

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MOROGORO)**  
**AT MOROGORO**

**CRIMINAL APPEAL NO. 39 OF 2022**

*(Originating from Criminal Case No. 200 of 2020 in the District Court of Kilombero)*

**MSAFIRI CLEMENT @ MPEND.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGEMENT**

*Hearing date on: 16/08/2022*

*Judgement date on: 22/08/2022*

**NGWEMBE, J:**

Msafiri Clement @ Mpenda is in this court trying to challenge both conviction and sentence of fifteen (15) years imprisonment meted by the trial court on a charge of cattle stealing contrary to section 268 (1) & (3) of the Penal Code.

According to the particulars of the charge sheet, on 21<sup>st</sup> May, 2019 at Mbasa area within Kilombero District in Morogoro region the appellant did steal one cow valued at TZS. 600,000/= property of Mayala Bwire.

Upon being arrested and arraigned in court, he pleaded not guilty, hence the prosecution lined up three (3) witnesses, at the end of prosecution, the trial court found him having a case to answer, thus invited him to defend. Rightly, the appellant defended himself and did



not call an additional defence witness. At the end of trial, the appellant was found liable, hence convicted and sentenced to imprisonment for fifteen years (15) years, thereafter was ordered to pay compensation to the complainant PW1 a total of TZS. 600,000/=.

Being so convicted and sentenced according to law, and upon finding himself at prison, failed to observe time limitation to issue the requisite notice of intention to appeal and appeal to this court. Being out of time, he successfully lodged an application for extension of time, thus was granted 21 days to actualize his intention. Successfully he instituted his this appeal clothed with seven (7) grounds. However, I find no necessary to recap them herein for the reasons to be disclosed later on.

In brief recap of the arguments of both parties, noted that though the appellant was not represented by an advocate, yet apart from relying on his detailed grounds of appeal, also briefly submitted that, the sentence meted by the trial court was unfair and unjust. However, he failed to expound on how that sentence was unfair and unjust. He strongly prayed for deep consideration of his grounds of appeal and this court may be pleased to find him not guilty.

The Republic was represented by learned State Attorney Edger Bantulaki who outright supported the appeal for different reasons apart from the grounds raised by the appellant. The learned State Attorney, strongly argued that in the whole prosecution case, no witness saw the appellant stealing the alleged cow. The only evidence touching the appellant was the alleged oral confession before PW2.

Second the evidence of PW3 was to the effect that, he recorded the statement of the appellant which same was admitted marked exhibit



P1. However, the State Attorney, challenged it as ineffective and useless because exhibit P1 was recorded out of prescribed time frame of 4 hours from the time of arrest. It is evident that the appellant was arrested between 21/5/2019 and 23/5/2019 but the caution statement was recorded on 28/5/2019, thus contrary to section 50 of Criminal Procedure Act. Added, failure to record caution statement within 4 hours as per section 50 of CPA, any other time, extension of time must be obtained as per section 51 of CPA. Thus, prayed exhibit P1 be expunged.

Upon expunging exhibit P1, what remains is the evidence of PW2, unfortunate his evidence cannot be considered because PW2 was at front in searching and arresting the appellant. Therefore, he had an interest on the matter. In law such evidence ought to be corroborated by another person.

Pointed further that there were key witnesses to prove the case but were not called in court with no apparent reason. Such persons were Paul Mgogo and Abdallah Said whose evidences would corroborate the evidences of PW2, but the prosecution failed to call them. Thus, negative inference may be drawn to the prosecution for failure to call those key witnesses.

Went further to point out that, PW1 failed to prove ownership of the alleged cow, which failure amounted into failure to prove the accusations against the appellant beyond reasonable doubt. Thus, the appeal may be allowed, he rested.

Upon summarizing the arguments of both parties, specifically the arguments advanced by learned State Attorney, I find compelled to



revisit the testimonies adduced during trial by the prosecution side. The purpose is to satisfy if at all the case of cattle theft was established and proved as required by law. The testimonies of PW1 (owner of the stolen cow) was brief that on the eventful date he was not at home, but was informed that one cow was stolen. Upon his return home on 23/5/2019 he was told the appellant was arrested for stealing that cow. He participated in interrogation of the appellant at WEO's office. What he demanded was compensation from the appellant. Such piece of evidence did not disclose the type of the alleged cow, bull or female, its color, how such cow came into his ownership and alike. Considering the claimant's testimony, obvious he failed to establish proper ingredients of ownership of that cow.

Moreover, the evidence of PW2 as acting WEO categorically participated in following up foot prints of the alleged stolen cow up to the appellant's house. They were together with Abdallah Said an animal keeper in the house of PW1. Also, they were told that the said cow was sold to Paulo Mgogo, but unfortunate the prosecution failed to call those two key witnesses to support the evidences of PW2.

The last prosecution witness was E.7183 C/CPL Charles whose testimony was in respect to interrogation and recorded caution statement of the appellant on 28/5/2019 which same was admitted marked exhibit P1. Unfortunate that caution statement cannot stand due to time limitation as concluded above.

The defence case was covered with general denial and not knowing neither PW1 and the animal keeper one Abdallah Said and nor Paulo Mgogo. In such a situation, obvious key witnesses like Abdallah



Said and Paulo Mgogo were inevitably material witness. Failure to call them led into a very weak prosecution case.

I find important to consider it in detail on the validity caution statement and its statutory requirements. First recording of cautioned statement is governed by sections 48 – 51 of Criminal Procedure Act (CPA). These sections were discussed in details in the cases of **Anzigar Diones and Another Vs. R, Criminal Session No.2 of 2019**; in the case of **Azizi Mohamed Vs. R, Criminal Appeal No.15 of 2006 (CAT-Mtwara)**; and in the case of **Gragori David Maokola Vs. R, Criminal Appeal No.238 of 2009 (CAT) Mtwara**. Usually, the court will expunge the caution statement if there is no proof that the sections cited above are complied with.

Section 50 (1) (a) is unambiguous, clear and direct which does not require any assistance from an expert of legal interpretation. It is a requirement of law that a caution statement should be recorded within four (4) hours from the time the accused is under restraint. In respect to this appeal the appellant was arrested on 23 November, 2019 but his statement was recorded on 26 November, 2019. Section 51 of CPA provide requirement of extension of time prior to recording that statement.

In any event caution statement should comply with section 50 and any exceeding time, must have extension of time under section 51 of CPA.

However, in this appeal the statement was recorded after seven days from the date of arrest and without extension of time from the court. It meaning the whole exercise of recording the appellant's statement was futile, null and void abinitio.



Notably, procedural law was enacted to be complied with, some procedural rules are fundamental, which must be complied with, others do not go to the root of the case itself which may not be fatal if not complied with. The procedure which provides time limitation, to the best must be complied with.

Accordingly, I subscribe with the submission of the learned State Attorney Edgar Bantulaki, that the caution statement admitted as exhibit P1 must be expunged as I hereby do. What follows is to answer whether the prosecution case was established and proved to the standard required.

Repeatedly, this court and the Court of Appeal have stated in numerous criminal cases that the prosecution must, undoubtedly establish and prove a prima facie case against the accused person by producing cogent evidences, which link the accused/appellant with the offence accused for. This burden never shifted, but always remain to the prosecution. It is an elementary knowledge of criminal law that always the prosecution has uncompromised duty to establish and prove a prima facie case against the accused prior to the accused being called to answer those accusations. The Court of Appeal in the most celebrated decision of **Nathaniel Alphonse Mapunda and Benjamini Alphonse Mapunda Vs. R, [2006] T.L.R. 395** categorically held: -

*"As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of Mohamed Said Matula v. R. (2) this Court reiterated the principle by stating that in a criminal charge the burden of proof is always on the prosecution. And the proof has to be beyond*

*reasonable doubt. There must be credible evidence linking the appellants with the offence committed".*

As rightly averred by Mr. Edgar Bantulaki, the theft of the alleged cow was not established and proved beyond reasonable doubt, that the appellant was the one who committed such offence. Moreover, it is not established who was the owner of the alleged stolen cow? Fundamentally the offence was not established and proved to the standard required.

Another equally important fact ought to be established is failure of the prosecution to call material witnesses. Obvious, the prosecution cannot be forced to call witnesses. Rather the prosecution knows who is material witness and who is not. However, in certain circumstances, certain witnesses who were eye witnesses and when in all circumstances are material, must be invited in court to testify what they saw and witnessed. Failure to call them without any sufficient reason, the court has at liberty to draw an inference adverse against the prosecution.

I think in our jurisdiction the law is well-developed, on the consequences of failure to call material witnesses. It was stated in the case of **Azizi Abdallah Vs. R, [1991] T.L.R 91** quoted with approval by the Court of Appeal in the case of **Mashimba Dotto @ Lukubanija Vs. R, Criminal Appeal No. 317 of 2013** (CAT – Mwanza)

*"The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason*



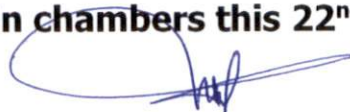
*being shown, the court may draw inference adverse to the prosecution"*

In this appeal Abdallah Said was a material witness because he is the one who kept the alleged cow, when went missing, and steps he took until the appellant was arrested. More so, Paulo Mgogo who was alleged to have purchased the stolen cow was not only material witness, but also was a co-accused for receiving stolen property. Surprisingly, both were not lined up as witnesses. The question is who else could prove the elements of theft? I fully subscribe to the arguments of the learned State Attorney that, the prosecution abdicated their noble duty to establish and prove a prima facie case against the appellant.

For the reasons so stated, this appeal has merits same is allowed. I proceed to nullify the conviction and set aside the sentence meted by the trial court. Consequently, I order an immediate release of the appellant from prison, unless otherwise, lawfully held.

**It is so ordered.**

**Dated at Morogoro in chambers this 22<sup>nd</sup> August, 2022**



**P.J. NGWEMBE**

**JUDGE**

**22/08/2022**

**Court:** Delivered at Morogoro in Chambers on this 22<sup>nd</sup> day of August, 2022 in the presence of the appellant and in the presence of learned State Attorney Edgar Bantulaki for the Republic/respondent.

**Right to appeal to the Court of Appeal explained.**



A handwritten signature in blue ink, appearing to be "P.J. Ngwembe", is written over a large, empty oval space.

**P.J. NGWEMBE**

**JUDGE**

**22/08/2022**