

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

AT SHINYANGA

CRIMINAL APPEAL NO. 78 OF 2018

**(Arising from Criminal Case No.26 of 2018 of the District Court of Meatu
at Meatu)**

TAMBI OMARI.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date of the last Order: 16th January, 2020

Date of the Judgment: 23rd January, 2020

E.Y. MKWIZU, J.

The Appellant TAMBI OMARI was arraigned before the District Court of Meatu, tried and found guilty of the offence of cattle theft. The Statement of the Offence showed this to be contrary to Section 258 and 268 of the Penal Code Cap 16 [R.E. 2002].

The appellant denied the offence, instigating the prosecution to call five witnesses to substantiate the offence. Appellant called three witnesses for defence and gave also his evidence on oath.

The facts of the case are that, on 4th day of March 2018 appellant approached PW3 KIJA MALEMBEKA who was taking care of the cows

belonging to PW2, Selemani Katuga. He told PW3 to hide cows in the bush as Maasai people would kill him if they find him there. While hiding, appellant ordered him to disappear or else he would kill him. PW3 then ran to PW4 who was doing cotton activities just 250 meters from where PW3 was grazing, informed him of the incident and that appellant has stolen the cow. On being informed about the incident, PW4 relayed the information to his father via phone and traced the appellant just to find him at about 600 meters from where he was. Appellant on seeing PW4, he took to his heels leaving behind the cow. PW4 took the cow back home. Appellant was later on apprehended and charged with the offence of cattle theft.

On his defence, appellant refuted the allegation. He relied on the defence of alibi. He alleged that on the material time and date he was at Pili Pululu on arrangement of cultivating his farmstead. His defence was supported by the evidence of DW2, DW3 and DW4. After a full trial, the trial court found the appellant guilty of the offence, convicted him and sentenced him to 10 years imprisonment. Dissatisfied with the conviction and sentence, appellant has come to this court with 7 grounds of appeal.

At the hearing of the appeal, appellant appeared in person, unrepresented, whereas the respondent/Republic, was represented by Ms Immaculate Mapunda, learned State Attorney. Appellant opted to hear the submission by the State Attorney first on the grounds of appeal while reserving his right to reply.

On the outset, the learned State Attorney informed the court that she is partly supporting the appeal on the main ground that the evidence on record do not support the offence of cattle theft under sections 258 and 268 of the Penal code in which the appellant was convicted, but the cognate offence of attempt to commit an offence under sections 381 of the penal code. She requested that, the appeal be allowed to that extent and the offence and conviction be substituted to that extent and appellant be appropriately sentenced according to the law. On being asked as to the time the appellant has being incarcerated. The state attorney was quick to reply that, the appellant's new sentence should be ordered to run from 10th July,2018 when he was earlier on sentenced by the trial court.

In rejoinder, appellant thanked the State Attorney for her submission.

A close look of the records, it is clear that the appellant was charged with the offence of cattle theft c/s 258 and 268 of the penal code. A further scrutiny of the prosecution's evidence reveals, as correctly submitted by the learned State Attorney that the prosecution evidence proved an attempt to steal and not cattle theft as found by the trial magistrate. It is from this ground that the learned State Attorney is inviting this court to find the appellant guilty of a lesser offence of attempt to commit an offence under sections 381 of the penal code.

Section 300 of the **Criminal Procedure Act**, Cap 20 RE 2002 (CPA) provides that an accused person may be convicted of a minor offence although not charged with. The section stipulates:

"300 - (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it..

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

That is the position of the law. Case law has construed this provision of the law. In the case of **Robert Ndecho and Another VR**, (1951) 18 EACA 171 at page 174, the then East African Court of Appeal said: -

*"In order to make the position abundantly clear were-state again that ... where an accused is charged with an offence, he may be convicted of minor offence, although not charged with it, **if that minor offence is of a cognate character, that is to say of the same genus and species.**" [Emphasis supplied.]*

The above authority is to the effect that for an accused person to be convicted of a lesser or minor offence, the offence should be on the face of it minor and cognate in character to the greater offence to which the accused person was initially charged with.

As stated earlier on, the appellant was charged, convicted and sentenced of the offence of cattle theft C/s 258 and 268 of the penal code .Prosecution evidence laid before the District court established that,

appellant had threatened PW3 one Kija Malembeka and made an attempt to move with one cow. PW4 managed to rescue it before it was stolen by the appellant. Appellant was then apprehended and charged of the offence of cattle theft.

In her submission, the State Attorney said, the prosecution's evidence on record proved the offence of an attempt to commit an offence and not offence of cattle theft. She suggested that, the appellant should be found guilty under section 381 of the penal code and conviction that was entered by the trial court plus the sentence thereto be substituted to that of an attempt to commit an offence.

Section 381 of the penal Code Cap 16 R.E.2002 goes thus: -

"Any person who attempts to commit all offence is guilty of an offence for which, unless a different punishment is provided, he is liable to imprisonment for two years or a fine or both."

In the case of **Ali Mohamed Hassan Mpanda V R**, [1963) EA at page 296, the Court of Appeal for East Africa said for an accused person to be convicted of a minor offence, the charged major offence must narrate the facts that constitute the minor offence. And that the greater offence must

be related to the minor offence and must be of the same category. See also the case of **Christina Mbunda vs Republic** (1983) TLR 340.

I agree with the position taken by the State Attorney. Going by the record of this case, the prosecution managed to prove all essential elements of cattle stealing except the aspect of as portation which an important aspect of theft. The appellant, though, did not commit the full offence of cattle stealing in the sense that there was no as portation, he acted awful and did all the preparatory acts that proves his guilty towards commission of the offence he stand charged with. Had the trial court engaged into a proper evaluation of evidence, the appellant would have been convicted of an attempt to commit theft attracting a jail term of two years and not that of 10 years as the trial court did.

To be safe before I substitute the conviction from that of cattle theft to one of attempted theft and in making sure that appellant is not taken by surprise, I had to engage in considering whether the appellant, through the facts and evidence laid in the main charge of cattle theft is aware of the offence I am about to convict of. In this I am satisfied that **one**, the offence of attempt to commit theft is encompassed in the main offence of cattle theft the appellant stand charged with. **Second**, that the later

offence is minor offence to the one that the appellant was charged and tried with. **Third**, the facts and evidence presented by the prosecution in the major charge of cattle theft that the appellant was charged with, has given the appellant notice of the circumstances constituting the offence of attempted theft of which the appellant is to be convicted.

On the way forward, section **366 of the Criminal procedure Act**, gives an answer. It says:

***366.**-(1) At the hearing of the appeal, the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the public prosecutor, if he appears, may then address the court and thereafter, the court may invite the appellant or his advocate to reply upon any matters of law or of fact raised by the public prosecutor in his address and the court may then, if it considers there is no sufficient ground for interfering, dismiss the appeal or may-*

*a) in an appeal from **a conviction-** reverse the finding and sentence and acquit the accused or discharge him under section 38 of the Penal Code or order him to be re-tried by a court of competent jurisdiction or direct the subordinate court to hold*

committal proceedings;

(ii) alter the finding, maintaining the sentence or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without such reduction or increase of sentence and with or without altering the finding, alter the nature of the sentence

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

(c) in an appeal from any other order, alter or reverse such order and, in any such case, may make any amendment or any consequential or incidental order that may appear just and proper.

(Emphasis added)

Guided by the above provision, I quash the appellant's conviction for the offence of cattle theft and substituted thereof a conviction for the offence of attempted to commit an offence contrary to s 381 of the Penal Code,

The offence for which the appellant has now been convicted attracts a sentence of two years imprisonment, with fine or both. I would therefore set aside the sentence of ten (10) years which was imposed for the full offence of cattle stealing. I do hereby sentence the appellant to a sentence of two years imprisonment which is to run from the date of the trial judgment.

This appeal partly succeeds and partly fails in the manner indicated above.

It is so ordered.

DATED at SHINYANGA this 23rd day of JANUARY, 2020.

