

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

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL APPEAL NO. 1 OF 2021**

**(C/F the District Court of Babati at Babati Criminal Case No. 43 of 2021.)**

**ERICK DANIEL @ AMOSI ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

**28/09/2022 & 02/11/2022**

**GWAE, J**

The appellant, Erick Daniel @ Amosi together with another person by the name of Shaibu Mohamed Mshata were arraigned at the District Court of Babati at Babati charged with the offence of Cattle theft contrary to section 258 (1) and section 268 (1) & (3) of the Penal Code Cap 16 Revised Edition, 2019.

It was alleged by the prosecution that on 5<sup>th</sup> March 2021 the appellant together with his fellow at Gendi area within Babati District did steal one cow valued at Tshs. 600,000/= the property of one John s/o Joseph. However,

before hearing commenced the prosecution withdrew the case against the second accused (Shaibu Mohamed Mshata) under the provision of section 98 (a) of the Criminal Procedure Act Cap 20 Revised Edition, 2019. Therefore, trial proceeded against the appellant who was eventually found guilty of the offence. Consequently, he was sentenced to the term of five (5) years imprisonment.

Aggrieved by both conviction and sentence, the appellant has preferred this appeal with the following grounds of appeal;

1. That, the trial Court erred in law and in fact by failing to observe section 310 of the Criminal Procedure Act. Cap 20 R.E 2019.
2. That, the trial court erred in law and in fact by failing to afford a fair hearing of the accused/ appellant during trial of the case.
3. That, the trial court grossly erred in law and in fact by concluding that there was abundant evidence showing that the prosecution had proved their case beyond reasonable doubt.
4. That, the trial court erred in law and in fact for basing its conviction on the weakness of the appellants defence rather than on strength of the prosecution case.
5. That, the decision of the trial court is marred by irregularities.

On 24<sup>th</sup> August 2022, when parties appeared before me, the appellant was under the representation of the learned counsel, Mr. Masanja whereas the republic was under the representation of Ms. Alice Mtenga, the learned State Attorney. With leave of the court, the appeal was disposed of by way of written submissions.

To be brief, the appellant on the first ground of appeal submitted that, the trial court ignored section 310 of the Criminal Procedure Code Cap 20 R.E 2019. According to him the above section imposes the duty to the trial court to inform the accused of his right to be defended by an advocate. He argued that, there is no point in time the trial court informed the accused his right to defend himself or by his advocate. He emphasized that, since the prosecution side was duly represented by the public prosecutor, who is well acquainted with the procedures of the court. Then, the trial court ought to have observed the principle of fair trial by informing the appellant of his right to defend himself or be defended by an advocate. To bolster his argument, he relied on the following cases **Hassan Kingama vs Republic [2000] T.L.R 200, Lekasi Mesawarifki vs Republic [1993] T.L.R 139, Yusufu Citta Vs Republic [1959] E.A 211** all these cases emphasized on the principle of fair hearing.

On the second ground of appeal, the appellant submitted that, Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1997 which demand for fair trial and hearing was not observed.

On ground number three, it was the appellant submission that, there was contradiction on the testimonies over the color of the bull allegedly to stolen. He further submitted that, by looking on the trial court proceedings the prosecution failed to prove their case on the established principle as the testimonies of the prosecution witnesses totally based on their perceptions and opinion. The appellant supported his argument by citing the book by B.D Chipeta, titled Book for Public Prosecution, 3<sup>rd</sup> Edition at page 212, The book of C.D. Field` s on Law of Evidence, 13<sup>rd</sup> Edition page 878 and the case of **Sultan Seif Nassor vs Republic** [2003] T.L.R 231. Whereby, all of the above authorities emphasize that, prosecution has the burden to prove their case beyond reasonable doubt.

As to the fourth ground of appeal, it was the appellant's submission that, the trial court was supposed to convict the accused not by relying on the defence weakness but on the strength of the prosecution case. Therefore, the trial court erred in law and in fact, by convicting the accused basing on the weakness of the defence case. Emphasis was given through

the case of **Republic vs Kerstin Cameron** [2003] T.L.R 84, and the case of **John s/o Makolobel Kulwa Makolobela and Eric Juma Tanganyika vs Republic** [2002] T.L.R.

Submitting on the last ground of appeal on the complaint that, the trial court proceedings, the appellant was not given chance to cross-examine the prosecution witnesses and that, he was not given the chance to see and challenge all exhibits tendered by prosecution side.

Replying to the appellant submission, on the first ground of appeal it was the submission of the counsel that, the quoted section 310 of the Criminal Procedure Act. **Firstly**, does not make it mandatory for the court to address the accused his legal right to defend. **Secondly**, she submitted that, the provision of the law requires the courts to accord an accused person with an opportunity to enjoy legal representation, if he wanted to hire an advocate to represent him. It was further the submission by the learned counsel for the Republic that, the relied provision of the law does not oblige the courts to inform the accused person over such right. On that point, the counsel invited this court to the case of **Hassan Mohamed Mkande & Another vs Republic** 1991 T.L.R 148 (H.C) the case of **Mussa Ngoolikela vs Republic**, Criminal Appeal No. 148 of 2006 [unreported.]

On the 2<sup>nd</sup> and 3<sup>rd</sup> ground, it was submitted that, the principle of natural justice was well observed. And the accused was given the chance to cross examine but he failed to exercise the same. Ms. Mtenga quoted the case of **Nyerere Nyangue vs Republic**, Criminal Appeal No.67 of 2010 [unreported] where the Court of Appeal stated that, failure to cross-examine witness on important matters customarily implies acceptance of the truth of the witnesses' evidence. The learned State Attorney went further to state that minor discrepancies of colour of the alleged stolen bull does not go to the root of the prosecution case. She emphasized that, even the bull was tendered and admitted to the court as exhibit PEII without any objection from the appellant.

On the fourth ground, it was the respondent's reply that, the evidence illustrated in the proceedings justified the trial court on the reliance of the doctrine of recent possession. She added that, the appellant was found in certainly in possession of the bull. The case of **Joseph Mkubwa and Another vs Republic Criminal Appeal No. 94 of 2007 (Unreported.)** was cited to emphasize on the doctrine of recent possession.

Having briefly given what transpired in the trial court the submissions made by both parties in this appeal. This court is now called upon to answer as to whether this appeal is meritorious or not.

Starting with the first and second ground of appeal, where the main contention of the parties herein is Article 13(6) (a) of the Constitution of the United Republic of Tanzania 1997 on fair hearing during trial of a case and section 310 of the Criminal Procedure Act Cap 20 R.E 2022 which reads as follows;

*"S. 310. Any person, accused before any criminal court, other than a primary court, may be defended by an advocate of the High Court subject to the provisions of any written law relating to the provision of professional services by advocate".*

I have thoroughly read the above quoted provision of the law, the following are the court's observations; **firstly**, that, the said provision does not coach to the mandatory requirement to the trial court to inform an accused person of his right to be represented by an advocate,

**Secondly**, that section 310 does not make it mandatory for the court to address an accused person his right to legal representation and, **thirdly**, that, the provision requires the court to accord the accused person with an

opportunity to enjoy legal representation if he wishes to exercise such rights  
- however;

Nevertheless, be it as it may, a failure of the trial court to inform the accused of his fundamental right to legal representation as per section 310 is not fatal to justify this court to nullify the proceedings of trial court. This position was well discussed by the Court of Appeal of Tanzania in **Msanif Ramadhan Msanif vs. Director of Public Prosecution**, (Criminal Appeal No 454 of 2019) [2022] TZCA 371 (16 June 2022 TANZLII). Where the Court of Appeal faced with similar situation and had the following to say quoting with approval of the case of **Maganga s/o Udugali vs. Republic**, (Criminal Appeal No. 144 of 2017) [2021] TZCA 639 (03 November 2021 TANZLII) where it was stated that;

*"...the law does not impose to the court the duty to inform an accused person that he has the right to be defended by the advocate. The law simply provides that, it is a right of an accused person to be defended by an advocate. After all, every person is presumed to know the law. The appellant cannot therefore be heard complaining that he was not informed of his right to legal representation."*



Guided by the above position of the law and as per the proceedings of the trial court, there is nowhere the appellant informed the trial court that, he needed to exercise his right to legal representation nor did he request to have an assistance of legal aid and that, the trial court denied him of such right. Therefore, he cannot shift that burden to the trial court since it was his duty to exercise his legal right. That being the case, the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal are with no merit.

As to the **third ground** of appeal on the evaluation of evidence where the appellant is found complaining that, there was no enough evidence to find him guilty. He strongly submitted that; the trial court relied on contradictory evidence on the colour of the bull alleged to have been stolen. That PW4, testified that, the colour of the alleged bull is gray in colour while PW5, testified that, the colour of the said bull is Brown in colour, and PW6 and PW7 both testified that the colour of the stolen bull is gray in colour. Therefore, he argued that, the trial court erred in law and in fact by proceeding to convict him basing on the above contradictory evidence. On the other hand, the respondent argued this court to disregard the appellant's arguments as the alleged contradictions on the colour of the alleged stolen bull are minor human error.

This court had to go back to the proceedings of the trial court and the following were noted; that, it is true that, there was such contradiction on the colour of the alleged stolen bull by the prosecution witnesses as submitted by the appellant. However, at page 16 of the proceedings when the trial court observed that, the same was gray in colour and when the accused person was given the chance to say if he has any objection, he said the following I quote;

*"ACCUSED; your honor I do not have any objection. It is true and correct that on that day I was founded (sic) with this bull. It belongs to Julius Moses."*

To my understanding, the above quoted statement given by the accused is to the effect that, the accused himself admitted that, the alleged bull was found in his possession the prosecution witness testified for is that one seen outside the court and admitted as PEII and the same, was observed to be in gray colour. Thus, it is the finding of this court that the alleged contradictions were cured by the fact that, the stolen bull was tendered in court as an exhibit and the same was observed to be gray in colour. Therefore, the appellant's complaint that, due to the alleged discrepancies

the prosecution failed to prove their case on the standard required is with no merit.

On the **4<sup>th</sup>ground** of appeal, the appellant submitted that, the trial court relied on the weak evidence of the appellant to convict and not on the strength of the respondent evidence herein. As stated above while discussing 3<sup>rd</sup> ground of appeal, the Republic managed to establish that, the appellant was found in possession of the bull at Gendi area and even when he stated that the same belonged to Julius Moses he failed to establish as to how the said bull came into his possession. If that is not enough, even when the bull was tendered in the trial court for evidential value, the appellant never objected to have been found in possession of such bull. All these, are enough to say that, the respondent proved their case on the standard required and that, the trial court convicted the accused based on the strength of the respondent case and not as alleged by the appellant. Hence, ground No. 4 equally lacks merit.

On the last ground of appeal, the appellant is complaining to have not been given an opportunity to see and challenge all the exhibits and to cross-examine the respondent's witnesses. In order for this court exercising its appellate jurisdiction to satisfy itself on the appellant's allegation, I visited

the proceedings of the trial court and noted the following; that, the appellant was fully and amply afforded with the right to cross-examine the prosecution witnesses. The proceedings speak for themselves at page, 9, 10, 11, 13, 11, 17, 19, 20 and page 21 where it is plainly revealed that, the appellant was given the chance to cross-examine all the prosecution witnesses. And above all, the proceedings also reveal that all exhibits were shown to the appellant and he was given an opportunity to challenge their admissibility. For instance, when PEI (Appellant's statement) was tendered in the trial court, the appellant admitted to have made the statement but he did not remember the date (see page 15 of the typed proceedings). Moreover, when the respondent sought to tender PEII the appellant did not have any objection on its admissibility and went further to state that, it was true and correct that on the material date he was found with the said bull (see page 17 of the typed proceedings).

Likewise, this court has also observed on the admissibility of exhibit PE III (certificate of Seizure), when the respondent sought to tender the same, the appellant did not object its admissibility (see page 21 of the typed proceedings). In the light of the above court's findings, ground number five

also lacks merit, as this court has not observed any irregularity alleged by the appellant.

The above being said, I find this appeal with no merit, and I proceed to dismiss it in its entirety.

It is so ordered.

**DATED at ARUSHA this 2<sup>nd</sup> day of November, 2022**



  
**M. R. GWAE**  
**JUDGE**