

IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
HC: CRIMINAL APPEAL NO. 29 OF 2021

*(Arising from the decision of the District Court of Magu in Criminal
Case No. 180 of 2019 by Hon. E. J. Kimaro, RM dated 1st April, 2020)*

SHIJA S/O GEORGE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of last Order: 16.06.2021

Date of Judgment: 21.06.2021

A.Z. MGEYEKWA, J

The appellant Shija S/O George was arraigned at the District Court of Magu. He was charged for Cattle Theft contrary to sections 258 and 268 of the Penal Code Cap.16 [R.E 2019]. It was alleged that Shija S/O George was charged on 9th September, 2019 at about 14:00 hours at Misungwi

village within Magu District in Mwanza Region did steal four herds of cattle specifically goats each valued Tshs. 50,000/, a total value of Tshs. 200,000/= the property of Deus S/O Kalemani.

The factual background behind the conviction of the appellant run as follows: On the night of 9th September, 2019 at 14:00 hrs at Misungwi village, the complainant one Steven S/O Deus (PW1) was grazing goats and the accused person approached him claiming that their goats have destructed his crops, therefore, he took some goats with him. The stolen goats were black and white in colour.

PW1 reported the matter to the Police Officer and her fellow villagers. PW1 with the assistance of her fellow villagers kept on looking for the stolen cattle and on 20th June, 2016, she received information that three cattle were found at, Mikumi area within Misungwi. The ones who found the stolen cattle in possession of the appellant were PW1, PW2, PW3, and PW4 and the stolen were tendered and admitted in court as exhibit P1. PW5 was an arresting Police Officer who confirmed that the appellant was brought to the Police station in possession of four goats.

After the trial, the trial court was satisfied that the prosecution had proved the charge against the appellant to the required standard and proceeded to convict and sentence the appellant to serve five years imprisonment.

The appellant now seeks to impugn the decision of Magu District Court upon a Petition of Appeal comprised of six grounds of appeal as follows:-

1. *That, the Honourable trial Magistrate erred in law by unfairly consider the evidence of the prosecution side whilst ignoring to accord any weight to the evidence of the appellant.*
2. *That, the trial court's judgment is not a result of an objective appreciation and analysis of issues and testimonies of all witnesses, which ultimately prejudiced the rights of the appellant.*
3. *That, the trial court erroneously sentenced the appellant in a case containing numerous contradictions in the evidence of the prosecution side.*
4. *That, the evidence of the prosecution side does not support the offence of cattle theft.*
5. *That, the trial court's judgment is grossly and incurably defective for a total lack of conviction.*
6. *That, the Hon. trial Magistrate erred in law and fact by failing to discern the fact that the matter stemmed from the appellant's*

bonafide claim of right when PW1's goats trespassed on the appellant's farm which act was titled by the prosecution to look like the offence of cattle theft.

When the matter was called for hearing on 16th June, 2021 the appellant appeared in person, unrepresented while the respondent was represented by Ms. Sabina Choghoghwe, learned State Attorney.

The appellant had not much to say, he adopted his grounds of appeal and chose for the learned State Attorney to reply to his grounds of appeal but reserved his right to rejoin if the need would arise.

Ms. Sabina began her submission by expressing her stance at the very outset that she supported the verdicts of the trial court. The learned State Attorney argued one ground after another.

The learned State Attorney started his onslaught by attacking the first ground, Ms. Sabina admitted that the trial Magistrate in his judgment did not analyse the defence case which was contrary to the requirement stated under section 312 (1) of the Civil Procedure Act, Cap.20 [R.E 2019] which requires the trial Magistrate to state reasons for his decision based on the appellant's testimony. The learned State Attorney urged this court to step into the shoes of the trial court and evaluate the defence case.

Arguing in respect of the complaint touching on the analyses of the case, Ms. Sabina argued that the trial Magistrate evaluated and analysed all witnesses' testimonies. She added that the trial Magistrate raised one issue whether the prosecution side proved his case beyond reasonable doubt.

Ms. Sabina was very brief in her submission on ground number three. She argued that, in the records, all prosecution witnesses testified to the effect that the appellant stole four goats, the property of PW3. Insisting, she argued that the record revealed that the appellant stole the said goats and there was no any contradiction raised from the prosecution side.

As to the fourth ground, that the evidence on record does not support the offence of cattle theft. Ms. Sabina contended that the evidence on trial court proceedings shows that PW1 testified to the effect that four goats were stolen as stated in the charge sheet. She added that PW3 and PW4 also testified that four goats were stolen. To bolster her submission she referred this court to pages 9, 11, 18, and 23 of the trial court proceedings. She stressed that the appellant was caught in possession of four stolen goats therefore the offence of cattle theft was proved. She urged this court to disregard this ground of appeal.

With respect to the fifth ground, Ms. Sabina stated it is true that the trial court Magistrate the word conviction is missing. He argued that the trial Magistrate found the appellant guilty and proceeded to sentence him. However, it was her view the lack of the word conviction can be cured. To support her submission she referred this court to the case of **Mabula Makoye & Amos Shaban v Republic**, Criminal Appeal No. 227 of 2017 specifically on pages 10 -12 of the Court of Appeal judgment. She added that the Court of Appeal found that the said omission can be cured under section 388 of the Criminal Procedure Act Cap.20 [R.E 2019]. The learned State Attorney went on to state that there was no any miscarriage of justice.

On the last ground, that the appellant claimed that the issue that the appellant's watermelon was destroyed was not considered by the trial court. Ms. Sabina argued that this is an afterthought since the appellant did not mention in his defence that his watermelon farm was destructed neither did he inform the Village Executive Officer. She argued that PW2 testified that at the scene of the crime there was no any nearby watermelon farm.

On the strength of the above submission, Ms. Sabina urged this court to dismiss the appeal and find that the prosecution proved its case to the standard required by the law.

In his rejoinder, the appellant had nothing new to rejoin. Insisting, he urged this court to consider his ground of appeal.

After listening carefully to the submissions by the appellants' Advocate and the prosecution, I have come to the conclusion that the issue for determination is *whether the prosecution managed to prove the case beyond reasonable doubts*.

In my determination, I will consolidate the second and third grounds together because they are interrelated. Equally related are the fourth and sixth grounds which I shall also determine together. Except for the first and fifth which will be argued separately.

Submitting on the fifth ground, the appellant complained that the trial court judgment is grossly and incurably defective for a total lack of conviction. I have perused the court record and noted that the trial magistrate did not enter a conviction. The position of the law as well stated in these authorities is that section 312 imposes a mandatory requirement that the trial court must enter a conviction. The Court of Appeal of Tanzania in the case of **In January Alhaji and Patrick Sarpis Msuya v Republic**, Criminal Appeal No. 77 of 2016, held that section 388 of the Criminal Procedure Act, Cap.20 cannot be invoked to cure the defect in section 235 as its words are couched in

mandatory terms. However, as rightly stated by Ms. Sabina that the Court of Appeal of Tanzania overruled the holding in the case of **Alhaji** (supra). In the case of **Amitabachan Machaga @ Gorong'ondo v Republic**, Criminal Appeal No. 271 of 2017 (unreported), the Court of Appeal of Tanzania was confronted with a similar situation where an akin argument was brought to the fore; that there was no conviction entered before sentencing. The Court of Appeal of Tanzania did not remit the record to the High Court for it to enter the conviction. Instead, both parties urged the court to proceed with the hearing and determination of the appeal to its logical conclusion and the Court of Appeal of Tanzania agreed.

For the main reason that not always such omission to enter a conviction will necessarily lead to an order of remission of the record to the trial court especially, in the case, where the justice of the case demands otherwise. In other cases, it has been considered prudent to treat the omission as a mere slip and the Court has deemed the conviction to have been entered thus it ignored the omission and proceed with the determination of the appeal on merit.

Equally, in the case of **Mabula Makoye & Amos Shaban v Republic**, Criminal Appeal No. 227 of 2017. The Court of Appeal of Tanzania, with approval, referred to the cases of **Musa Mohamed v Republic**, Criminal

Appeal No. 216 of 2005 (unreported) and **Ally Rajabu & 4 Others v. Republic**, Criminal Appeal No. 43 of 2012 (unreported). The Court of Appeal of Tanzania observed that the first appellate court took a proper path to entertain the appeal, despite the omission by the trial court to enter a conviction before sentencing the appellants.

The court went on to observe that proceedings to entertain the appeal did not prejudice anybody, not even the law. In the premises, The Court of Appeal of Tanzania in **Mabula Makoye** (supra) holds that the appeal is competent. Guided by the decision of the Court of Appeal of Tanzania, I find that the omission did not prejudice the appellant therefore, I proceed to determine the appeal based on other grounds of appeal, the appellant's complaint on this arm is therefore without merit.

On the second and the third grounds, these grounds are centre on analyses of the issue in relation to the evidence on record and alleged contradiction of prosecution witnesses' evidence. Record reveals that the framed issue was whether the prosecution side has proved the case beyond reasonable doubt. The trial court analysed the prosecution's evidence and in the end, he was satisfied that the prosecution has proved his case to the hilt.

I have perused the court record to find out whether the prosecution witnesses' testimonies were contradictory or not. PW1 testified to the effect that the appellant approached him and claimed that his goats have destroyed his crops, therefore he took two doe goats and two buck goats. PW1 narrated the whole story to PW2. PW2 informed the court that he was also grazing cattle, PW1 told him that his goats by an unknown person. They made a follow-up and saw the appellant with four goats after seeing them he started to run away. They called the owner Deus Kalemani and Lameck Elias.

Deus Kalemani (PW3) testified to the effect that he was his biological son Steven Deus (PW1) called him around 14:00 hrs telling him that they have caught a thief who stole his four goats. PW3 headed to the scene of the crime and saw many people including the appellant. The appellant claimed that the goats have destroyed his watermelon farm. Lameck Elias (PW4) had a similar story as PW3. A Police Officer (PW5) testified to the effect that on 9th September, 2019, he was informed that the appellant was arrested in possession of four goats.

All witnesses had almost a similar story, there is no any contradiction to effect the prosecution case. PW3, the owner tendered the goats for identification purposes and the appellant did not object. Therefore, there is

no doubt that the prosecution witnesses proved the case without any doubt. These grounds are demerit.

As to the fourth and sixth grounds, the appellant lamented that the prosecution evidence does not support the offence of cattle theft. And the goats trespassed the appellant's crops. The record shows that the appellant was caught red-handed in possession of the alleged four stolen goats. The charge sheet reflects the same that four goats were stolen and the same were brought in court for identification and the goats were received and marked as exhibit P1.

I am in accord with Ms. Sabina that the appellant has raised a new issue that was not raised during his defence at the trial court. The records are silent that the appellant informed the court, the goats trespassed his watermelon farm. The appellant in his defence denied the charge and claimed that he was brought to the Police station and before the court without knowing the cause of his arrest. In the case of **Juma v Manager PBZ Ltd & others** [2004] I EA 62 Court of Appeal Tanzania at Zanzibar, held that:-

"...the first appellate Judge, therefore, erred in deliberating and deciding upon an issue which was not pleaded in the first place".

Guided by the above authority, it is obvious that the appellate court cannot determine a new issue that is introduced by the appellant at this juncture. Therefore, these grounds of appeal are disregarded.

Addressing the first ground, that the trial court considered the evidence of the prosecution whilst ignored the weight to the evidence of the appellant. A glance at the trial court's judgment reveals that the appellant's defence, advanced in his defence testimony, was duly considered by the trial magistrate. I am in accord with the State Attorney that the trial court did not analyse the defence evidence in his judgment. Thus, the appellant (original accused) was deprived of having his defence properly considered by the trial Magistrate. In the case of **Yusuph Amani v Republic**, Criminal Appeal No. 255 of 2015 the Court of Appeal of Tanzania held that:-

“ It is the position of the law generally failure or rather improper evaluation of the evidence leads to wrong conclusions resulting in miscarriage of justice. In that regard, failure to consider defence evidence is fatal and usually vitiates the conviction.”

In the instant case, the learned Magistrate summarized the evidence of both prosecution and defence case. However, in evaluating the same he did not at all touch on the defence case. The Court of Appeal of Tanzania quoted

with approval the decision in the case of **Leonard Mwanashoka v Republic**, Criminal Appeal No. 226 of 2014 (unreported) where it was stated that:-

“ It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider the evidence and then disregard it after proper scrutiny or evaluation, and another thing not to consider the evidence at all in the evaluation and analysis.”

I am alive of the law that being the first appellate court, I am allowed to re-evaluate, re-analyze, consider the defence case and treat the evidence as a fresh and reach into just conclusion. As it was stated in the case of **Armand Gueh v Republic**, Criminal Appeal No. 242 of 2010, the Court of Appeal of Tanzania (unreported). The trial Magistrate erred in law for not considering the defence evidence on record and reach a fair decision. It is for the foregoing reasons, I find that for the trial Magistrate to rely on the prosecution's evidence alone was a serious misdirection that rendered the conviction entered unsafe and untenable.

In that regard, in accordance with section 312 of the Criminal Procedure Act, Cap. 20 [R.E 2021] I proceed to analyse the defence as follows:-

The accused person (DW1) dissociated himself with the accusations levelled against him. In his defence at the trial, he had a different version of the story. He claimed that on the material date he was coming from his farm and was encountered by unknown people, they arrested him was brought to the Police station then to the court. He claimed that he knew the offence charged with while at the court. He lamented that the investigator did not visit the locus in quo.

The accused did not deny that he was arrested on 9th September, 2021, however, he dissociated with the crime of theft. However, reading the court records, the prosecution witnesses testified to the effect that on 9th September, 2019 the accused was caught in possession of four goats that means the accused was telling lies. Claiming that the prosecution did not visit *locus in quo* is baseless because in his defence he did not complain that the goats destructed his crops, therefore, there was no need for the investigator to visit the *locus in quo* as long as he was caught in possession of the alleged stolen goats.

All things considered, I am satisfied that the entire defence evidence did not manage to introduce any reasonable doubt going to affect the cogency of prosecution evidence. To the contrary as demonstrated herein earlier, the

prosecution managed to prove their case to the hilt. In the light of the foregoing discussion.

Having found and held above that all the grounds of appeal are without merit, it follows that the case was proved to the required standard; beyond reasonable doubt. The above said and done, I find the entire appeal without any scintilla of merit and dismiss it entirely.

Order accordingly.

DATED at Mwanza this 21st June, 2021.




A.Z.MGEYEKWA

JUDGE

21.06.2021

Judgment delivered on 21st June, 2021 via audio teleconference whereas the appellant and Ms. Sabina, learned State Attorney were remotely present.


A.Z.MGEYEKWA

JUDGE

21.06.2021

Right to appeal fully explained.