THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO 38 OF 2020

(Originating from Nanyumbu District Court in Criminal Case No. 34 of 2019)

HASSAN ISMAIL ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Hearing date on: 30/5/2020
Judgment date on: 03/6/2020

NGWEMBE, J;

Hassan Ismail of 24 years old on 28th May, 2019 was found himself in jail for the period of fifteen (15) years for what is alleged animal stealing. Being aggrieved of that conviction and sentence, on 5th June, 2019 lodged his notice of appeal and on 26th march, 2020, managed to lodge five (5) grounds of appeal faulting the trial court's conviction and sentence meted against him.

As a matter of background, the journey to prison commenced on 12th November, 2018 when the appellant being at Nangaramo village within Nanyumbu District in Mtwara Region as a herd boy did steal one cow red in colour having a value of TZS 1,500,000= property of Amina Twalib

Mwichocho. Upon completion of investigation, the appellant was arraigned in court charged for stealing an animal contrary to section 268 (1) of Penal Code [Cap 16 R.E. 2002 now referred to as Cap 16 R.E. 2019]. During trial, the Republic lined up three (3) prosecution witnesses to prove the criminal accusations against the appellant. In turn the trial court found the prosecution proved case to the standard required, hence convicted and sentenced him to fifteen (15) years imprisonment.

Being so Aggrieved with that conviction and sentence, he is in this court clothed with five (5) grounds which for convenient purposes may be summarized into one ground to wit; *the prosecution failed to prove a case against the appellant beyond reasonable doubt.*

On the hearing date of this appeal, the appellant appeared in person, while the Republic/respondent was represented by Mr. Meshack Lyabonga learned State Attorney. As a matter of rights, the appellant was given the first right to argue his appeal, but he opted first to hear the position of the Republic, and reserved his right to respond to what the respondent has submitted. That being the wish of the appellant, this court found no harm on that procedure, hence granted him the prayer and the learned State Attorney exercised the first right to argue the appeal.

From the outset, Mr. Lyabonga supported the appeal, due to obvious reason that the owner was the one who sold it when the appellant was grazing. Such evidence was testified by an eye witness PW3 who was grazing those cows together with the appellant. Above all, PW1 did not say anything valuable on how the appellant stole the said cow? At the same

time PW2 did not testify anything admissible in court for what he said was mere hearsay evidences.

Following the evidence of PW3, an eye witness, who testified that the event occurred sometimes in October 2018 while the charge sheet specified that the event occurred on 12th November 2018. There is no evidence which supported the charge sheet. Therefore, failure to prove what is alleged in the charge sheet is fatal, he concluded.

In turn the appellant supported what the Learned State Attorney so far argued.

It has been repeatedly stated by this court and by the Court of Appeal that, the prosecution has uncompromised duty to prove criminality of the accused as stated in the charge sheet. Failure to do so is fatal irregularity. This position was also pronounced frantically in the case of **Salum Rashid Chitende Vs. R**, **Criminal Appeal No. 204 of 204** (unreported) where the court held:-

> *"we are of the considered opinion that the prosecution side is obliged to prove what actually has been stated in the charge sheet. Hence variance of name of the victim found in the charge sheet and what has featured in the evidence is a serious irregularity which is not curable under section 388 of the Criminal Procedure Act".*

The prosecution witnesses must prove what is stated in the charge sheet. In this appeal, the evidence of PW1 mentioned different date while PW3 as an eye witness mentioned different month. There was no witness who

supported the evidence of PW1. Thus, resulting into unproved accusations against the appellant. In the case of **Simon Abony Vs. R, Criminal Appeal No. 144 of 2005** (unreported) court held:-

> *"The importance of proving the offence as alleged in the charge hardly need to be over emphasized. From the charge, the accused is made aware of the case he is facing with regard to the time of the incidence and place so that he would be able to Marshall his defense"*

The evidence adduced in court must directly link with the offence charged. In respect to this appeal, the prosecution witnesses adduced evidences which proved contrary to what is alleged in the charge sheet. Section 3 (2) (a) and 110 of the Evidence Act, confer uncompromised statutory duty to the prosecution to prove criminal accusations against the accused person beyond reasonable doubt. In the contrary, the whole evidences adduced by PW1 and PW3 did not prove anything in the charge sheet.

I am sure the magistrate had he directed his mind on the requirement of evidences that should prove the accusations in the charge sheet, obvious he would have arrived into a different conclusion. In totality, the charge sheet was not proved, thus the offence charged against the appellant was not established and proved according to the standard required, that is, beyond reasonable doubt.

Moreover, I think I need to discuss a bit more on the sentence of fifteen (15) years imprisonment meted by the trial court. The trial magistrate at page 4 of the judgement, had this to say:-

> *"Having heard the plea from the prosecution, this court is sentencing the offender to serve jail term of fifteen (15) years"*

It is clear that the trial magistrate directed his mind that the punishment provided for in 268 (1) of the Penal Code is under minimum sentence Act, thus proceeded to pronounce what is termed minimum sentence of fifteen years' imprisonment. For ease of reference the section is quoted hereunder:-

> *"If the thing stolen is any of the animals to which this section applies the offender shall be liable to imprisonment for fifteen years"*

An immediate question is whether such drafting of the section meant maximum or minimum sentence, why the trial magistrate sentenced the appellant to fifteen (15) years imprisonment? According to statutory drafting, when the section, contain the phrase ***"shall be liable to"*** is qualified by other words, they should not be read in isolation; such phrase must be construed in the light of the qualifying words. The phrase like ***"shall be liable to"*** in the section is qualified by the words, ***"Imprisonment for fifteen (15) years".*** Clearly, therefore, the phrase ***"shall be liable to"*** ought not to be read in isolation, it must be read together with the qualifying words of that paragraph. In the contrary, for instance section 197 of the Penal Code, read that:-

"A person convicted of murder shall be sentenced to death" while section 198 of the same Code read; ***"Any person who commits manslaughter is liable to imprisonment for life"*** Thus, the phrase '***shall be liable to'*** must be read together with the following qualifying words.

This position likewise was clearly discussed by Judge Fauz in the case of **Fahadi Joshua Akikabi Vs. R, Criminal Appeal No 89 of 2017**, (Unreported) held:-

> *"the word shall be liable to" without more, gives discretion to the court to impose a sentence which it deems appropriate according to the circumstances of the case"*

It is now becoming a common trend to trial courts to pronounce maximum sentences as if that is the minimum sentence in a pretax that their hands are tied up, while in reality no one tied them. It is now becoming a common phrase in many judgements of trial courts to read "*my hands are tied up, since the law provide only one sentence, then I cannot do otherwise than to comply with what the law says"*Thereafter, they proceed to pronounce maximum sentence. In this appeal the trial magistrate said "*having heard the plea from the prosecution, this court is sentencing the offender to serve jail term of fifteen (15) years"* Trial courts are urged to ask more questions on sentencing the accused. The basic elements of penology is to pass punishment according to demand to change the behavious of the convict and send good signors to whoever intended to engage in such criminality. Obvious not every punishment is intended to change the unwanted behavious of the convict in the society, others go

contrary to the governing principles of criminology and penology. Like in this appeal, sentencing a young boy estimated of twenty-four (24) years old to fifteen (15) years' imprisonment in an offence, which is not proved to the required standard is unwarranted in a civilized society.

Magistrates should always read section 170 (1) (a) of the CPA before pronouncing their sentences. Section 170 (1) is a guiding yard stick of all subordinate courts, before they pronounce appropriate sentence. The section is quoted hereunder for easy of reference:-

> *"A subordinate court may, in the cases in which such sentences are authorized by law, pass any of the following sentences:-*
>
> *(a) Imprisonment for a term not exceeding five years; save that where a court convict a person of an offence specified in any of schedules to the minimum sentences Act which has jurisdiction to hear, it shall have jurisdiction to pass the minimum sentence of imprisonment"*

I think this section does not require any assistance of intellectual legal drafters' interpretation, but it means exactly what it says. The right punishment to the offence of stealing animals, when proved beyond reasonable doubt is any period up to five (5) years for subordinate courts and maximum of fifteen (15) years by an appropriate court seized with jurisdiction to pass such maximum sentence.

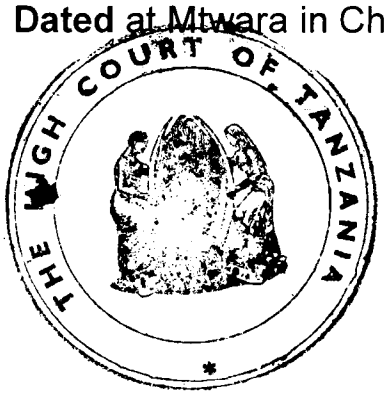
I would therefore, conclude that maximum sentence is reserved to hard core criminals whose lenient sentences do not help them to change. Even if the appellant would properly be convicted, yet the sentence meted by the trial court was irregular. It is on record that the appellant was the first

offender who deserved lenient punishment. In totality, the trial magistrate wrongly misinterpreted the section and arrived into a wrong sentence contrary to the applicable law.

Having so said and for the reasons so stated, this appeal is meritorious same is allowed, consequently, I proceed to quashed the conviction and set aside the sentence meted by the trial court and proceed to order an immediate release from custody unless otherwise lawfully held.

I Order accordingly.

Dated at Mtwara in Chamber on this 3rd day of June, 2020



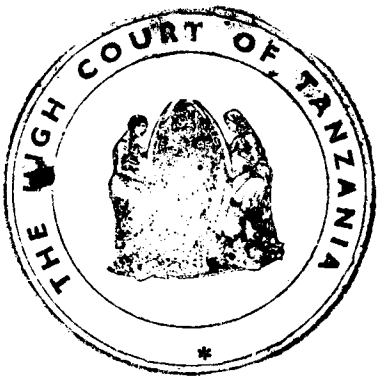
P.J. NGWEMBE

JUDGE

03/6/2020

Court: Delivered at Mtwara in Chambers on this 3rd day of June, 2020 in the presence of the Appellant and Mr. Paul Kimweri, Senior State Attorney for the Respondent.

Right to appeal to the Court of Appeal explained.



P.J. NGWEMBE

JUDGE

03/6/2020