

**IN THE HIGH COURT OF TANZANIA**

**AT SONGEA**

**DC CRIMINAL APPEAL NO. 09 OF 2016**

**(Originating from the decision of the District Court of Songea at  
Songea in Criminal Case No. 57 of 2015)**

**ISMAIL MILANZI @ SUMA.....APPELLANT**

**Versus**

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

**JUDGMENT**

Last Order: 11<sup>th</sup> April, 2016  
Date of Ruling: 18<sup>th</sup> April, 2016

**CHIKOYO, J.**

Basically the appellant at the Songea District Court was charged and convicted for an offence of cattle theft contrary to section 268 (1) of the Penal Code [Cap. 16 R.E. 2002], consequently he was sentenced to serve five (5) years in jail. Aggrieved by the said conviction and sentence, he has

preferred to appeal herein, hence this is his appeal, where he has raised five (5) grounds of appeal.

The appellant's grounds of appeal are to the effect that, **one;** the trial magistrate's judgment is null and void since he was not convicted as per section 235 of the Criminal Procedure Act [Cap. 20 R.E 2002]. **Two;** the trial court's judgment did not comply with the provision of section 312 (2) of the Criminal Procedure Act (supra) and **three;** the trial court erred in law by convicting him while the prosecution side failed to prove the alleged offence beyond reasonable doubts.

The facts leading to this appeal are as follows; on 11/04/2015 at 05:00 pm while JEREMIAH CHRISANDUS FUSSI (PW1) was attending '40 yanduguyake' was informed that, his cow has been stolen and the suspect has been arrested, as a result PW1 went to the Village Office and met the chairperson of the security committee one EDSON KILIPAMWAMBA (PW4) who showed PW1 the alleged stolen cow in which PW1 alleged to have identified his cow by its colours. On how the appellant was arrested is alleged to have been established by one CUSTOM FUSSI (PW3) that according to him, on 11/4/2015 around 09:00 am while he was going to his office met one MANENO HAULE (PW2) the neighbor of PW1 who had an

information about the alleged theft, who informed PW3 about the said incident, and they (PW2 and PW3) started to make a follow up until they saw a cow roped and later they saw the appellant coming to take the said cow that is when the appellant was arrested and PW4 was called and they went into Village Office with the appellant with the said cow. When the appellant was interrogated therein, he said that 'amemuokota-Mdwema', a place near Mtyangimbole. Then the matter was reported at the police, where the appellant was sent to the police station and later he was prosecuted at the trial court but the appellant strongly denied the said allegations however as stated above, at the end of the trial he was convicted and sentenced accordingly.

When this appeal was called for hearing, the appellant appeared in person and defended himself while Mr. Mwegole the learned State Attorney appeared for the respondent/Republic. The appellant in his submissions supporting his appeal argued that, the prosecution case was not proved beyond reasonable doubts, and he prayed this court to do justice on this appeal.

Mr. Mwegole did not support this appeal at all. Starting with the issue of non-compliance of section 235 and 312 (2) of the Criminal Procedure Act

(supra), Mr. Mwegole opposed it since the trial court complied with the above stated provisions of the law. On the issue as to whether the prosecution side proved their case beyond reasonable doubts, Mr. Mwegole insisted that the case against the appellant was proved beyond reasonable doubts since the evidence from the prosecution side reveals on how the appellant was arrested with the alleged stolen cow, and when he was asked as to where he got the said cow, he merely stated that 'aliokota' 15 miles from Mtyangimbole Village. In the event, Mr. Mwegole prayed this appeal to be dismissed.

In his rejoinder, the appellant insisted that he did not commit the alleged offence and even the person who was said to inform PW2 about the incident was not called as a witness; no police officer was called as a witness to testify; PW2 and PW3 alleged that, he was arrested at the auction place but no any person from the said auction was called as a witness. All in all, the appellant prayed his appeal to be allowed.

As to me, the issue here is whether this appeal has merit or not. Before I venture into the merit of the instant appeal, from the outset I agree with Mr. Mwegole that, the trial court full complied with **sections 235 and 312 (2) of the Criminal Procedure Act (supra)**, thus I find the appellant's

grounds one and two lack merit, and I proceed to dismiss them. Turning to the merit of this appeal, upon my perusal of the court records and submissions from both parties, from the outset it is trite law that, the burden of proving any criminal case is vested to the prosecution side to prove the case beyond reasonable doubts be it whether the adduced evidence by the accused person is weak or whatsoever. In the case of **Juma Hamis Kabibi Versus Republic, Criminal Appeal No. 216 of 2011 (CAT-MWZ) (Unreported)** at page 9 the Court of Appeal had this to cement;

*'Where the prosecution case itself is weak, it cannot salvage from the latters of the defence. It is quiet plain that, false statement made by an accused person if at all do not have substantive inculpatory effect and cannot be used as make-weight to support an otherwise weak prosecution case. **The fact that an accused person had not given a true account only becomes relevant, to tend assurance, in a situation where there are already is sufficient prosecution material.**'* [Emphasis is mine]

The trial magistrate before convicting the appellant at page 3 of his judgment had this to say;

*'...but the accused person was arrested with the stolen cow at the place it was rope dunropping it near the "Mnadani" areas **with no reasonable explanation as to how he came about it. This goes to prove beyond reasonable doubts that it is the accused who had stolen the cow...**'*[Emphasis is mine]

Since the appellant in the instant appeal as shown above is alleged to have found with the cow alleged to be the PW1's property and upon his failure to give out reasonable explanation as to how he came into possession of the alleged stolen item, but the law is settled on this account because the complainant is required not only to state general description over his/ her items but more importantly to state distinctive marks over his/her alleged items. **See; Haji Shabani Bukho Versus Republic, Criminal Appeal No. 279 of 2011 (CAT-AR) (Unreported)** where in the instant appeal PW1 stated that he managed to identify his cow through colours as it had black and white 'mabakamabaka'. The question is whether the alleged stolen cow was positively identified by PW1?

In my view, that question is answered negatively because even though PW1 tendered the cow as Exhibit P.1 in the trial court, but there is no nexus between the tendered cow and the cow alleged to have been found with the appellant since according to the testimony of PW1 at page 17 of the typed proceedings reveals that, upon the alleged arrest of the appellant with the alleged cow and when the police came there, it was then ordered that PW1 to remain with his cow. (This piece of evidence is also corroborated by PW4 in his examination in chief as per page 23 of the typed proceedings). For the sake of clarity, this is what PW1 had testified in examination in chief;

*'The police decided to photograph that cow and ordered it to be handled to me for safe custody as they could not stay with it until when the case will be heard.'* [Emphasis is mine]

Having in mind with the above extracted piece of evidence, but as correctly argued by the appellant that, at the trial court in the instant appeal, there was no police officer who was called to testify therein, and there was no tendered photographs taken therein. Had it been that the above mentioned police officer was called to testify, obviously among other things he/ she could have tendered the said taken photographs, and this court could have

in a good position to ascertain as to whether Exhibit P.1 as referred herein was the real the same in colours from the taken photographs. All in all in my view, failure of the prosecution to call the police officer as a witness at the trial court, obviously I find it appropriate to draw adverse inferences against the prosecution side.

Again, under the above stated circumstances I find that, PW1's allegations on how he managed to identify his alleged stolen cow was not sufficient since he merely based on the colours instead of giving more distinctive marks from other cows, otherwise I could have solemnly relied on PW1's assertion and came up with a different finding only if the prosecution side had proved that, in the entire area in which the alleged offence had occurred, it was only PW1 who had that cow with the alleged colours.

All in all, I find this appeal has merit hence allowed since at the trial court the prosecution side failed to prove the alleged offence beyond reasonable doubts. Consequently I hereby set aside and quash the conviction and sentence imposed by the Songea District Court in Criminal Case No. 57 of 2015 to ISMAIL MILANZI @ SUMA, the appellant and order the appellant be released from the custody unless held with another lawfully cause.



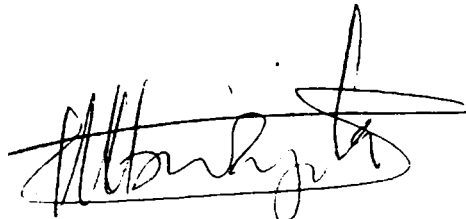
It is so ordered.

**S.M. CHIKOYO**

**JUDGE**

**18/04/2016**

Judgment delivered in chambers in the presence of the appellant in person,  
~~and~~ Ms. Juntwa Learned State Attorney for the respondent and Mr. Komba  
Court Clerk, this 18<sup>th</sup> day of April, 2016.

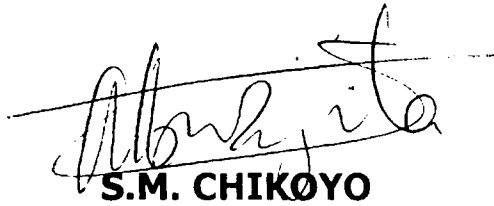
A handwritten signature in black ink, appearing to read 'S.M. Chikoyo', with a large, sweeping flourish extending from the end of the signature.

**S.M. CHIKOYO**

**JUDGE**

**18/04/ 2016**

**COURT:** Right of appeal explained. .



**S.M. CHIKOYO**

**JUDGE**

**18/04/ 2016**