

**IN THE HIGH COURT OF TANZANIA**

**(MOROGORO SUB REGISTRY)**

**AT MOROGORO**

**CRIMINAL APPEAL NO. 43 OF 2022**

*(Arising from the Judgment of the District Court of Kilosa, at Kilosa in Criminal Case No. 178 of 2022)*

**JAILOS SIMON MBEHO .....APPELLANT**

**FAMKA HAMIS MATINDA ..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

**30<sup>th</sup> November, 2022**

**CHABA J,**

In the District Court of Kilosa, at Kilosa the appellants, **Jailos Simon Mbeho** and **Famka Hamis Matinda** were convicted on their own plea of guilty of the offence of Cattle Theft contrary to sections 258 (1) and (268 (1) of the Penal Code [Cap. 16 R. E. 2019], now [R E. 2022] in Criminal Case No. 178 of 2022. It was alleged by the prosecution that on 16<sup>th</sup> day of May, 2022 at about 06:00 hours at Ngaite village within Kilosa District in Morogoro Region the appellants did steal 11 herd of cows valued at Tsh. 7,700,000/=, the property of one Kiliba s/o Sokoine.

The trial Magistrate was satisfied that the plea of guilty entered by the appellants were unequivocal and that the facts narrated by the public

prosecutor did constitute the ingredients of the offence the accused stood charged with. Upon being convicted basing on their own plea of guilty, the appellants on the same day on 6/6/2022 were sentenced to serve a term of five (5) years imprisonment. Disgruntled, the appellants have come to this court protesting for their innocence.

When the appeal was called up for hearing, parties consented that the same be disposed of by way of filing written submission and the court so ordered. Both parties adhered to the court's scheduling orders. Whereas, the appellants were represented by the learned advocate, Prof. Cyriacus Binamungu, the Respondent/Republic enjoyed the legal service of Mr. Emmanuel Kahigi, learned State Attorney.

In a bid to challenge the judgment of the trial court, the appellants fronted four (4) grounds of appeal in their memorandum of appeal. On scrutiny of the appellants' grounds of appeal, I noticed that they were all centred at one complaint to the effect that the trial magistrate erred in law and fact to enter unequivocal plea of guilty to the appellants on the charge which disclosed no offence known to the law.

Arguing in support of the appellants' appeal, Prof. Binamungu submitted that, the position of the law under section 360 (1) of the Criminal Procedure Code [Cap. 20 R. E, 2022] (the CPA) is that, no appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence. However, the Court of Appeal of

Tanzania in the case of **Laurent Mpinga v. R [1983] TLR 166**, listed four exceptions to the above general provision of the law as follows:-  
**One;** *That, even taking into consideration the admitted facts, the plea was imperfect, ambiguous, or unfinished,* **Two;** That, the appellant pleaded guilty as a result of mistakes or misapprehension, **Three;** *That, the charge laid at the appellant's door disclosed no offence known to law,* and **Four;** That, upon the admitted facts the appellant could not in law have been convicted of the offence charged.

Prof. Binamungu submitted further that this appeal fits neatly under the exceptions **one** and **three**. He highlighted that, the facts demonstrating how the said cows were taken out from the hands of the owner (Kiliba) should have been narrated since theft presupposes taking property in possession of someone else without permission with an intention to deprive the owner permanently. Moreover, the court did not explain to the accused persons / the appellants the basic ingredients of the offence charged as both were recorded to respond to this effect: "*it is true*". To buttress his contention, Prof. Binamungu accentuated that in the case of **Seni Masele v. R, Criminal Appeal No. 56 of 2020, HCT at Shinyanga District Registry (Unreported)**, the High Court quoted the principle in the case of **Waziri Said v. R, Criminal Appeal No. 39 of 2017 CAT at p. 7 of the judgment**, and observed that, it is mandatory for the trial magistrate to explain to the accused person the basic ingredients of the offence charged. The Court expounded further that, if the accused then admits all those elements, the magistrate should record what the accused has said nearly as possible in his own words,

and formally enter a plea of guilty.

In view of the above submission, Prof. Binamungu stressed that since the rules were not complied with, he prayed the appellants' appeal be upheld and the appellants be acquitted.

In reply to the appellants' written submission in chief, the learned State Attorney, Mr. Emmanuel Kahigi partly joined hands with the submission put forward by the appellants' counsel that the plea that was taken by the trial court against the appellants was ambiguous one and was unsafe to rely in on both conviction and sentences meted out against the appellants. He referred the Court to the provision of the law under section 228 (2) of the Criminal Procedure Act [Cap. 20 R. E, 2022] (the CPA) and submitted that, where a charge is read over and fully explained to the accused person and the latter admits the charge, the has a duty to enter conviction forthwith. The law says:

*"Section 228 (2) - Where the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary".*

To round up, Mr. Kahigi highlighted that according to the record, the appellants pleaded guilty to the charge, although the truth is that

the same was incomplete after the appellants replied, "it is true". In law that was an equivocal and ambiguous plea. He therefore, prayed the court to allow the appellants' appeal and order a fresh retrial.

In rejoining, Prof. Binamungu submitted that upon going through the reply to his written submission in chief by the counsel for the respondent, he prefaced his disagreement that matter shall be tried de-novo. To reinforce his argument, he cited the case of **Samson Kayora and Leonard Msumba v. R, [1985] 158**, on which the Late Justice Maina (As he then was), allowed the appeal since the charge and facts as given by the prosecution were not consistent with the plea. He then reiterated his prayers in his written submission in chief.

Having considered the rival submissions from both parties, I find it apt to start with the trial court proceedings. On reviewing the same, the following is what had been transpired in the District Court of Kilosa, at Kilosa on 06<sup>th</sup> June, 2022:

*Date* : 06/06/2022  
*Coram* : Hon. A.T. Millanzi - SRM  
*Pros* : D/CPL Pazi  
*Accused* : Present  
*CC* : J. B. Msangi - RMA

***Court:*** Charge read and explained to the accused person in the language understood by him (Swahili) and accused person pleaded thereto: -

***1<sup>st</sup> Accused: True.***

***2<sup>nd</sup> Accused: True.***

*EPG to the offence charged.*

**SGD: A. T. MILLANZI**  
**SENIOR RESIDENT MAGISTRATE**  
**06/06/2022**

**Public prosecutor:** *I pray to read facts of the offence.*

**Court:** *Prayer granted.*

**Facts of the offences.**

*TJailos s/o Simon Mbeho and Famka s/o Hamisi Matinda are jointly and together on 16<sup>th</sup> day of may, 2022 at about 06:00 hours at Ngata village within Kilosa District in Morogoro Region did steal 11 herds valued Tshs. 7,700,000/= property of KILIBA SOKOINE. Following that instance accused persons were arrested hence this present case.*

**SGD: A. T. MILLANZI**  
**SENIOR RESIDENT MAGISTRATE**  
**6/6/2022**

**Court:** *Facts of the offence read over and fully explained to the accused persons in Swahili and in response say.*

**1<sup>st</sup> Accused:** *Facts of the offence are correct and true.*

**1<sup>st</sup> Accused:** *Sgd.*

**2<sup>nd</sup> Accused:** *Facts of the offence are correct and true.*

**2<sup>nd</sup> Accused:** *Sgd.*

**Public Prosecutor:** *Sgd.*

After recording the above details and complied with the legal procedural requirement, the appellants were accordingly convicted on their own plea of guilty and sentenced to serve a term of five (5) years imprisonment. As correctly submitted by the learned counsel for the appellants, the trial court erred both in law and fact upon entered a plea against the appellants which in the eyes of the law was imperfect, ambiguous, or unfinished and that the charge laid at the appellant's door disclosed no offence known to law.

Further, I am in agreement with the counsel for the appellants that the word, "did steal 11 herd of cows" contravened the law as true meaning of the words would mean 11 groups of cows or 11 cows which is confusing and distorts the particulars of the offence. Suffice to say that the facts of the case did not specify what was actually stolen and yet the appellants were asked to plead to the charge.

From the above discussion, though I agree that the substance of the charge was stated to the appellants by the court, and asked whether each of the appellant admits or denies the truth of the charge, but still their own plea of guilty as shown above was imperfect because it ought to have been backed up by additional account, and admission of facts of the case did not disclose the ingredients of the offence of cattle theft known to law. In **Josephat James v. R, Criminal Appeal No. 316 of 2010**, the Court of Appeal of Tanzania observed that: -

*"We entirely subscribe to that view. In the instant case, the trial court was enjoined to seek an additional*

*explanation from the appellant, not only what he considered was "correct" in the charge, but also what was it that he was admitted as the truth therein. With respect, the trial Court was not entitled by the answer given, "it is correct", to distill that it amounted to an admission of the truth of all the facts constituting the offence charged."*  
[Emphasis added].

Similarly, in the case of **Safari Deemay's v R Criminal Appeal No, 269 of 2011 (unreported)**, the Court of Appeal of Tanzania held that: -

*"Great care must be exercised, especially where an accused is faced with a grave offence like the one at hand which attracted life imprisonment. We are also of the settled view that it would be more ideal for an appellant who has pleaded guilty to say more than just, "it is true". A trial court should ask an accused to elaborate, in his own words as to what he is saying "is true".* [Emphasis added].

Coming to the question whether the appellants should be acquitted or the matter be tried de novo, the learned counsel for the appellant when rejoining did not hesitate to tell this Court that he differed with the position held by the learned State Attorney that, in the circumstance of this case, the matter requires an order of a fresh retrial. It is trite law that where the court is satisfied that the conviction was based on equivocal plea, the



court may order retrial as it was underscored by the Court of Appeal of Tanzania in the case of **Baraka Lazaro v. Republic, Criminal Appeal No. 24 of 2016 CAT Bukoba (Unreported)**. Similarly, his Lordship, the Late B. D. Chipeta (As he then was) in his famous Book, goes by the name Magistrate Manual, at p. 31, also made comments on the subject. He stated that:

*"Where a magistrate wrongly holds an ambiguous or equivocal plea or as it is sometimes called an imperfect or unfinished plea, to amount to a plea of guilty and so convict the accused thereon on appeal the conviction will almost certainly be quashed and in a proper case, a retrial will be ordered usually before another magistrate of competent jurisdiction."*

In another case of **Michael Adrian Chaki v. The Republic, Criminal Appeal No. 399 of 2019**, the Court of Appeal was faced with a similar situation and upon being given deep thoughts to the prayer advanced by the learned State Attorney, it came up with the following observations:

*" .... For the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence. We direct the record of the trial court be remitted back to the trial court for it to deal with the appellant as if he had pleaded not guilty, that is to say, the trial court has*

*to proceed with the case from where it had ended before the appellant purportedly pleaded guilty...”.*

From the foregoing observations by the Apex Court in our Country, I find the principle extracted is a good law, and I subscribe to it. Having found that the trial court proceedings was impaired by non-adherence to the legal requirements as conversed above, the appeal is partly allowed and the whole proceedings in Criminal Case No. 178 of 2022 of the District Court of Kilosa are declared nullity. Meanwhile, the appellants' conviction on the purported own plea of guilty, and sentences meted out against them are quashed and set aside, respectively.

Consequently, I order the matter to be tried de novo before another resident magistrate with competent jurisdiction. As soon as practicable, the case file should be remitted to the trial court for compliance with the court's order. In the meantime, appellants shall remain in prison custody waiting for their trial. Expeditious trial to the appellants is paramount importance. **I so order.**

**DATED** at **MOROGORO** this 30<sup>th</sup> day of November, 2022.

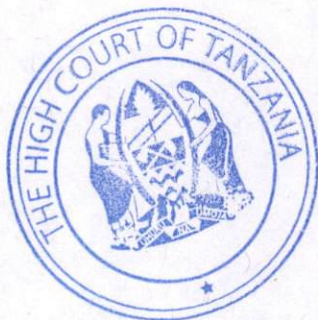


**M. J. CHABA**

**JUDGE**

**30/11/2022**

Right of Appeal to the parties fully explained



  
**M. J. CHABA**

**JUDGE**

**30/11/ 2022.**