

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

HIGH COURT CRIMINAL APPEAL NO. 12 OF 2021

(Arising from the District Court of Bukombe in Criminal Case No. 68 of 2019)

TINDIHO MAREKANA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

28th April & 18th May, 2021

RUMANYIKA, J.:

With respect to charges of Receiving and Retaining stolen property (2nd count) Contrary to Section 311 of the Penal Code Cap 16 R.E. 2019 (the code), Tindiho Malekana's appeal is against conviction, sentence of one (1) year conditional discharge and an order of compensation of shs. 7.0 million. The later herein shall be referred to as the appellant. Unless the context otherwise required, Richard Burudege (according to records the 1st accused) who stood charged for stealing by agent Contrary to Section 272(b) of the Code (1st count) he was not a party to the appeal.

The 3 grounds essentially revolved around 2 points:-

- (1) That with regard to 2nd count the evidence was improperly evaluated.

(2) That the order of compensation had no legal basis.

Messrs L. Mushongi and L. Meli, learned counsel and state attorney appeared for the appellant and respondent Republic. By way of audio teleconferencing I heard them through mobile numbers 0764463958 and 0759894810 respectively.

Mr. Mushongi learned counsel submitted; **(1)** that erroneously though the trial court convicted him only basing on evidence by co-accused and the appellant's weak defence case **(2)** that the order of compensation of shs. 7.0 million it was not founded because value of the alleged stolen herds of cattle it was not even established much as the charge sheet showed it was only of shs. 300,000/= **(3)** that actually the appellant had no knowledge that the herds of cattle were stolen and upon admitting Exhibits PE1 and PE2 and contrary to laid down principle the exhibits were not read aloud in court therefore both were liable to be expunged.

Ms. L. Meli learned state attorney submitted; **(1)** that actually the prosecution case was beyond reasonable doubts proved much as the appellant did to dispute it (case of **Damian Luhele V.R;** Criminal Appeal No. 501 of 2007 (CA) unreported much as, and indeed weak defence case was no good basis for conviction **(2)** the appellant admitted as having had

knowledge and he was ready to surrender the herds of cattle to the complainant. The principle the best witness is an accused who confesses his guilty to the charges because his confession carried the prosecution case further (case of **Mohamed Huruna and Another V.R;** Civil Appeal 259 of 2007 (CA) unreported **(3)** that the 1st accused's **bonafide** claim of right it was but afterthought **(4)** that the order of shs. 7.0 million was justified as per reasons at page 11 of the typed proceedings. That the accused's defence of **bonafide** claim of right may have had been ignored yes, but this one being the 1st appeal, the court may wish to do the needful. That Exhibits PE1 and PE2 may have not been read in court, therefore on that basis liable to be expunged yes, but sufficed the remaining evidence. That is all.

The evidence on record reads thus;

Pw1 DR. Peter Kamu of Kahama stated that he owned a number of herds of cattle at the time being grazed by the first accused. That on 01/10/2018 at about 10.00 am but away at work – Kahama, through mobile phone his son one Paul Kamu informed him about the incident. Only on arrival to learn that the appellant had sold 10 (ten) of the herds of

cattle to the 2nd accused. That before policemen at Runzewe the appellant confessed the charges but the herds of cattle were not recovered.

Pw2 Paulo Kamu son of Pw1 he stated as material as Pw1 did.

Pw3 D.5580 DC Evalius stated that following the incident he interrogated, and, accordingly he recorded the respective appellant's cautioned statement (Exhibit PE2).

Pw4 E.4032 Sgt. Kelvin stated that following the incident he interrogated the confessing 1st accused's cautioned statement (Exhibit PE1). That is all.

Dw1 (the first accused) stated that indeed the 10 herds of cattle belonged to Pw1 his boss but he sold them to the appellant because he owed Pw1 some wages.

Dw2 (the appellant) stated that he purchased the herds of cattle from the 1st accused but he sold the same away at Businzo market. That is it.

As between them the issue is whether having knowledge the appellant had received and retained the stolen herds of cattle.

The most material, relevant and implicating part of the repudiated appellant's cautioned statement (Exhibit PE1) reads thus:-

".....niliuziwa ng'ombe kumi (10) majike wenye alama ya "KK" kwenye paja la mguu wa kulia kwa thamani ya shs. 3,000,000/= milioni tatu na ilikuwa tarehe 01/10/2018 na ng'ombe hao aliniuzia mbele ya mwenyekiti wa kitongoji cha BugalamaNa nilikuwa nafahamu kwamba wale ng'ombe ni mali ya Richard s/o Burudege".

From the quotation above therefore, at least the appellant disclosed all except name of the alleged local chair who witnessed the sale, as said by him, the sale agreement may have been executed in writing but he produced no copy leave alone where exactly the sale was done. In a cow shade, in bushes or at the market, at what time at midday or during night In the absence of all this, not only he risked it all, but also the appellant had knowledge that either the herds of cattle were stolen or were unlawfully obtained. Without more words therefore, the charges were beyond reasonable doubts proved.

Now that according to the charge sheet value of the herds of cattle was shs. 7.0 million, by ordering shs.7,000,000/= compensation the learned trial resident magistrate was justified the issue of reasons therefor it should not have been raised much unlike in civil proceedings that one

wasn't specific damages that needed to be specifically proved. Both the sentence and order(s) were proper.

The devoid of merits appeal is dismissed. It is so ordered.

Right of appeal explained.


S. M. RUMANYIKA

JUDGE

08/05/2021

The judgment delivered under my hand and seal of the court in chambers this 18/05/2021 in the absence of the parties.




S. M. RUMANYIKA

JUDGE

18/05/2021