

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

CRIMINAL APPEAL NO 08 OF 2019

**(Arising from Criminal Case No. 270 of 2018 of the District Court of Kahama at
Kahama)**

PETRO S/O DAUD..... ..APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date of the last Order: 16/1/2020

Date of the Judgment: 24/2/2020

E.Y. MKWIZU, J.

The appellant PETER S/O DAUD, charged with DAUD s/o EDWARD, in the **District Court of Kahama with an offence of cattle stealing contrary to section 268** of the **Penal Code, Cap. 16 RE 2002**. It was alleged that on 30th April, 2017 at about 06.00 hours at Nyashimbi Village within Kahama District in Shinyanga Region, appellant did steal three heads of cattle valued at T.sh.1,350,00 the property of one ALBERT S/O BUNDALA.

After a conduct of the full trial, the appellant was convicted and sentenced to seven (7) years imprisonment while DAUD s/o EDWARD was acquitted. Dissatisfied with the conviction and sentence, appellant filed his notice of intention to appeal on 31st December, 2017 followed by a petition of appeal containing four grounds, namely:

1. That the trial Magistrate erred in law and fact in holding that the Prosecution side proved its case beyond reasonable doubts.
2. That the trial Court erred in law and fact by accepting unreliable evidence adduced by prosecution witnesses.
3. That the trial Magistrate erred in law by relying on a mere words adduced by prosecution witnesses
4. That the defence case was not considered

Before going to the grounds of appeal, it is necessary to give a factual background giving rise to the present appeal. On 30th April, 2017 at about 6.00 am, Albert Bundala, PW1, discovered that his three heads of cattle were missing from the cage. He awakens neighbours to help for the search of the missing cattle. On 1/5/2017, the information was disseminated to the neighboring village by the Commander of Vigilante Group of Nyashimbi. And on 2/5/2017 PW1 received a phone call from his street chairperson informing him that there are three heads of cattle compounded at Butegwa Village thus he should go to see if they belong to him. PW1 and

other people went to Butegwa. At Butegwa, they found the crowd of people, three cattle and two people who were tied with ropes indicating that they were thieves. PW1 identified the cow to be his. The accused and the three heads of cattle were taken to the police station at Kahama.

Lutema Nungula, PW2 re-counted that on 2/5/2017 at noon while at his homestead there came two young men with three heads of cattle asking for accommodation and food. They introduced themselves as coming from Malunga going to Nduku auction. On demand, appellant and his fellow showed PW2 cattle movement permit which was for five cattle while the appellant and his fellow had in their possession three heads of cattle. Doubting the permit, PW2 called the permit from the maker, Chairperson of Malunga hamlet for verification. The Chairperson of Malunga confirmed to have issued the alleged permit but doubted the root the permit holder took. It was in that particular point that PW2 was informed of cattle theft in Nyashimbi area. The Nyashimbi Commander was informed of the existence of three heard of cattle at Butegwa. On 3/5/2017 PW1 identified the cattle as his. On being interviewed, 1st accused said he was hired by the 2nd accused (Appellant in this court) to take the cattle to the auction and the appellant admitted to have stolen the cattle from Nyashimbi village.

Confirming what PW2 told the court, Aloyce Maganga, PW3 explained that on 2/5/2017 while at his homestead he was called by the Chief of the vigilante group where he was shown two men arrested in possession of three cattle .He said, they were arrested on suspicion arising from their cattle movement permit. The permit was issued on 28th April, 2017 and it indicated that appellants had five heads of cattle which were being taken to Nduku village. He questioned appellants who confessed that they stole those heads of cattle from Nyashimbi village.

PW4 is a police officer 2491 CPL Adam who testified on oath that on 3/5/2017 at about 10.00am they were instructed to go to Nyashimbi where there was suspects of cattle theft. At Nyashimbi, they found the suspect surrounded by a crowd of people and three heads of cattle suspected to have been stolen. They took the appellant and his fellow plus the three heads of cattle to Kahama police station

Chairperson of Korogwe street, one Edward Charles Mbelele also testified in Court. His story goes thus, on 27/4/2017 during morning hours he issued the 2nd accused (now appellant) with a permit as he was going to sell his five (5) cattle at Bulinge auction. It was PW4's evidence that appellant said, the

cattle was at his homestead. He tendered the permit as exhibit in court. That three days later, he was informed of the arrest of the appellant for cattle theft.

DW1's defence was to the effect that, on 1/5/2017 while in search for a job, he met 2nd accused who hired him to transport his five heads of cattle to Butegwa and later to Nduku village. On the next morning appellant handled him three cattle which he was to send them to Butegwa primary school where they would meet. At Butegwa he met the 2nd accused (now appellant) who took him to a local leader so that the following day they would go to Nduku village. The rest of his defence matched PW1's story.

When put to his defence, the appellant (Petro Daudi) denied the offence. He said ,they bought the cattle at Kagongwa auction and they were taking them to Nduku auction via Butegwa village. He is in consensus with the **DW1**, **PW1** and **PW3** on how they arrived at Butegwa village as well as what transpired there. He challenged the rest of the prosecution evidence.

At the hearing of the appeal, the appellant appeared in person unrepresented. The respondent was represented by Ms Immaculate Mapunda, State Attorney.

Appellant had nothing extensively to say on his grounds, understandably because he is a lay person. He just adopted his grounds of appeal and left everything to the court to decide. On her part, learned State Attorney opposed the appeal. She said, the prosecution proved the offence against the appellant beyond reasonable doubt. Supporting her stance, Ms. Mapunda submitted that, appellant was charged with an offence of cattle theft where by prosecution was to prove that there existed a thing capable of being stolen, and that, that thing belonged to another person other than the appellant and the prosecution was required to prove conversion and that the appellant did so with a fraudulent intent, clarified the State Attorney.

It was Ms Mapunda's further submission that prosecution's evidence tendered at the trial court managed to prove all the essential element of the offence with which the appellant was charged. She itemized pieces of evidence from the trial court's record that proved the case.

Starting with the evidence of confession before reliable witnesses, Ms. Mapunda contended that PW2 explained at page 19 of the record that he interviewed the appellant who confessed to have stolen the cattle from Nyashimbi village. PW3 also heard appellant confessing said the learned State Attorney. Justifying her submission she referred the court to page 27 of the

record where PW3 was recorded to have said he is among the people who interviewed the appellant after their arrest and that accused admitted to have stolen the cattle from Nyashimbi village. To support this line of argument, Ms Mapunda said admission made by the appellant before reliable witnesses is sufficient to support appellant's conviction. She cited the case of **Director of Public Prosecution Vs Nuru Muhamed Gulamrasul** (1998) TLR, 82.

Another ground for supporting appellant's conviction, said Ms Mapunda, is the evidence of the Doctrine of Recent Possession. In this she explained, PW1's cattle got stolen at Nyashimbi village on 1/5/2017 just to be found with the appellants at Butegwa village on 2/5/2017. Linking the PW1's evidence and that of PW2, the learned State Attorney said, while giving his evidence PW2 supported PW1's version that on asking the appellant where they got the said cattle, they admitted to have stolen them from Nyashimbi Village. PW3's version at page 27 support what was narrated by PW2 .

Underscoring on the guilt of the appellant, the learned State Attorney submitted that prosecution's evidence left nothing to cast doubt on the identification of the stolen property. Making reference to page 13 of the trial court's record, the learned State Attorney said, the stolen cattle were well

identified by the owner, PW1, who identified the cow at Butegwa village and gave its description in court. The evidence of PW3 also supported the evidence of PW1 to the effect that on seizing the cattle, they mixed them with other cattle to enable the owner to correctly identify his. On arrival said PW3, PW1 managed to pick his cow out of rest cow. This was so said at page 25 of the record, stressed the State Attorney.

In a serious note and in an effort to demonstrate the legality of the appellant's conviction, the learned State Attorney submitted that, the prosecution's evidence was so consistent from the evidence by PW1 to that of PW4 indicating that the prosecution witnesses were credible and that they were worth believing.

Finally, Ms Mapunda invited this court to find the appellant's conviction well founded. However, She was of the view that, the sentence given to the appellant is excessive. On this, argued the learned State Attorney, the offence that the appellant stand charged with, falls under section 5 (b) of the minimum sentence Act which provides a sentence of 5 years imprisonment. She prayed that should the court find merit on this ground, it should proceed to substitute the sentence from that of 7 years given by the trial court to that of 5 years. Submitting on the time appellant has been incarcerated, State

Attorney argued that, should the sentence be substituted, time spent by the appellant in jail should be taken into consideration.

In his rejoinder appellant had nothing to say. He left everything to the court to decide.

When the court was about to compose its Judgement, it came into its knowledge that the appellant was charged with cattle theft but the charge sheet that was read to the accused (now appellant) before the trial court cited section 268 of the penal code. On 23/1/2020 parties were invited to address the court on the position of the law on whether the charge against the appellant was proper or not.

Appellant was quick to answer that, being a lay person, he could not understand what the law required.

The learned State Attorney conceded right away that the charge sheet which was read over to the appellant is incurably defective and it prejudiced the appellant as he was not made aware of offence he was charged with. She cited the case of **Jackson Venant v Republic**, Criminal appeal No 118 of 2018 CAT citing at Bukoba. She urged the court to find the appeal before it incompetent, and proceed to strike it out. The proceedings of the trial court

and its judgement be nullified, conviction quashed and sentence set aside.

The appellant to be released from prison forthwith as the defect is not curable.

For clarity and before going to the details of the discourse, I find it appropriate to reproduce the contents of the charge sheet under discussion.

It reads: -

"CHARGE SHEET"

PARTICULARS OF ACCUSED PERSON CHARGED

NAME: DAUD S/O EDWARD

AGE: 24 YRS

TRIBE: MSUKUMA

RELG: CHRISTIAN

OCC: PEASANT

RESID: BALIGE-KAHAMA

TEL:0759 233 015

NAME: PETRO S/DAUDI

AGE: 40YRS

TRIBE: MSUKUMA

RELG: CHRISTIAN

OCC: PEASANT

RESID: MALUNGA AREA-KAHAMA

TEL:.....

STATEMENT OF OFFENCE: *Cattle theft c/s 268 of the Penal code Cap 16 (R:E 2002)*

PARTICULARS OF THE OFFENCE: *That DAUDI S/O EDWARD and PETRO S/O DAUD are jointly and together charged on 30th day of April, 2017 at about 06:00 hrs at Nyashimbi Village within Kahama district in Shinyanga Region did steal three heads of cattle valued at Tshs 1,350,00/= the property of one ALBERT S/O BUNDALA.*

Station.....KAHAMA

Date: 05/05/2017

.....

PUBLIC PROSECUTOR "

As correctly submitted by the State Attorney, Ms Mapunda, the charge sheet is defective. The issue before me now is whether the said defect prejudiced the appellant to the effect that there was no fair trial. In deciding this issue I will be guided by the contents of the provision of **section 268 of the Penal code Cap 16 (R:E 2002)** under which the appellant was charged, convicted and sentenced. The section reads:

Section 268

"(1) If the thing stolen is any of the animals to which this section applies/ the offender shall be liable to imprisonment for fifteen years.

(2) where any person kills any animal to which this section applies with intent to steal its skin or carcas or any part of its skin or carcas he shall for the purpose of section 265 and this section/ be deemed to have stolen the animal and shall be liable to be prosecuted against and punished accordingly.

(3) This section applies to a horse/ mare/ gelding ass mule/ camel, ostrich/ bull cow/ ox/ ram/ ewe/ whether got or pig. "

Undeniably, the section concerns stealing certain animals. However, it provides for categories of animal theft in each of its subsection. While sub section one provides for the punishment of fifteen years for a person found guilty of stealing any animal mentioned under subsection (3), sub section two makes reference to another category of theft involving the killing of any animal mentioned in sub section 3 with intent to steal its skin or carcas or any part of its skin or carcas and provides a different punishment altogether.

As it can be gleaned from the above, charging the appellant under section 268 generally was wrong .This is because, the appellant was not sure as to which offence under subsection one or two of section 268 the appellant was facing and so the punishment. The charge sheet, did not disclose with

certainty, the offence and the punishment against the appellant as required by section 132 of the CPA, which provides as follows: -

*"**Every charge** or information shall contain, and shall be sufficient if it contains, a statement of the **specific offence or offences with which the accused person is charged**, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." (Emphasis added.)*

As to what the statement should contain, s. 135 of the CPA gives the answer and it provides as follows:-

"135. The following provisions of this section shall apply to all charges and information and, notwithstanding any rule of law or practice/ a charge or an information sheet, subject to the provisions of this Act~ not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section:-

(a) (i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence

*(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, **if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence.** "*

[Emphasis supplied]

The court of appeal in the case of **Shabani Rahisi V Republic**, criminal appeal no 207 of 2015 when discussing the need to comply with the provision of section 132 of the CPA had this to say at pages 5 and 6 of the typed judgement.

*"It is now settled that a person accused of an offence must know the nature of the charge facing him as per a principle of a fair trial. The prosecution and the trial court are duty bound in making sure that the charge against the appellant is correct before the commencement of the hearing. To emphasize the duty of the prosecution to file a charge correctly, this Court in the case of **Mohamed Kaningo v. Republic**, [1980] TLR 279 observed as follows:-*

"It is the duty of the prosecution to file the charges correctly, those presiding over criminal trials should, at the commencement of the hearing, make it a habit of perusing the

charge as a matter of routine to satisfy themselves that the charge is laid correctly, and if it is not to require that it be amended accordingly". (Emphasis added.)"

In the case of **Jonas Ngolida V The Republic**, Criminal Appeal No. 351 of 2017 (CA- Unreported) the court of Appeal confronted with a defective charge sheet held that:

"We think, charge sheets must make correct reference to the provisions creating not only the offences, but also the punishment that is to follow should the accused person be convicted. In other words, the offence is not complete without attendant punishment.

In short, the charge sheet under scrutiny is defective for failure to cite the proper provisions of the law. It failed to give an accused person an opportunity to fully appreciate the nature of the allegations against him so as to have properly prepare and present his defence. That omission is a major one as it goes to the very existence of the charge itself. This was so said in the case of **Richard Maginga V The Republic**, Criminal appeal No 133 of 2016.

Again, uncertainty of the charge against the appellant brought another serious problem. Going by the record, the appellant was sentenced to a term of seven (7) years imprisonment. It was not stated as under which sub section of the provision of section 268 the appellant was sentenced. As stated earlier, the punishment for the offence premised under subsection (1) of section 268 of the Penal Code, is different from the one which could have been imposed under subsection (2). The generality of the charge brought about a general conviction which led to a general sentence which in my view, prejudiced the appellant. In the **Jackson Venant's case** (SUPRA) cited by the learned State Attorney, Court of appeal challenged with a similar issue had this to say at pages 7 and 8 of the decision;

*" ...we are of the considered opinion that the **appellant was prejudiced during the trial and in his defence and therefore there was no fair trial.** The defect in the charge was incurable in the circumstance of this case...*

*We need to emphasize that, in any Criminal trial, a charge is an important aspect of the trial as it gives an opportunity to the accused to understand in his own language the allegations which are sought to be made against him by the prosecution. It is thus important that **the law and the section of the law against which the offence is said to have been***

committed must be mentioned and stated clearly in a charge. *The charge therefore must tell the accused precisely and concisely as possible the offence and the matters in which he stands charged.”(emphasis is mine)*

The court proceeded to nullify the proceedings and judgement of the trial court, the conviction was quashed and sentence, set aside and the appellant was set free.

To this end, and guided by the above cited authorities, I am satisfied that the charge sheet that was laid against the appellant was incurably defective. The trial was therefore vitiated.

On the way forward, I have engaged my mind in view of the principles enunciated in the decision of the erstwhile Court of Appeal for Eastern Africa in the case of **Fatehali Manji v. R** (1966) EA 343, which directs that a re-trial should be ordered when the original trial is illegal or defective. I have also considered all the circumstances of the case and I do not think that it will be in the best interest of justice to take such a course. This is because appellant has been incarcerated for about three years now since May,2017. In the event, and for reasons stated above, I quash the proceedings and conviction of the trial court and set aside the sentence. I

also order that, the appellant PETRO S/O DAUD be released from prison forthwith unless otherwise lawfully detained.

It is so ordered.

DATED at SHINYANGA this 24th day of FEBRUARY, 2020.



E.Y. MKWIZU

JUDGE