

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF TANGA)

AT TANGA

CRIMINAL APPEAL No. 7 OF 2021

(Arising from the District Court of Handeni at Handeni in Criminal Case No. 44 of 2020)

1. SAIDI NGUZELE &
2. MKOMBOZI HEMED @ MAHENG } ----- **APPELLANTS**

Versus

THE REPUBLIC ----- **RESPONDENT**

JUDGMENT

13.09.2021 & 21.09.2021

F.H. Mtulya, J.:

On 24th November 2020, the **District Court of Handeni at Handeni** (the district court) delivered its decision in **Criminal Case No. 44 of 2020** (the case) and sentenced Mr. Said Nguzele and Mkombozi Hemed @ Mahenge (the appellants) to five (5) years after conviction of the offence of cattle theft contrary to section 258 and 268 (1) of the **Penal Code** [Cap. 16 R.E. 2019] (the Code).

The appellants were not satisfied with the decision hence preferred the present appeal complaining that the case against them was not proved beyond reasonable doubt as the district court improperly admitted exhibit P.1. The appeal was scheduled for hearing on 13th September 2021, and when the appellants were

invited to take the floor to argue on their complaint, they had a very brief submission that the prosecution failed to prove its case beyond reasonable doubt. In substantiating their argument, they both stated that there was no evidence tendered against them. Fortunately, this brief submission was understood and well received by learned State Attorney, Ms. Tussa Mwaihesya, who appeared for the Republic.

According to Ms. Mwaihesya, there were two faults in the proceedings of the case which render the whole case a nullity. In justifying her statement, Ms. Mwaihesya stated that the two matters are: first, exhibit P.1 was improperly admitted; and, second, the appellants were denied the right to be heard. In explaining the issues, Ms. Mwaihesya submitted that the cautioned statement on confession of the first accused person in the district court, Mr. Ibrahim Joachim was improperly admitted and was not read before the court. According to Ms. Mwaihesya, this piece of evidence connected the appellants with the offence and was heavily relied by the district court to convict the appellants and once expunged from the record, there will be nothing connecting the appellants with the offence.

On the second fault, Ms. Mwaihesya submitted that both appellants prayed to summon two witnesses after the ruling of the case to answer, but were denied to enjoy the right hence were curtailed the right to have fair hearing. To substantiate her

argument, Ms. Mwaihesya cited page 52 of the proceedings in the district court. Finally, she supported the appeal and prayed the conviction against the appellants be quashed and proceedings nullified.

I have perused the record of this appeal and found that page 40 of the proceedings before the district court, the district ruled that the prosecution had registered facts and evidences which established *prima facie case* to call for the accused persons to file facts and evidences in their defence. When the appellants were addressed under section 231 of the **Criminal Procedure Act** [Cap. 20 R.E 2019] (the Act) to enjoy the right to call witness, they both recorded to have two (2) witnesses to summon during the defence hearing.

However, before the dual had closed their defence, the district court ordered for judgment date as depicted at page 52 & 53 of the proceedings in the district court conducted on 5th August 2020. Again, there is no any reasons recorded in the proceedings which were displayed in the record to justify the denial of the right. According to Ms. Mwaihesya this is the violation of the right to be heard. I join her hand. There is a denial of the right to be heard which is not only a natural right, but also constitutional right enshrined under article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] as interpreted in the precedents in **Mbeya-Rukwa Auto**

Parts & Transport Limited v. Jestina George Mwakyoma, Civil Appeal No. 45 of 2002 and **Judge In Charge, High Court at Arusha & The Attorney General v. Nin Munuo Ng'uni** [2004] TLR 44.

The record in this appeal also shows that the cautioned statement of Ibrahim Joachim (DW1) was prayed to be tendered in the case by police officer E.5285 D/C Beda (PW6) as displayed at 37 of the proceedings of the district court and was admitted as exhibit P.1 before it was cleared for admission as per law in the precedents of this court in **Mashaka Robison @ Chela @ Konya v. Republic**, Criminal Appeal No. 1 of 2021 and Court of Appeal in **Stany Loidi v. Director of Public Prosecutions**, Criminal Appeal No. 466 of 2017. The Court of Appeal in its commonly cited page 14 of the decision, stated that:

Whenever it [the court] is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out. Reading out documents before they are admitted in evidence is wrong and prejudicial. If the document is ultimately excluded, as happened in this case, it is difficult for the court to be seen not to have been influenced by the same.

In the present appeal, the record shows that neither admission nor process of reading out exhibit P.1 was conducted. I think, I must agree with learned State Attorney Ms. Mwaihesya that the evidence in exhibit P.1 be expunged as it was improperly admitted and relied by the district court to convict the appellants. This was wrong and prejudiced the appellants and, I hereby expunge P.1 from the record.

Having expunged exhibit P.1 from the record, there is nothing in the record which connects the appellants with the charged offence and therefore the prosecution case was not proved beyond reasonable doubt. I therefore allow the appeal, quash the conviction, set aside the sentence meted out against the Appellant and order for their immediate release from prison custody unless held for other lawful cause.

Order accordingly.




F.H. Mtulya

Judge

21.09.2021

This judgment is delivered in Chamber under the seal of this court in the presence of the appellants, Mr. Saidi Nguzele and Mkombozi Hemed @ Mahenge and in the presence of learned State Attorney, Ms. Regina Kayuni, for the Republic.

A handwritten signature in blue ink, which appears to read "F.H. Mtulya", is written over the seal and the text below it.

F.H. Mtulya

Judge

21.09.2021