IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 268 OF 2019

(Appeal from the judgment and orders of the District Court of Bagamoyo at Bagamoyo in criminal Case No. 89 of 2018 before Hon. H.A. Makumbe, **RM** dated 04/07/2019.)

ALI MURADI DILSHAD..... APPELLANT

VERSUS

THE DPP ..... RESPONDENT

JUDGMENT

21st June, 2021 & 16th July, 2021.

E. E. KAKOLAKI J

Before this court the appellant is protesting his innocence after being convicted of the offence of **Unlawful Killing of Animals**; Contrary to Section 325 of the Penal Code [Cap. 16 R.E 2002] and sentenced to five (5) years imprisonment in default of payment of Tanzanian Shillings Ten Million (Tshs. 10,000,000/=). The appellant was so convicted and sentenced by the District Court of Bagamoyo in criminal Case No. 89 of 2018, in its judgment handed down on 04/07/2019. In assailing that decision the appellant is equipped with nine grounds of appeal going thus:

1. That the learned District Magistrate erred in law and fact in holding that the accused persons wilfully and unlawfully killed 171 heards of cattle valued at Tanzanian Shillings Two Hundred and Ninety Five Million One Hundred and Twenty Thousand (Tshs. 295,120,000/=) belonging to one Mashauri Athuman Saloni contrary to the evidence adduced.
2. That the learned District Magistrate erred in law and fact in not finding that there was no proof of cause of death of the cows without a post mortem being done.
3. That the learned District Magistrate erred in law and fact in not finding that the samples collected had possibility of being tempered with due to the handling and storage and contradictions in the evidence.
4. That the learned District Magistrate erred in law and fact in holding that the rain water in the quarry pit had Nitrate chemical due to blasting activities without proof thereof.
5. That the learned District Magistrate erred in law and fact in not holding that the harmful chemical is Nitrites and not Nitrate which was not found in the samples examined.
6. That the learned District Magistrate erred in law and fact in not finding that the levels of chemical known as Nitrates are not harmful levels and do not contain Poison which is dangerous for animals and human beings.
7. That the learned District Magistrate erred in law and fact in holding that the water contained chemical known as Nitrates which caused the death of the cattle without proof of the levels of the chemical substances found.

8. That the learned District Magistrate erred in law and fact in holding that the value of the cows is at Tanzanian Shillings Two Hundred and Ninety Five Million One Hundred and Twenty Thousand (Tshs. 295,120,000/=) without any proof.
9. That all in all the learned District Magistrate erred in law and fact in convicting the Appellant without the requisite proof required and by disregarding the submissions made and the authorities thereof.

With that bundle of grounds of appeal the appellant prays this court to allow the appeal by quashing the conviction and set aside the sentence and fine or orders imposed on him and substitute it with an order for refund of the fine paid by him.

Briefly before the trial court it was prosecution's case that the appellant who was charged jointly with another person one **Mmanga Sud Khamis**, on the 21/03/2017 at Pongwe Village – Musungula area within Bagamoyo District in Coast Region, wilfully and unlawfully killed one hundred seventy one (171) herds of cattle all valued at Two Hundred and Ninety Five Million One Hundred and Twenty Thousand (Tshs. 295,120,000/=) the property of Mashauri s/o Athumani Saloni. It was contended the said 171 herds of cattle died after drinking poisoned water from the manmade pond water reserve created out of quarry mine activities conducted and owned by the appellant. On being called to answer to the charge, both accused persons denied the accusation against them the result of which forced the prosecution to parade seven witnesses to prove its case while the accused persons calling three witnesses including themselves to protest their innocence.

During the trial, the court was informed by the prosecution witnesses PW1, cattle owner and the herder PW4 that, on the fateful day the herds of livestock were heading home from grazing when they diverted to the quarry pond and drank water before they were seen emitting foam like liquid from their mouths and dying. PW3 the District livestock and fisheries officer collected samples from the internal organs such as intestine, heart, liver, lungs, some water from the alleged pond and grasses from the sounding areas that were sent to the Government Chemist Laboratory for examination. A report from the Government Chemist Laboratory which was tendered by senior Government chemist PW4 was tendered and admitted as exhibit P1 showed the said grasses and water contained "nitrates" chemical while the ruminal contents collected from the alleged cattle carcasses had no any known poison. On the defence side the accusations levelled against both accused persons were squarely denied. It was DW1's testimony that as owner of Ashraf Company producing quarry they were not owning any dam at their site and were in compliance of all safety conditions including placing warning sign boards in all entrance areas with Swahili massage saying *"tafadhali chukua tahadhali yako binafsi pamoja na ulichonacho kwani unaingia katika eneo hatari la pilikapilika za quarry"*. DW2 being technician of the quarry company apart from corroborating DW1's denial of the company's owning the dam explained that during excavation small ponds are created wherein rain water can be reserved. That they were in use of the alleged contaminated water for the past five years without being affected. He denied any liability on the alleged killed cattle reasoning that the quarry area apart from being distant for about 4 to 8 kilometres from pastoral land depending on the side, the area is not reserved for grazing

cattle. At the end of the day the court did not believe the defence's story and found the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellant while acquitting his fellow. On the sentence the appellant was condemned to fine of ten (10) million or serve imprisonment term of five (5) years. The appellant escaped the custodial sentence by paying the said fine. And being aggrieved here he is manifesting his dissatisfaction of the conviction and sentence imposed to him through the nine grounds of appeal as alluded hereinto above.

On the date of hearing the appellant was represented by Mr.Salim Mkonje assisted by Ms. Saada Malota both learned advocates while the respondent had the services of Janipher Massue learned Senior State Attorney. Both parties were heard viva voce. On taking the floor Mr. Mkonje informed the court that he was set to argue all the grounds of appeal in seriatim. Canvassing the first ground he argued the ingredients of the offence with which the appellant was facing was not established and proved by the prosecution. He contended while the ingredients are wilfulness and unlawfulness on the killing of the animal capable of being stolen, the prosecution did not prove the mens rea element as evil mind of the appellant was not established. He said apart from asserting that the said cattle entered the quarry mining site owned by the appellant no evidence was read to prove were invited into the area by the appellant. That aside he argued the cattle's cause of death was not established as no post-mortem examination was ever conducted and evidence led in court to that effect leave alone the Government Chemist Laboratory report (exhibit P.1) which proved to the contrary when concluded that the ruminal contents collected from the said cattle had no any known poison. To fortify his submission he referred to the

Court the case of **Jonas Nkize Vs. Republic,** (1992) TLR 214 on the onus of proof in criminal cases which lies to the prosecution, submitting that in this case the prosecution failed to discharge its duty. He therefore urged the court to find the ground has merit and proceed to allow the appeal.

In her response to the said ground Ms. Massue for the respondent supported the appeal and conceded to Mr. Mkonje's submission that, it is true the prosecution failed to prove the case beyond reasonable doubt as the law dictates. Justifying her position she said the ingredients of the offence as stated by Mr. Mkonje were not proved beyond reasonable doubt. She reasoned that, PW4 in his evidence stated the said cattle escaped from his control and drank water from the pond thus the element of willingness of the appellant in commission of the offence was not proved. On the report of the Government Chemist Laboratory exhibit P1 she submitted the same was incompetent and lacked legal value since after its admission was not read over as required by the law as it was held in the **Robison Mwanjisi and 3 Others Vs. R** (2003) TLR 2018. In the absence of the report there was nothing to establish the water had any poisonous content leave alone the cattle's internal organs that were established to contain no any known poison. In summing though not raised in the grounds of appeal as officer of the Court Ms. Massue reminded the court to inquire and make findings on the sentence imposed to the appellant which according to her is illegal and in violation of the law. She reasoned, the appellant was charged under section 325 of the Penal Code, [Cap. 16 R.E 2019] the provision which does not provide punishment in which the resort is to the provision of section 35 of the Penal Code, where the sentence does not exceed two (2) years. She was therefore of the submission that entering the sentence of 5 years the

trial court was in error. On the basis of those submission she invited the court to interfere also with the sentence meted to the appellant for being illegal.

I have dispassionately considered the arguments raised by both counsels as well as perusing the entire record including the impugned judgment. From the onset I endorse both counsels' arguments on this ground. I so do as in convicting the appellant the trial magistrate answered positively the issue as to whether the said cattle were killed or not. He only misapprehended the fact on the second issue as to whether it is the accused/appellant who killed the said animals when relied on the evidence of PW5 the investigator to convict the appellant by making a finding that, the appellant being the managing director and responsible for all safety measures in the said quarry mining site ought to have taken all necessary precautions and safety measures at the mining site therefore, he was criminally negligence for allowing poisonous water to settle in his place, hence a conclusion the cows were unlawfully killed by the appellant. To let his word be loudly heard I reproduce part of her findings at page 7 of the judgment:

> *"...It is the finding of this court therefore that there were criminal negligence by the 1st accused by allowing the poisonous water to settle within his quarry and without taking any cautious measures. Therefore the said cows were unlawfully killed by none than the 1st accused person."*

From the excerpt of the judgment cited above it is not difficult to me to find the trial magistrate did not concentrate her mind in establishing the

ingredients of the offence as provided under section 325 of the Penal Code. The said provision reads:

> *325. Any person who wilfully and unlawfully kills, maims or wounds any animal capable of being stolen is guilty of an offence.*

The provision establishes three ingredients of the offence. **One**, wilfulness that refers to intent or *mens rea* of the person committing the offence. **Second**, unlawfulness of the act or *actus reus* done by the accused person. And **third**, the affected property or thing to be capable of being stolen. Coming to the case at hand it is the general rule in criminal prosecution that onus of proving the offence must be discharged fully by the prosecution failure of which is unforgivable. This stance is supported by the case of **Jonas Nkize** (supra) when my brother Katiti, J (as he then was) had this to comment on the onus of proof in criminal cases:

> *"The general rule in criminal prosecution that the onus of proving the charge against the accused person beyond reasonable doubt lies on the prosecution, is part our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking."*

In this case as submitted by both counsels which submissions I am in agreement with it is only the third ingredient which was proved by prosecution by proving that the killed cattle are properties capable of being stolen. As to the first ingredient there was no evidence led by the prosecution to prove that the appellant wilfully killed the said cattle leave alone establishment of the cause of death. Both PW1 and PW4 in their evidence testified that while passing nearby the appellant's quarry mine the said herds

of cattle escaped from the herder's control (PW4) and drink the alleged water before they started falling down while emitting foam like liquid from their mouth. In his defence the appellant (DW1) led his uncontroverted evidence to prove that he never invited the said cattle at the quarry mine as the area was not meant for pastoralists and that the quarry company was observing the safety guidelines at all of the time. Since it is the owner through the herder who took the said herds of cattle to the scene of crime it cannot be said the appellant wilfully killed the said cattle.

On the second ingredient I also hold was not proved as there was no evidence adduced by the court to prove that it is the appellant who was seen pouring poison in the alleged pond water. Assuming there was such evidence of seeing him pouring something in the pond where the said cattle are alleged to have drank water and affected still I could hold the ingredient was not proved. I will explain why? It was expected that the internal organs sample collected from the said cows and examined by the Government Chemist could have shown the cattle died of poison which allegedly was consumed from the pond water. To the contrary the Government Chemist Report exhibit P1 exhibited that in the ruminal contents there was no any know content of poison. This is a proof that the alleged cause of death of the said cattle allegedly drank water from the pond found in the appellant's quarry mine area was not established by the prosecution. As the ingredients of the offence were not established by the prosecution I hold the trial magistrate was in erred to find the appellant wilfully and unlawfully killed the said 171 herds of cattle as the charge against him was not proved beyond reasonable doubt, thus uphold the first ground of appeal. As this ground has the effect of disposing off the appeal I find no reason to consider the

remaining grounds as the exercise will be rendered academic, which I am not prepared to dwell into now.

Before I pen off, I wish to revisit the propriety of the sentence meted to the appellant in which the learned Senior State Attorney, Ms. Massue invited this court to look into. As submitted by her the provision of section 325 of the Penal Code with which the appellant was booked with does not provide punishment and therefore the resort by the court could be to section 35 of the Penal Code. Instead the trial court entered the sentence of 5 year imprisonment or payment of Ten Million in lieu of, in which the appellant managed to pay the fine. It is the law under section 235 of the CPA that the trial court after entering conviction shall sentence the accused or enter any order according to the law and not otherwise. The provision provides thus:

> *235.-(1) The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and* ***pass sentence upon or make an order against him according to law*** *or shall acquit or discharge him under section 38 of the Penal Code. (Emphasis supplied).*

And section 35 of the Penal Code reads:

> *35. When in this Code no punishment is expressly provided for any offence, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both.*

Applying the above cited provision of the law to the facts of this case I am convinced as submitted by Ms. Massue that by imposing the sentence of 5

years imprisonment in default of payment of Tshs. Ten million to the offence created under the provision which does not provide punishment, the trial court was in infraction of the provisions of section 235 of the CPA and section 35 of the Penal Code, [Cap. 16 R.E 2019]. Exercising the revisionary powers of this court I proceed to quash the conviction entered against the appellant and set aside the sentence meted to him for payment of fine of Tanzanian Shillings Ten Million or imprisonment of 5 years in default. As the appellant paid the said fine, I order that said Tanzanian Shillings Ten Million be paid back to him. The appeal is therefore allowed.

It is so ordered.

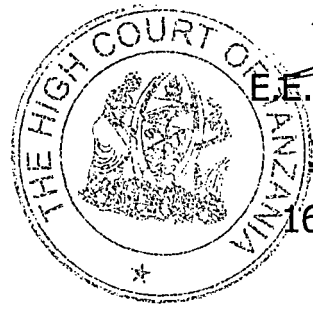
DATED at DAR ES SALAAM this 16th day of July, 2021.

E. E. KAKOLAKI

JUDGE

16/07/2021

Ruling delivered today 16th day of July, 2021 in the presence of Mr. Salim Mkonje advocate for the appellant, the appellant in person and Ms. Monica Msuya, Court clerk and in the absence of State Attorney for the Respondent.



E.E. KAKOLAKI

JUDGE

16/07/2021