IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO 66 OF 2010

(ORIGINAL CRIMINAL CASE NO 182 OF 2005 OF THE DISTRICT COURT OF KONDOA AT KONDOA)

SUMAHELE S/O MHINDI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

16/03/2011 & 20/04/2011

JUDGMENT

KWARIKO, J.

The appellant herein had been arraigned before the district court of Kondoa together with one HAMISI S/O JENGO the then second accused where they were charged in the first count with the offence of Cattle Theft contrary to section 268 and 265 of the Penal Code Cap 16 Vol. 1 of the Laws R.E. 2002. In the second count the

second accused was charged with the offence of Being in possession of a property suspected of having been stolen or unlawfully acquired contrary to section 312 (1) (a) of the Penal Code. It was alleged by the prosecution that the two had jointly and together on the 07th day of July, 2005 at about 11.00 hours at Chiori Songolo village within Kondoa district in Dodoma region stolen one head of cattle valued at Tshs 120,000/= the property of YONDU S/O KWALAH. The second accused was alleged to have been found in possession of the said cattle suspected to have been stolen or unlawfully acquired.

The two had denied the charge where at end of the trial the second accused was found not guilty and accordingly acquitted whereas the appellant was found guilty and sentenced to ten (10) years imprisonment.

The facts of the case as evidenced in the record show that one YONDO WALEHI (PW1) did on the material day take his flock of cattle to take water but later found a black and white in colour bull missing. He reported the matter to the village office where a search permit was issued to him. In the fifth day of the search PW1 got to Mapuni open market and there he found his missing cattle in

possession of the then second accused. The second accused said that the cow was sold to him by one person of barbaig ethnic group and promised to find him soon. Surely the second accused found and caused the appellant's arrest in the same day for the allegations. That the appellant said the cow was his own property and was sent to the police. The cow and its pictures were tendered in court as exhibits PI and P2 respectively.

In his defence the appellant denied the allegations and said that he was not in the open market on 12/ 07/2005 but at Enei village where he had a talk with someone when he was arrested. On his party the second accused's defence was similar to what PW1 had testified and especially how the cattle was found.

The appellant was aggrieved by the trial court's decision hence this appeal. In his petition of appeal the appellant raised four grounds of appeal where he essentially complained that the prosecution case was not proved beyond any reasonable doubts against him.

During the hearing of the appeal the appellant adopted his grounds of appeal and prayed his appeal to be allowed. Whereas

the respondent Republic was represented by Mr. Nchimbi learned State Attorney who supported the conviction and sentence in respect of the appellant.

However, for reasons that will be apparent soon this appeal will not be decided on its merits. I have gone through the trial court's record and found something neither party has raised; I found that the trial magistrate grossly erred in law after the prosecution case had been closed. The record shows that the prosecution closed its case on 30/11/2005 and the court reserved its ruling apparently in terms of sections 230 and 231 of the Criminal Procedure Act Cap 20 Vol. 1 of the Laws, R.E. 2002 (herein after the Act) to 07/12/2005, 16/12/2005 and 30/12/2005. When the case came before the court on 30/12/2005 the accused were called upon to give their respective defences and nobody talked about any pending ruling. At the end of each accused's defence evidence the court fixed a judgment date to be 15/02/2006 but indeed the same was delivered on 31/03/2006.

It is the opinion of this court that the cited provision of the law was not enacted for decorative purposes and our courts are obliged to follow it to the letter. Thus the trial court ought to have ruled out if

the accused had a case to answer as is given under the law in the following terms:

> ***"If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person 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 sections 300 to 309 of this Act, he is liable to be convicted the court shall dismiss the charge and acquit the accused person."***

The trial court therefore did not afford the accused their legal right to be informed if a case had been made out against them sufficiently to require them enter their respective defences. In law, before an accused enters his defence some prerequisite conditions need to be fulfilled by the trial court as mandatorily provided under section 231 (1) to (4) of the Act. Section 231 (1) of the Act provides thus:

> ***"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 person sufficiently to***

require him to make a defence with either in relation to the offence with which he is charged or in relation to any other offence of which, under the provision of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the 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; and

(b) to call witness in his defence,

and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."

The remaining subsections of section 231 of the Act explain what the court should do after the accused has exercised any of the given rights.

In the case at hand the trial court ordered the accused to enter their respective defences without explaining the rights given in clear and mandatory terms under the cited provisions of the law. No one knows what would have been the accused's options had the trial court explained the cited legal rights to them. The cited law is couched in the mandatory terms hence the court had no choice but to follow it. Failure by the trial court to explain the accused's rights as legally provided amounted to denial to a fair hearing. If the accused wished to call witnesses for their defence they could not exercise such right since the court sat on their rights and they would not have known the existence of such provision since they were laymen and unrepresented.

A right to a fair hearing is guaranteed in our Constitution (see Article 13 (6) (a)) and in this case this right was violated and it was a fatal irregularity which vitiated the proceedings. Thus, through this court's revisionary powers the proceedings of the trial court are declared a nullity and they are hereby quashed and all orders thereof are set aside.

I would not either order a retrial of the case firstly, because the prosecution evidence against the appellant leave a lot to be desired; However, I will not go through it and make my own conclusion since I have nullified the proceedings of the trial Court. Also the trial Court meted out an illegal sentence against the appellant without assigning any reasons and contrary to section 170 of the Act since the legally provided punishment for the offence of Cattle Theft is imprisonment of not less than five years (***see section 5 (b) of the Minimum Sentences Act, Cap. 90 vol. II of the Laws, R.E. 2002).*** Therefore, if the appellant had been legally sentenced to five years imprisonment he must have by now completed his sentence long ago.

For the foregone therefore it is ordered that the appellant be immediately set at liberty unless his continued incarceration is in connection to other lawful causes. Order accordingly.

(M.A.KWARIKO)

JUDGE

20/04/2011

Court : Right of Appeal fully explained.

(M.A.KWARIKO)

JUDGE

20/04/2011]

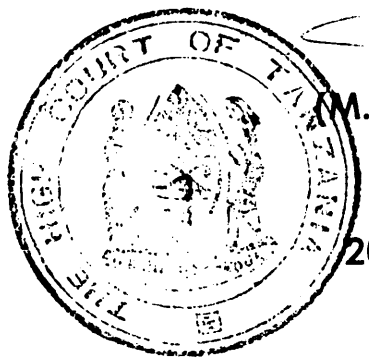
AT DODOMA

20/04/2011.

Appellant: Present

For Respondent: Ms. Magoma, State Attorney.

C/C: Ms. Komba.



(M.A.KWARIKO)

JUDGE

20/04/2011