

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[ARUSHA DISTRICT REGISTRY]
AT ARUSHA

PC CRIMINAL APPEAL NO. 23 OF 2019

*(C/f the District Court of Ngorongoro at Loliondo, Criminal Appeal No.1 of 2019,
Originating from Loliondo Primary Court Criminal Case No. 214 of 2018)*

- 1. RIMON ASKOFU 1st APPELLANT**
2. JAMES JOHN 2nd APPELLANT

VERSUS

SIMON PUSINDAWA RESPONDENT

JUDGMENT

Date of Last Order: 12/03/2020

Date of Judgment: 29/05/2020

Masara, J

Rimon Askofu and James John (the Appellants) were jointly charged and convicted at Loliondo Primary Court of the offence of Cattle Theft, Contrary to Sections 258 and 268 of the Penal Code, Cap 16 [R.E 2002]. They were sentenced to a term of five years imprisonment. Aggrieved of the said decision of the Trial Court, they appealed to the District Court of Ngorongoro sitting at Loliondo where their conviction and sentence was upheld. They have preferred this second appeal on six grounds that may be reduced into the following four grounds:

a) That, the Appellate District Court erred in law and fact in failing to consider the fact that the Appellants were not availed with the copy of judgment in time so the appeal reasons based on what they heard on the day of judgment;

- b) That, the Appellate District Court Magistrate erred in failing to note the inconsistencies of the testimonies of the witnesses especially SM2 and SM3 and the fact that the case against the Appellants' was not proved beyond doubts;*
- c) That the District Court erred in not taking note that the trial Magistrate did not seek the opinion of the Assessors before judgment; and*
- d) That, the District court magistrate erred in failing to consider the fact that the first appellant's confessional statement was not properly recorded by SM4 and tendered as exhibit.*

The Appellants, thus, pray that this Court quashes the judgments of both lower courts and set them at liberty. The appeal was heard *ex parte* as the Respondent did not enter appearance. The Appellants were unrepresented and fended for themselves. The issues for determination are whether the case against the Appellants was proved beyond doubts; whether the trial Magistrate involved the trial Assessors in reaching the decision and whether the confessional statement of the first Appellant was properly admitted and relied upon. I will start with the second issue which is the gist of the third ground of appeal, then I will deal with the third issue before tackling the first issue if need be.

(a) Were the Assessors involved in determination of the case against the Appellants?

The record shows that the trial of the case took only a day and judgment was pronounced on the same day, that is 3rd January 2019. The record further shows that the case was heard by Hon. Gasper Malisa who was assisted by two assessors identified as S. Robert and M. Yohana. There is no record of handwritten judgment or proceedings of the time of judgment, mitigation and sentence. The typed record, however, indicate

judgment, mitigation and sentence. The typed record, however, indicate that the two Assessors were present at the time the Appellants were convicted and eventually sentenced. They are also shown to have signed at the last page of the typed record. What is missing is the record whether the decision reached was unanimous or whether the Assessors were asked to say anything on the guilty or otherwise of the Appellants. Section 7 of the Magistrate Courts Act, Cap. 11 [R.E 2002] mandates decision of the primary Court to be made by a Court constituted by a Magistrate and not less than two assessors. Each member of a primary Court has an equal vote unless there is a tie whereby a magistrate is given a casting vote. Subsections 1 and 2 are provided hereunder for easy of reference:

"(1) In every proceeding in the primary court, including a finding, the court shall sit with not less than two assessors.

*2) All matters in the primary court including a finding in any issue, the question of adjourning the hearing, an application for bail, **a question of guilt or innocence of any accused person, the determination of sentence**, the assessment of any monetary award and all questions and issues whatsoever shall, in the event of difference between a magistrate and the assessors or any of them, **be decided by the votes of the majority of the magistrates and assessors present** and, in the event of an equality of votes the magistrate shall have the casting vote in addition to his deliberative vote.* (Emphasis added)

Furthermore, Rule 3 (1) and (2) of the Magistrate's Courts (Primary Courts) (Judgment of Court) Rules, 1987 GN No. 2 of 1988 provides as follows:

"(1) Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, the magistrate shall proceed to consult with the assessors present, with the view of reaching a decision of the court.

*(2) If all the members of the court **agree on one decision, the magistrate shall proceed to record the decision or judgment of the court** which shall be signed by all the members.*

*(3) For the avoidance of doubt **a magistrate shall not**, in lieu of or in addition to, the consultations referred to in sub-rule (1) of this Rule, be entitled to **sum up** to the other members of the court.”*
(emphasis supplied)

The Court of Appeal in the case of **Neli Manase Foya Vs. Damian Mlinga**, Civil Appeal No. 25 of 2002 (unreported) had the following to say:

"Assessors are members of the court, co – equal with the magistrate. After they have completed hearing the evidence from the parties, the stage is then set for the magistrate to consult with them in order to reach a decision of the court. This presupposes that before the court reaches a decision, there will be a conference of the members of the court to deliberate on the issues before them and reach a decision. In such a case, the magistrate will write down the decision, which will then be signed by all members of the court... The assessors are members of the court and sign the judgment as such, and not for the purpose of authenticating it or confirming it."

A trial Magistrate cannot therefore decide a case in the Primary Court without involving assessors. In the case at hand, despite the missing handwritten record, the typed record bear original signatures of the persons who served as assessors. What is missing is the signatures of assessors at the end of the judgment. The trial Magistrate should not have omitted the requirement of having the assessors sign the judgment if they were agreeable to it. That however should not vitiate the decision as it appears to be a mere omission. The complaint made by the Appellant is on summing up to assessors which does not apply in cases tried by Primary

Courts. As the assessors signed the record of the trial Court, that signifies that the decision to convict the accused persons was unanimous. This ground therefore fails.

(b) Was the Confessional Statement of the first Appellant properly admitted and relied upon?

The next issue that I am called to determine is on the confessional statement of the first Appellant. The Appellants claim that the confessional statement was not voluntarily made by the first Appellant and that it was not procedurally admitted and relied upon. It is trite law that for a confessional statement to be admitted as evidence, it has to be proved that it was voluntarily made. Section 27 of the Evidence Act, Cap.6 provides:

- "(1) A confession voluntarily made to a Police Officer by a person accused of an offence may be proved as **against that person**.*
- (2) The onus of proving that any confession made by an accused person was voluntarily made by him shall lie on the prosecution.*
- (3) A confession shall be held to be involuntarily if the court believes that it was not induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the police force or by any other person in authority."*

The law in relation to confessions is settled. In ***Hemed Abdallah Vs. R***, [1995] TLR 172, the Court of Appeal while affirming the erstwhile Court of Appeal for East Africa decision in ***Tuwamoi Vs. Uganda*** (1967) EA 84 held as follows:

"It is trite law that generally it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particular

or unless the court after full consideration of the circumstances is satisfied that the confession cannot but be true."

It is a mandatory requirement of the law that before a confessional statement is admitted as exhibit the magistrate should satisfy that such statement was freely given. As argued by the Appellants, the trial magistrate did not discharge that legal duty. Also, it is true from the record that the confession statement was not read to the Appellants after its admission as evidence. This is a serious irregularity. The Court of Appeal in various decisions has provided guidance on this aspect. In ***Nkolozi Sawa and Another Vs. Republic***, Criminal Appeal No.574 of 2016 (Unreported) the Court of Appeal stated:

"In our considered view, the essence of reading the respective exhibits is to enable the accused to understand what is contained therein in relation to the charge against them so as to be in a position of making an informed and rational defence. Thus, the failure to read out the documentary exhibits was irregular as it denied the appellants an opportunity of knowing and understanding the contents of the said exhibits."

The effect of not reading the documentary evidence to the appellants is that it is expunged from the court record. As I stated earlier, the confession statement (exhibit P5) was not read to the appellants. Even if it was to be read, the same should not have been taken as a confession to the offence that the Accused persons stood charged. The first accused statement was to the effect that he was given the cows by another person to help in taking them to the auction. It is also noted that SM4 who tendered the alleged confessional statement was not the author and no

explanation was provided why the author did not appear in Court. I accordingly expunge it from the record. The issue is thus answered in the negative. I now turn to the last issue.

⁴ (c) Was the case against the Accused Persons proved beyond doubts?

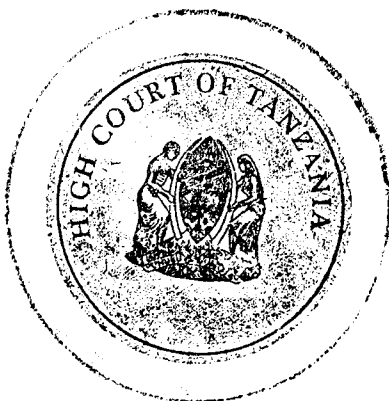
The case against the Appellants was to the effect that on 22nd November 2018, about 400 herds of cows belonging to the Respondent were taken for grazing at Sale Village. On the morning of 23rd November, 2018, when the respondent was inspecting the cows, he realized that four cows (1 bull and 3 heifers) were missing. He reported the loss to his colleagues. On the same day, at 05:00Hrs, SM2 the Mageri Village chairman while asleep, heard the dogs barking vigorously. He went outside his house and saw the two people herding the four cows heading to Wasso village. He suspected them; and thus, immediately called the Magaiduru Village chairman where they were headed to, alerting him of his suspicion and requiring him to make an inquiry on the appellants together with the cows. At 07:00hrs, SM2 made a follow up and on arrival, he found the appellants were already arrested by the Magaiduru Village chairman together with the cows in their possession. They took the appellants to the Olorien Village Executive Officer, and later the respondent arrived and identified the four cows to be the lost cows. SM3 admitted to have arrested the appellants with the stolen cows. He added that he knows the first appellant who had once sold a stolen cow to him and fled away. The four cows were admitted as exhibits P1, P2, P3 and P4 respectively.

Submitting on the grounds of appeal, the Appellants denied commission of the offence and were of the view that the case was made against them. They reiterated that the evidence of Stephen Kasino (SM2) was not reliable as he did not identify any of them. They thus, averred that the charge against them was fabricated. I have examined the record of the trial Court and that of the first appellate Court. I hesitate to say that the case against the Appellant was proved beyond doubts. While SM1 stated that after noting that his cows were missing, he sent information to many people describing the cows, SM2 stated that he is the one who called SM3 after suspecting that the cows that passed near his homestead were stolen. No special marks of the cows were described and SM1 did not tender the Cows. They were tendered by SM3 who cannot be said to know the said cows. SM3 appear to be conflicted as he stated that the first Appellant was a person known to him before and that he had previously sold to him a stolen cow. Was it a coincidence? Furthermore, there is no proof that the two appellants were known to each other. As they had denied being arrested together, it was necessary that evidence be led to prove them otherwise. Lastly, it appears that SM1 who was the complainant was not the one conducting the case against the Appellants. During sentencing, it appears that SM4 was the one present and did submit aggravating circumstances that may have prejudiced the Court. The fact that a person was accused of an offence cannot be cited as an aggravating factor unless there is proof of previous conviction. The fact that SM1 was not central to the prosecution of the case against the Appellant explains why he never entered appearance before the first appellate court and before this Court.

In the circumstances, I am persuaded by the arguments made by the Appellants that the case against them was nothing but a fabrication. It is therefore my holding that the case against the Appellants was not proved to the required standards in criminal proceedings.

For the foregoing reasons, it is the finding of this Court that the first Appellate Court was wrong in not finding that the trial against the Appellants was tainted by a number of procedural irregularities and that the evidence against them could not suffice to convict them. I therefore quash the conviction against both Appellants and set aside the sentence imposed upon them. The Appellants should be released from prison forthwith unless they are lawfully held for another lawful cause.

Order accordingly.




Y. B. Masara
JUDGE

29 May, 2020.