

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 153 OF 2020

*(Arising from Criminal Case No. 9 of 2019 in the District Court of Ileje
at Itumba)*

Between

PATSON PWELE APPELLANT

Versus

THE REPUBLIC RESPONDENT

JUDGMENT

A.A. MBAGWA, J.

This is an appeal against both conviction and sentence in Criminal Case No. 9 of 2019 in the District Court of Ileje. The appellant herein together with Hakimul Laiton Msongole @ Majuto, who did not prefer an appeal, were jointly and convicted of animal stealing contrary to section 268(1) & (3) of the Penal Code. Whereas Hakimul Laiton Msongole @ Majuto was sentenced to serve a prison term of five (5) years, the appellant was imprisoned for fifteen (15) years on the ground that he was a second offender

At the trial Court, it was alleged that Patson Pwele and Hakimul Laiton Msongole @ Majuto on the 4th day of February, 2019 at around 01:00hrs at Isongole village within Ileje district in the region of Songwe stole three herds of cattle valued at Tanzanian shillings one million five hundred



(1,500,000/=), the property of Abery Mwesya. The prosecution paraded five (5) witnesses and one exhibit in a bid to prove the accusations, on the one part. The appellant stood as a solo witness for his defence whereas Hakimu Laiton Msongole @ Majuto testified as DW2 and called a witness namely, Zawadi Amanyise Fijabo DW3, on the other part.

The facts which led to the arraignment, trial and ultimately conviction of the appellant may, in a nutshell, be recounted as follows,

In the morning of the 4th day of February, 2019, Mr. Abery Mwesya (PW1) woke up only to find three herds of cattle were missing in the kraal. He therefore communicated the information on the incident to a ten-cell leader one Wilson Mtafya (PW2), among other people. PW2 raised an alarm to which the villagers including Jofrey Wilbroad Kanyika (PW3) responded by assembling. Having assembled, the villagers divided themselves into three groups and commenced the race to locate the stolen three bulls. One group which went to the top of Mkumbukwa hill found the appellant with the three stolen bulls. On seeing them, the appellant took at his heels but he was apprehended shortly thereafter. It was the evidence of PW1, PW2 and PW3 that upon his arrest, the appellant admitted to have been found in possession of stolen cows and mentioned Hakimu Laiton Msongole @ Majuto as his conspirator. The said Hakimu Laiton Msongole @ Majuto was, under pretext, among the villagers who were looking for the stole cattle. Thus, on being mentioned by the appellant, he was apprehended by villagers on the spot. The duo was taken to Itumba Police Station and subsequently arraigned in the District Court of Ileje.



In his defence, the appellant admitted being arrested by the villagers though he denied the allegations. He said that he was arrested while on his way from Izuba to Itumba to look for labour work. He admitted mentioning the 2nd accused but qualified that he mentioned him after he was beaten by the villagers.

In the similar vein, the 2nd accused Hakim Laiton Msongole @ Majuto denied the allegations though he admitted that he was in the group which went to the top of the hill to look for the stolen cattle. He said that they found the stolen cattle on the top of the hill but he did not mention whether the said cattle under the possession of any person. Majuto called Zawadi Amanyise Fijabo DW3 to testify in his favour. DW3 in fact corroborated the prosecution evidence. She said that the appellant was arrested while attempting to flee. DW3 further said that upon interrogation by the villagers, the appellant mentioned the 2nd accused Majuto as his co-culprit.

Having heard the evidence of both sides, the trial District Court was satisfied that the prosecution proved its case beyond reasonable doubt. As such, it found them guilty of the offence of animal stealing and consequently convicted them. Whereas the 2nd accused Hakim Laiton Msongole @ Majuto was sentenced to five year imprisonment, the appellant was ordered to serve a prison term of fifteen years on the ground that he was a recidivist.

The appellant was not satisfied with the findings of the court and the sentence meted out hence this appeal.

He filed a petition of appeal containing five grounds as follows;



1. That the trial magistrate erred in law and fact to convict the appellant in the judgment which is lacking factual and legal point of determination in accordance with the mandatory provisions of the Criminal Procedure Act [Cap 20 R.E. 2019]
2. That the trial magistrate erred in law and facts by failing to analyse and evaluate the evidence on the record thereby failed (SIC) without even stating which evidence was acted upon as the basis of the appellant's conviction
3. That the trial magistrate erred in law and facts by failing to make a finding that the prosecution case was not proved beyond reasonable doubt and failed to consider and analyse the defence evidence adduced by the appellant.
4. That the learned trial magistrate erred in law and facts for failure to consider the mitigating factors and failed to properly apply the sentencing principles and hence wrongly imposed a sentence of fifteen (15) years against the appellant.

When the matter came for hearing, the Republic/respondent was represented by Davis Msanga, learned State Attorney whereas the appellant appeared in person. As usual, the appellant implored the Court to consider his grounds as contained in the petition of appeal and allow his appeal. He left the State Attorney to submit.

Mr. Msanga on his part opposed the appeal. He submitted that the appellant was rightly convicted. He opted to argue the appeal generally.

Mr. Msanga said that the evidence was well analysed by the trial magistrate. He submitted that PW3 who was a direct witness clearly



testified that the stolen cattle were found with the appellant. The learned State Attorney further submitted that the said stolen cattle were tendered in evidence as exhibit P1 and there was no objection from the appellant implying that the cattle were not the property of the appellant.

With respect to the complaint that the trial magistrate did not consider the defence evidence, Mr. Msanga submitted that the trial magistrate took into account of the defence evidence at page 5 of the typed judgment but found it too weak to raise reasonable doubt.

However, Mr. Msanga was not in agreement with the trial court in respect of the sentence of fifteen-year imprisonment. He said that imprisonment of fifteen years was a maximum sentence under section 268(1) of the Penal Code hence it was not proper to impose the maximum sentence.

Having heard the submission by the State Attorney, I got an opportunity to navigate through the record particularly the trial court record.

It is crystal throughout the prosecution evidence and that of DW3 that the appellant was found with the stolen cattle. This was particularly testified on by PW1 Abery Mwesya, PW2 Wilson Mtafya and PW3 Jofrey Wilbroad Kanyika. The said stolen cattle were tendered in evidence and received as exhibit P1 without objection. Thus, there was no dispute that the cattle which the appellant was found with belonged to PW1 Abery Mwesya. It is also in evidence that upon discovery of the stolen cattle, the appellant took at heels suggesting that he was guilty conscious. This fact was also corroborated by DW3 Zawadi Amanyese Fijabo who testified that the appellant was arrested when he was attempting to flee.




Having gone through the record as hereinabove hinted on, it is my findings, that the evidence was correctly analysed and the conviction was properly entered.

Furthermore, the appellant attacked the trial court judgment on the ground that it lacked the point for determination. With due respect to the appellant, this ground has no back up from the record. At page 5 of the judgment, the learned trial magistrate clearly indicated that the issue for determination was whether the accused persons committed the offence they stood charged. After analysing the evidence, the trial magistrate answered the issue affirmatively as he found them guilty of the offence. Therefore, it is the unfeigned findings of this Court that the trial court judgment was in all fours with the dictates of section 312 of the Criminal Procedure Act.

The appellant is also challenging the sentence of imprisonment of fifteen years (15). On the one side, Section 268(1) of the Penal Code under the appellant was convicted of provides a maximum sentence of fifteen year imprisonment. On the other side, section 170(1)(a) of the Criminal Procedure Act confines powers of subordinate courts to impose the maximum sentence not exceeding five years unless the offence for which the accused has been convicted of falls under the minimum sentence.

170.-(1) A subordinate court may, in the cases in which such sentences are authorised by law, pass any of the following sentences—

(a) imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the Schedules to the



Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;

From the foregoing provision it is clear that a subordinate court has no power to impose a sentence of imprisonment above five years unless such sentence is minimum.

Cattle theft is among the offences listed under the Minimum Sentence. Section 5 (b) of the Minimum Sentence Act [Cap. 90 R.E.2019] provides a minimum sentence of five year imprisonment for a person convicted of cattle theft. This is to say the offence of which the appellant was convicted attracts a minimum sentence of five years. As such, the trial District Court of Ileje had no powers to impose an imprisonment sentence exceeding five years. Thus, the sentence of imprisonment of fifteen years is illegal. I therefore set aside the imprisonment of fifteen years and substitute it for imprisonment of five years.

Before I wind up, I would like to make a few remarks on the charge. The charge, in particular, the statement of offence, indicates that the appellant was indicted on animal stealing contrary to section 268(1)& (2) of the Penal Code. The said provision reads as follows;

268.-(1) Where the thing stolen is any of the animals to which this section applies the offender shall be liable to imprisonment for fifteen years.

(3) This section applies to a horse, mare, gelding, ass mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig.



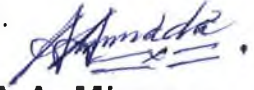
Subsection (1) is quite obvious that it is a punishment provision and not a criminalizing provision. It must be noted that statement of offence must contain both criminalizing and punishment provision. See the case of **Jonas Ngolida vs the Republic, Criminal Appeal No. 351 of 2017, CAT at Dodoma** and **Elisha Mussa vs the Republic, Criminal Appeal No. 282 of 2016, CAT at Tabora**

The proper provision creating an offence is section 265 of the Penal Code. Thus, the charge, in the statement of offence, ought to indicate both criminalizing and punishment provisions namely, sections 265 and 268(1). However, on reading the charge specifically the particulars of offence and the evidence, I have been satisfied that the appellant was not prejudiced in any how by non-citation of section 265 in that from the beginning, he understood the nature of the offence he was facing. In the circumstances, it is my considered view that the defects of non-citation are not fatal for they are curable under the provision of section 388 of the Criminal Procedure Act. See the cases of **Jamali Ally @ Salum Vs the Republic, Criminal Appeal No. 52 Of 2017, CAT at Mtwara** and **Feston Domician vs the Republic, Criminal Appeal No. 447 of 2016, CAT at Mwanza,**

That said and done, this appeal is partly allowed to the extent that the sentence of imprisonment of fifteen years is set aside and substituted it for imprisonment of five years.

The right of appeal is explained.




A.A. Mbagwa
Judge
01/11/2021