined to support the trial Courts decision. He submitted correctly that the charge had several irregularities, including wrong sections of the Law. That is section 265 of the Penal Code which the charge claimed to have been repealed by Act No. 13 of 1984 section 63 of the Economic and Organized Crime Control and 265 of the Penal Code. The learned State Attorney submitted that section 265 of the Penal Code has never been

repealed and the other mentioned Laws. What was done to that Law is an amendment which was replaced by Section 268, now creating the offence of cattle theft. That being the position of the Law, the appellant was supposed to have been charged of cattle theft contrary to Section 268(1) of the Penal Code as amended by Act No. 12 of 1987. He further submitted correctly that the irregularities did not injure the ends of justice because the appellant understood the charge through its contents and evidence. That was the position in the case of R.V. Kassim Taibale [1985] TLR. 186 and Ally Mpalila V.R. [1980] TLR. No. 170. The second irregularity was on procedural Law, on that the trial Magistrate failed to rule out whether the accused persons had a case to answer. Section 231(1) of the Criminal Procedure Act No. 9 of 1985 is clear on that procedure. That Law states:-

- (1) "At the close of the evidence in support of the charge, If it appears to the court that a case is made against the accused persons sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which under the provisions of section 312 -321 inclusive of this Act, he is liable to be convicted, the court shall again explain inclusive substance of the charge to the accused and inform him of his right.

- (a) to give evidence whether or not on oath or affirmation on his own behalf.
- (b) to call witness in his defence .  
and shall ask the accused/advocate if it is intended to exercise any of those rights and shall record the answer....."

The learned attorney argued that the failure to rule out on whether the accused had a case to answer or not could be tolerated as it is curable under section 388 of the same Law. That is because it did not occasion a failure to justice where as the omission instructed under Section 231 (2) which states that:-

"Notwithstanding that an accused elects to give evidence not on oath or affirmation, he shall be subject to cross-examination by the prosecution".

The requirement of the procedural Law makes it mandatory for the trial court to record the answers of the accused on whether he wished to call witness and make his defence on oath or not. The records in the trial courts proceedings does not show nor is there any indication that the procedure was followed. This court held in the case Adelin Kawishe V.R. (unreported) (at Songea High Court Cr.App.20/2001) that an error under section 231(2) of the Criminal Procedure Act is incurable under section 388 of the same Law as it occasioned a failure of justice. That position remain valid in the case at hand.

The basis for the conviction was the finding of some meat and a skin believed to be that of a sheep. The sheep claimed by Augustino Haule was identified by its colour without special marks. This court and the highest court of this land has held on several decisions that when the complainant claims title to property he/she has to make a proper description of it. In this case there was no such description at the time of reporting to the police nor were there any special mark or identity to prove that the skin was that of a sheep which belonged to the complainant. The meat was not proved to be the meat of a sheep, it could have been the meat of any animal. The identification of the exhibits alleged to have been found with the appellant was not sufficient evidence to hold a conviction. On that issue I totally agree with the learned State Attorney's submissions on that the identification of the skin and meat was too weak to hold a conviction.

On the issue of alibi, I do not agree with the learned State Attorney on that, the accused has a duty to prove the defence of alibi, I do not agree with the learned State Attorney on that, the accused has a duty to prove the defence of alibi. The Law requires that, the accused in the defence of alibi should adduce the fact and he/she is not required to prove it nor is the court required to believe. But, I do agree that at least he should have supporting evidence i.e. a ticket for the bus or oral evidence by a person who saw him at the place other than the place of crime.

I am now determined to find that the trial court was procedurally wrong on taking the defence case without following the proper procedures laid down under section 231 and 230 of the Criminal Procedure Act, No. 9 of 1985. Further more the

Identification of parts of the animal i.e. the skin and meat were not sufficient for the complainant to claim title. With that view I find that the conviction was not proper as there was no sufficient evidence to prove the charge. Appeal allowed, judgment and sentence entered by the trial court are hereby quashed and set aside accordingly. The (accused) appellant, should be set free forthwith unless otherwise lawfully held under custody. It is so ordered.

S.S. KAGANDA

JUDGE

25/2/2005

24/3/2005

Coram: S.S. Kaganda, J. .

Appellant: Opted not to be present. .

For Respondent: - Mr. Manyanda & Manjoti - State Attorney

C/C: - Mrs. Mwankenja.

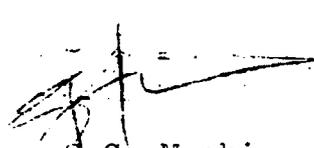
Court: Judgment read over and delivered this 21/3/2005  
in the presence of State Attorney.

S.S. Kaganda

JUDGE

21/3/2005.

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

  
Mrs. S.C. Moshi

DISTRICT REGISTRAR