

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

**AT SHINYANGA**

**CRIMINAL APPEAL NO.24 OF 2020**

*(Originating from Criminal Case No. 43 of 2018 of the Kahama District Court)*

**SHIJA S/O DAUD..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

*Date of the last Order: 25<sup>th</sup> June, 2020*

*Date of the Judgment: 14<sup>th</sup> August, 2020*

**MKWIZU, J.:**

This is an appeal arising from Criminal Case No. 43 of 2018, of Maswa District Court, whereby the Appellant was charged with an offence of Cattle theft contrary to section 268 (1) of the Penal Code [Cap 16, RE 2002]. Brief facts are that, on 03.03.2018 at 22.00 hours at Mwabomba village, appellant stole two heads of cattle valued at Tsh. 500,000/= the property of Simon s/o Samson. Appellant plead guilty to the charge and all facts presented before the court in relation to the commission of the said offence. Trial Magistrate proceeded to convict the appellant on his plea of

guilty under section 228 (1) of the Criminal Procedure Act and sentenced him to 15 years jail term. Aggrieved, appellant lodged his petition of appeal to this court with four grounds which boil down into three issues that ***the plea was equivocal plea of guilty since it was obtained through coercion/ duress. Appellant was excessively sentenced to 15 years and that the proceedings is tainted with irregularities.***

The appeal was heard in the absence of the appellant who had agreed to have his appeal so proceed. By the order of the court, Ms. Immaculate Mapunda learned State Attorney for the respondent/ Republic filed a written submission in support of the appeal.

In supporting the appeal Ms. Mapunda submitted that, the plea of guilty was absolutely equivocal as the appellant said "*ni kweli nilichukua ng'ombe wa bibi yangu nikaenda kuwauza lakini sikuwauza*". She said the plea of guilty to be properly procured, must qualify the four conditions stated in the case of **Buhimila Mapembe V. Republic** [1988] TLR 174.

Addressing the first condition, Ms. Mapunda contended that, appellant neither admitted nor denied every element of the charge. She argued that the appellant admitted to have taken his grandmother's heads of cattle but she did not succeed to sell them. For that matter she believe the appellant did not understood the charge read to him.

On the second condition, Ms Mapunda said, the words "***it is true***" used by the appellant did not amount to a plea of guilty as the appellant qualified them. Ms. Mapunda was of the view that, the appellant never admitted to the charge, she cited the case of **Adan V. Republic** (1973) EALR P. 445 C.A in which the court stated that,

*"if the accused does not agree the facts or raises any question of his guilty his reply must be recorded and the change of plea entered."*

She contended that, the facts given by the prosecutor at the trial court did not disclose essential elements of the offence. The plea was improperly procured, insisted Ms. Mapunda.

Ms. Mapunda supported the appellant's complaint that the sentence of fifteen years imposed by the trial magistrate was excessive. She said, the sentence was given contrary to **section 5 (b) of the minimum sentence Act Cap 90 R:E 2002** as provided that,

*"where any person who is convicted of stealing cattle, the court shall sentence him to imprisonment for term less than 5 years"*

On the last issue, the appellant challenged the charge sheet for being defective. On this, Ms. Mapunda said, the appellant was charged for cattle theft contrary to section 268 (1) of the Penal Code Cap 16 R:E 2002 which does not establish an offence. She implored the court to find the defect as fatal. She cited the case of **Jackson Venant V. Republic** Criminal Appeal No. 118 of 2018 CA sitting in Bukoba at page 8 that:

*"a charge is an important aspect of the trial as it gives an opportunity to the accused to understand in his own language the allegation 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"*

Ms. Mapunda prayed the court to nullify all the proceedings, and judgment by the trial court and quash the conviction and set aside the sentence imposed.

Having gone through the proceedings the grounds of appeal and the submissions of the learned State Attorney for the respondent/ Republic, I find it safe to start with the last ground of appeal. In this ground, the charge sheet is attacked for citing a wrong provision of the law. It is on the record that appellant was charged for cattle theft under **section 268 (1) of the Penal code Cap 16 (R.E 2002)**. 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."*

Undeniably, the above is a definition section. It creates no offence whatsoever. As correctly submitted by the learned State Attorney, 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 says:-

*"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:-*

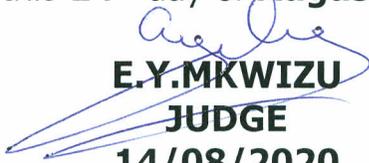
***"It is the duty of the prosecution to file the charges correctly, those presiding over criminal trials should, at the commencement of the hearing, make it a habit of perusing the charge as a matter of routine to satisfy themselves that the charge is laid correctly, and if it is not to require that it be amended accordingly". (Emphasis added.)"***

In short, the charge sheet under scrutiny is defective for failure to cite the proper provisions of the law creating the offence. This being the case, I find merit in this appeal. Having found merit on this ground, determining the remaining grounds would be a futile exercise.

In the event, and for reasons stated above, trial proceedings and conviction are quashed and the sentence is set aside. I also order that, the appellant **SHIJA DAUD** be released from prison forthwith unless otherwise lawfully detained.

It is so ordered.

**DATED** at **Shinyanga** this **14<sup>th</sup>** day of **August**, 2020.

  
**E.Y.MKWIZU**  
**JUDGE**  
**14/08/2020**

**COURT:** Right of appeal explained.



  
**E.Y.MKWIZU**  
**JUDGE**  
**14/08/2020**