

IN THE HIGH COURT OF TANZANIA

AT TANGA

CRIMINAL APPEAL NO. 18 OF 2013

*[Originating from Handeni District Court in
Criminal Case No. 27 of 2010 at Handeni]*

MOHAMED RAMADHANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

U. MSUYA, J.

The appellant, Mohamed Ramadhani along with two others were charged of the offence of stealing contrary section 258 and 265 of the Penal Code [Cap. 16 R. E. 2002]. It was alleged that on 28th day of December, 2009 at about 18.300 hours at Madebe village within Handeni District in Tanga Region, the appellant together with two others stole four cows valued at Tshs. 1,200,000/= the property of Madebe Society Drought Animals @ Animal Power. After the close of prosecution case, the appellant jumped bail, remained at large and the trial court convicted them in absentia. It

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further sentenced them to serve a sentence of five years imprisonment and ordered each of them to pay Tshs. 400,000/= to Animal Power as a compensation. The appellant was later traced rearrested and committed to prison to serve his sentence. Hence the present appeal.

It was the prosecution case that in 2007 through a project sponsored by PADEP, Madebe Society Drought Animal was given Tshs. 1,280,000/= to buy six cows. This piece of evidence was adduced by Mahija Bakari (PW1), a member of Madebe Society Drought Animal and Béatrice Lunga (PW6), PADEP coordinator from Handeni. PW1 testified further that six cows were purchased and Hussein Omari as a care taker was given a tender to feed them. It was PW1's testimony that among those six cows, two cows died of infectious disease. This piece of evidence was confirmed by Athuman Kilala (PW3), a veterinary and agricultural officer from Madebe Village. It is further on record that in December, 2009 the appellant together with Chabe Muya and Hadija Muya @ Mganga collaborated with Hussein Omary, a care taker of the purchased cows and sold the remained four cows. The incident was reported to Rajabu Chohoro (PW2), a Village Executive Officer. In his testimony, PW2 confirmed the incident and adduced further that, he interrogated the appellant with two others and they confessed to have sold the cows in question. It is also on record that Mohamed Juma (PW4) and Kassium Bakari (PW5) adduced that on 27/12/2010, a meeting of Madebe Society Drought members was held where

the appellant and his co-accused were interviewed and ordered to return the cows in question. It is also on record that the appellant and his two co-accused did not return the cows as ordered. They were therefore arrested and taken to Handeni Police Station. The appellant together with his co-accused persons were charged and arraigned in the District Court of Handeni at Handeni to answer the charge. After the close of prosecution case, the appellant and his co-accused jumped bail and remained at large. On the basis of prosecution evidence, the trial court found them guilty, convicted and sentenced them in absentia. They were later on apprehended and taken straight to jail for serving their sentences. Dissatisfied with both conviction and sentence, the appellant lodged this appeal.

In this appeal, the appellant complains that the trial magistrate erred in law for convicting and sentencing him in absentia and committing him to prison for serving his sentence without affording him the opportunity to be heard on why he was absent. Two, that the prosecution case was not proved against him to the standard required.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas Miss Athman Learned State Attorney represented the Republic/Respondent.

In his submissions, the appellant adopted the grounds of appeal and requested the court to allow his appeal.

In her reply, Miss Athman supported the appeal for the following reasons. One, that the appellant was convicted in absentia and in view of section 227 of the Criminal Procedure Act [Cap. 20 R. E. 2002] after the arrest of the appellant, he ought to have been taken to the trial court to show cause as to why he absconded. The Learned State Attorney argued that it was wrong to apprehend the appellant and straight away commit him to prison to start serving his sentence. In supporting her argument. The Learned State Attorney cited the case of ***Fweda Mwanajoma and Another V. R. Criminal Appeal No. 174 of 2008 CAT at Dodoma (unreported)***. Concluding the point, the Learned State Attorney argued that failure to comply with the requirement of section 227 of the Criminal Procedure Act (supra) deprived the appellant's right to be heard. In that regard, she urged the court to order that the matter be re-opened for the appellant to be given an opportunity to be heard.

Two, that the trial magistrate erred in law for relying on the confession which was admitted without following the Procedure. Explaining, the Learned State Attorney stated that in convicting the appellant, the trial magistrate relied on a confession alleged to have been, made to the Village Executive Officer. She contended that in terms of section 27 (2) of the Evidence Act [Cap. 6 R. E 2002], confession was improperly relied upon. In that regard, she urged the court to disregard it. Three, that there is nowhere in the proceedings where the appellant is implicated in committing the offence. The Learned State Attorney added that the proceedings refers Hussein

Omary to be responsible with the stolen/sold cows but he was not arrested.

Four, that the charge sheet before the trial court referred section 265 of the Penal Code Cap. 16 R. E. 2002 as a charging provision. Miss Athman stated that the cited section do not create the offence. She added that the relevant provision ought to have been section 268 of the Penal Code [Cap. 16 R. E. 2002] which relate to particulars of cattle theft. However, the Learned State Attorney quickly pointed out and I equally agree with her that since the particulars was read to the appellant and the evidence adduced is on cattle theft and since the appellant was not produced then such Omission is curable under section 388 of the Criminal Procedure Act [Cap 20 R. E. 2002].

In conclusion, the Learned State Attorney urged the court to quash conviction and set aside the sentence imposed against the appellant.

In this appeal, the only issue to be addressed is as to whether the appeal has merit or not. Basing on the evidence on record, the grounds of appeal and the submissions I am of the views that this appeal has merit. As correctly argued by Miss Athman, Learned State Attorney upon apprehension of a person convicted and sentenced in absentia, he should not be taken straight to prison to serve his sentence. But he must first be given an opportunity to show cause of his absence. This is it terms of section 227 of the Criminal

Procedure Act [Cap 20 R. E. 2002] and Article 13 (6) (a) of the constitution of the United Republic of Tanzania of 1977 (as amended time to time) which insist a fair trial. The principle of not taking straight a person convicted and sentenced in absentia to serve his sentence was insisted in a number of cases. These includes ***Olonyo Lemuna and Lekitoni Lemina V. R [1994] T. L. R 54 and Marwa mahende V. R. [1998] T. L. R. 249.*** In those case, the Court of Appeal insisted that when court convicts and sentences an accused person in absentia, the court should exercise the discretion under section 226 (2) of the Criminal Procedure Act (supra) in order to afford the accused person the opportunity to be heard, on why he was absent and on whether he had probable defence on the merit. In the present case, the appellant was convicted and sentenced in absentia and upon arrest, he was taken straight to serve his sentence. This was improper as it is against the cardinal principle of fair trial.

On basis above, I would have ordered the file to be remitted back to the trial magistrate to re-open the case, but I have noted that the case was not proved against the appellant beyond reasonable doubt. In the first place, the evidence on record indicates that after Madebe Society Drought Animals purchased the cows in question, Hussein Omary was given a tender of caring and feeding them. The cows in question were stolen from his hand. This was a material witness who was not called to testify at trial. It is a principle of law that failure to call a key witness has an impact of

drawing an adverse inference in favour of the person defending the case. Apart from criminal cases, this principle was insisted in a civil case of **Hemedi Saidi vs Mohamedi Mbilu [1984] T. L. R 113**. Where it was held:

"where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests".

In the present case, Hussein Omary was material witness who could have been called by the prosecution. Failure of the prosecution to call him has an impact of drawing an adverse inference in favour of the appellant.

Secondly, the evidence on record indicates that the appellant and his co-accused were arrested and taken to police station at Handeni. The police officer who investigated the matter from Handeni police station was not called at trial to adduce evidence. This was a shortfall in the prosecution case. The purpose of investigating the case was insisted in the **case of Robinso Mwanjisi and three Others V. R. [2003] 218** where the Court of Appeal held that the purpose of investigation is to collect facts and later to give evidence. In the present case there is nowhere in record where the investigator adduced evidence. I take cognance that section 143 of the Evidence Act [Cap 6 R.E 2002] directs that no number of

witnesses is required to prove the case. However, in the circumstances of this case, an investigator who was assigned to investigate the matter ought to have been called to testify. It was insisted in the case of **Azizi Abdallah V. R.[1991] T. L. R 71** that

"The general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution".

In the present case, an investigator was not called. In that regard and basing on the circumstance of the case at hand, the prosecution ought to have called him. Not calling an investigator weakened the prosecution case. Before I conclude, Rajabu Chohoro (PW2), Village Executive officer from Madebe village adduced that he interrogated the appellant together with his co-accused and they confessed to have sold the cows in question. Since the Village Executive Officer did not produce the appellant's statement, then his testimony ought to have not been relied upon by trial magistrate.

From the above analysis, I am satisfied that the conviction and sentence imposed against the appellant is not supported by evidence on record. I accordingly allow the appeal, quash the