

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**CRIMINAL APPEAL NO. 90 OF 2021**

***(Arising from the Decision of Criminal Case No. 41 of 2021 in the District  
Court of Bunda at Bunda)***

**BETWEEN**

**KAREE S/O MAGESA @ KURURYA..... 1<sup>ST</sup> APPELLANT**

**RICHARD S/O KASUNGA @ NZINGALUYAGA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

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

**JUDGMENT**

**A. A. MBAGWA, J.:**

This is an appeal against both conviction and sentence meted out by the trial District Court in Criminal Case No. 41 of 2021.

The appellants Keree Magesa Kururya and Richard Kasunga Nzingaluyaga were arraigned in the District Court of Bunda on indictment of cattle theft contrary to sections 258(1) and 268(1)(3) of the Penal Code.

The particulars of offence were that Keree Magesa Kururya and Richard Kasunga Nzingaluyaga on 10<sup>th</sup> day of February 2021 at Kyandegge village within Bunda district in Mara region stole eight herds of cattle valued at TZS 4,000,000/=, the property of John Daudi Keya.

The appellants denied the accusations hence the matter proceeded to a full trial. In endeavouring to prove the case, the prosecution called a total of five witnesses notably, John Daudi Keya (PW1), Julius Bendo Balagi (PW2), Nyamuhanga Wesiko (PW3), Inspector Joseph Malimi (PW4) and H.4987 PC Joseph (PW5). Besides, the prosecution tendered three exhibits; a permit to sell cattle in the name of Julius Marwa (P1), one recovered cow (P2) and caution statement of the 1<sup>st</sup> appellant Keree Magesa Kururya (P3).

It was the prosecution account that on 10<sup>th</sup> February, 2021 at night, while asleep at his home in Kyandegge village, John Daudi Keya (PW1) heard dogs barking. He thus wake up and took a peek outside only to find four people stealing his cattle. Of the four people, PW1 identified the appellants (accused). PW1 thus raised alarm and neighbour assembled including PW2 Julius Bendo Balagi. PW2 said that, on arrival at the scene, John Keya told him that his eight herds of cattle had been stolen. Further, Keya mentioned the appellants hence PW2 decided to go to the 2<sup>nd</sup> appellant's home in order to verify whether Richard Nzingaluyaga (2<sup>nd</sup> appellant) was at his home at that time. PW2 said that he did not find the 2<sup>nd</sup> appellant Richard Kasunga Nzingaluyaga at his home. When he was asked as to why he did not go to

the 1<sup>st</sup> appellant's home as he did to the 2<sup>nd</sup> appellant, PW2 said that 1<sup>st</sup> appellant stays far from their village.

According to the prosecution evidence in particular of PW1 and PW2, in the morning at 6:30hrs they started tracing footprints which led them up to Kenyamonta market area within Serengeti district. At Kenyamonta market, they found the 1<sup>st</sup> appellant Keree Kururya with one of the stolen cows. PW1 testified that he identified the cow to be his because it was bearing the marks 'J. KEYA'. They thus arrested the 1<sup>st</sup> appellant and submitted him along with the cow to the village authority where PW5 H. 4987 PC Joseph later came and found the 1<sup>st</sup> appellant under restraint. Thereafter, the 1<sup>st</sup> appellant was submitted to Nyamswa Police Station.

According to the prosecution evidence, the 1<sup>st</sup> appellant, upon arrest and interrogation, he said that he bought the cow from 2<sup>nd</sup> appellant. As such, PW1 and PW2, while still at Kenyamonta market area, called PW4 Inspector Joseph Malimi to arrest the 2<sup>nd</sup> appellant. PW4 said that he talked to the Village Executive Officer (VEO) of the village where 2<sup>nd</sup> appellant was living to arrest him. PW4 proceeded that the 2<sup>nd</sup> appellant was arrested and brought to Nyamswa Police Station.

Further, PW5 tendered a caution statement (P3) to buttress his testimony that 1<sup>st</sup> appellant admitted commission of an offence and mentioned the 2<sup>nd</sup> appellant.

In defence, both appellants denied the accusations. 1<sup>st</sup> appellant (DW1) stated that he was arrested at Kenyamonta market with a cow. Kururya said that he bought the said cow at TZS 365,000/= from a person called Julius Marwa. Keree Kururya continued that upon conclusion of sale, the said Julius Marwa gave him his permit to sell cattle (exhibit P1). He further denied to have made the caution statement (P3) as he claimed that he was tortured and later forced to sign the document which he did not know its contents.

The 2<sup>nd</sup> appellant, Richard Kasunga Nzingaluyaga, on his part, told the court that he was arrested on 9<sup>th</sup> February, 2021 by the militiamen of Mugeta on the allegations of using abusive language against one Bendo Beraga. He said upon his arrest, he was surrendered to Nyamswa Police Station where he remained in custody until 12<sup>th</sup> February, 2021 when he was joined by the 1<sup>st</sup> appellant Keree Kururya. Nzingaluyaga continued that after staying in remand for some days he was interviewed in respect of cattle theft which occurred on 10<sup>th</sup> February, 2021.

After a full trial, the trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubt. He thus convicted both appellants of cattle theft and accordingly sentenced the 1<sup>st</sup> appellant to five year imprisonment and 2<sup>nd</sup> appellant to seven (7) years imprisonment. In addition, the trial court ordered the appellants to compensate the victim John Daud Keya the seven unrecovered cows.

The appellants were not happy with conviction entered and sentences meted against them. They thus appealed to this court. They filed a petition of appeal contained several grounds however, on the hearing day, Mr. Emmanuel Mg'arwe who appeared for the appellants argued only 1<sup>st</sup> and 2<sup>nd</sup> grounds and abandoned others. The two grounds argued are;

1. That, the trial court erred in law and fact by convicting and sentencing the appellants while the prosecution failed to prove the charge against them beyond reasonable doubts.
2. That, the trial court erred in law and fact by convicting and sentencing the appellants by relying on defective charge

On the hearing date, the appellants had representation of Emmanuel Mng'arwe, learned advocate whereas the Republic appeared through Nimrod Byamungu, learned State Attorney.

Submitting in support of 1<sup>st</sup> ground of appeal, the appellants' counsel argued that the prosecution failed to prove the offence to the required standard on the following grounds: **one**, that the complainant (PW1) failed to establish ownership of the allegedly stolen cattle. He continued that ownership of cattle requires registration as per section 6(3) of the Livestock Identification, Registration and Traceability Act No. 12 of 2010. He thus opined that the prosecution was expected to produce a certificate evidencing the ownership. Further, citing regulation 7(2) of the Livestock Identification, Registration and Traceability Regulations GN. No. 362 of 2011 the appellants' counsel said that the complainant ought to bring a register or any person from the village council in order to prove the ownership of the livestock. He concluded that despite the identification of the marks which were mentioned, PW1 did not prove whether those marks are registered.

**Two**, Mr. Mg'arwe submitted that the prosecutions did not prove its case because the livestock (PE2) after being found with 1<sup>st</sup> appellant, the evidence shows that it was handed to PW1. He elaborated that PW1 stayed with it from 10/02/2021 until 23/03/2021 when he produced it in court. The counsel argued that the duration of period that PW1 stayed with the exhibit was too long to the extent that it is doubtful whether the exhibit is the very one that

the appellant was found with. On the basis of his submission, the counsel prayed that this court to allow the appeal on the first ground.

On the 2<sup>nd</sup> ground of appeal, the counsel challenged the charge for being defective. He lamented that it did not expound the ingredients of offence as provided under section 258(1) of the Penal Code. He continued that the particulars ought to disclose the ingredients namely, fraudulently, conversion and without claim of right. The counsel argued that the absence of these elements made the appellants not to appreciate the nature of the offence they were facing. Referring to the case of **Isidori Patrice vs the Republic**, Criminal Appeal No. 224 of 2007, CAT at Arusha, at page 15 and **Veronica Pastory vs the Republic**, Criminal Appeal No. 139 of 2020, HC at Mwanza at page 15, he submitted that the Court of Appeal held that every charge should contain particulars which should disclose the essential ingredients of the offence. Finally, Mr. Mg'arwe prayed the court to allow the appeal and set free the 2<sup>nd</sup> appellant.

While replying, Mr. Byamungu was in agreement with the appellants' counsel that every livestock owner should register them with the appropriate authority. However, Byamungu said that the main question is whether non registration vitiates ownership of livestock. He proceeded that even if the



livestock were not registered, it did not deny the fact that it was PW1's property. Further, the State Attorney submitted that in the laws cited by the appellants, there is no provision to the effect that where a person fails to register his cattle, he forfeits his rights to own them. The State Attorney added that, during trial, the question of ownership was not at issue hence it is an afterthought as it was raised at appellate stage. He concluded that the evidence given by PW1 was enough to prove ownership of the stolen cattle.

Concerning the custody of the exhibit (PE1), Byamungu admitted that as per PW5, after impounding the exhibit, it was handed to PW1 who brought it in court. He proceeded that according to the evidence, there is doubt that the impounded/ seized exhibit is the same which was brought to court. He elaborated further that the marks that were on exhibit PE1 are the same as what was mentioned by PW1.

With regard to the defects on the charge, the State Attorney said that whereas he subscribed to the decision of CAT in **Isidori Patrice** (supra) that particulars of offence should disclose the ingredients, submitted that the charge had no defects in that it was in all fours with sections 132 and 135 of the Criminal Procedure Act.



Mr. Byamungu said that the charge states that the appellants stole eight herds of cattle. Further he submitted that the meaning of stealing is provided under section 250 of the Penal Code hence by writing the word that they stole was sufficient. He continued that, the PW1's evidence was enough to inform them the nature of offence they were facing and that even during their defence, the appellants testified in such a way that shows that they well understood the offence. The State Attorney cited the case of **Tongeni Naata vs Republic**, 1991 TLR 54 in which the Court of Appeal said that merely making the omission a ground of appeal without showing how the appellant was prejudiced at the trial will not vitiate the proceedings. Mr. Byamungu was thus opined that the appellants understood the allegations they were facing.

On being probed whether section 258 creates the offence of stealing, the State Attorney said it is section 265 of the Penal Code but quickly remarked that the omission did not prejudice the appellant in light of the decision in **Festo Domician vs Republic**, Criminal Appeal No. 447 of 2016 CAT at Mwanza.

In rejoinder, Mr. Mg'arwe maintained that the charge was defective because the criminalization provision was not included hence incurable. He proceeded that it could have been curable if the omission were in respect of subsection.

Regarding the question of ownership, he submitted that the prosecution had a duty to establish ownership.

Having considered the rival submissions, grounds of appeal and the record, the crucial point for determination in this appeal is whether the conviction entered by the trial court was merited.

I have keenly re-evaluated the evidence adduced before the trial court. On the part of the 1<sup>st</sup> appellant there is dispute that he was found with a cow at Kenyamonta market on 10<sup>th</sup> day February, 2021. His defence is that he bought the said cow (P2) from one Julius Marwa. Nonetheless, he did not bother to call the said Julius Marwa to testify in his favour. Further, there is no evidence to suggest that, upon his arrest at Kenyamonta market he mentioned the said Julius Marwa so that he could be arrested. In these circumstances, considering that the 1<sup>st</sup> appellant was undeniably found in possession of the stolen cow and he failed to provide plausible explanations, I am satisfied that the trial court rightly convicted him.

With regard to the 2<sup>nd</sup> appellant Richard Kasunga Nzingaluyaga, I have serious doubts with evidence that led to his conviction. The 2<sup>nd</sup> appellant said that he was arrested by two militiamen on 9<sup>th</sup> February 2021 on the allegations of abusive language against one Bendo Beraga whereas PW4 Inspector Joseph Malimi claims that he arrested him at his home on 10<sup>th</sup> February after getting information through a phone call from PW1 and PW2 that 1<sup>st</sup> appellant confessed that he stole the cattle in collaboration with 2<sup>nd</sup> appellant. The question I asked myself is, if PW1 truly called PW4 on the fateful night and mentioned Nzingaluyaga (2<sup>nd</sup> appellant) as one the culprits he identified at the scene, why did PW4 not start to locate and arrest him immediately after the incident instead he waited until when he got a call from PW1 and PW2 that they found the 1<sup>st</sup> appellant with a stolen cow and he mentioned the 2<sup>nd</sup> appellant Nzingaluyaga. Further it should be noted that a confession statement cannot be used to convict a co-accused unless it is corroborated by other evidence. In this case, I do not find any other evidence which can reliably corroborate the confession (P3).

Moreover, PW2 said that he went at 2<sup>nd</sup> appellant's home on the fateful night but he was told by his wife that Nzingaluyaga (2<sup>nd</sup> appellant) was not present whereas PW4 testified that they arrested him at his home on 10<sup>th</sup> February,

2021 in the morning. Ordinarily, if the 2<sup>nd</sup> appellant were involved in the incident and on the very fateful night PW2 went to look for him at his home, it is against common sense and logic that he would have stayed at his home in the morning of 10<sup>th</sup> February, 2021 waiting to be arrested. Under these circumstances, I entertain serious reservations with regard to the testimonies of PW1, PW2 and PW4 in respect of the 2<sup>nd</sup> appellant's involvement.

In his defence, the 2<sup>nd</sup> appellant said that he was arrested on 9<sup>th</sup> February, 2021 by the militiamen on the allegations of using abusive language against one Bendo Beraga. In my considered view, the 2<sup>nd</sup> appellant's defence raised reasonable doubt. As such, the trial court wrongly convicted him. Had the trial court properly assessed the evidence, it would not have convicted the 2<sup>nd</sup> appellant.

That said and done, I hereby quash conviction and set aside the sentence of seven (7) years meted against the 2<sup>nd</sup> appellant Richard Kasunga Nzingaluyaga. He should therefore be released from custody forthwith unless he is continually held for other lawful cause.

Further, it is worthwhile to note that the sentence of seven (7) years was illegal as the trial court did not have the powers in terms of section 170(1)

of the Criminal Procedure Act. The Subordinate Court cannot impose imprisonment sentence exceeding five years except where such sentence is a minimum penalty provided by the law. The section reads;

***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;***

In this case, the trial magistrate erred in law to impose a sentence of seven-year imprisonment because according to section 5 (b) of the Minimum sentence Act, the minimum punishment for cattle theft is five.

In the event, the appeal is allowed in respect of the 2<sup>nd</sup> appellant Richard Kasunga Nzingaluyaga while it is dismissed in respect of 1<sup>st</sup> appellant Keree Magesa Kururya.

It is so ordered.

Right to appeal is explained.



A handwritten signature in blue ink, appearing to read "A. A. Mbagwa".

**A. A. Mbagwa**

**JUDGE**

**12/10/2022**

**Court:** Judgment delivered in the presence of Nimrod Byamungu (SA) and the 2<sup>nd</sup> appellant this 12<sup>th</sup> day of October, 2022.

A handwritten signature in blue ink, appearing to read "A. A. Mbagwa".

**A. A. Mbagwa**

**JUDGE**

**12/10/2022**