

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 134 OF 2021

(Arising from Resident Magistrate Court of Geita at Geita in Criminal Case No. 247 of 2020)

MUSA EMMANUEL DAUD-----APPELLANT

VERSUS

THE REPUBLIC----- RESPONDENT

JUDGMENT

Last Order: 10.2.2022

Judgment: 25.02.2022

M. MNYUKWA, J.

The appellant herein together with four others were charged with the offence of cattle theft contrary to section 268 of the Penal Code, Cap 16[R.E 2019] before the Resident Magistrate Court of Geita at Geita. It was alleged that on 5th June 2020 at Mguso Village within the District and Region of Geita, did steal 18 cows valued at Tsh 18.000.000/= the property of Robert s/o Paul. The appellant denied the charge and as a result the case proceeded to a full trial. In proving the charge against the



appellant, the prosecution relied on the evidence of six witnesses and four documentary evidence. PW1 who was the complainant, gave an account on how the saga started. He said that on 5th June 2020, during the night hours, he was informed by his herdsman one Bahati that his cows were stolen. He searched for the stolen cows but he did not find them. He informed his father and together they raised an alarm but still the cows were not found. In the following morning he reported the matter to the police station that his cows marked as "MK" and others "25" marks on their right and left legs respectively were stolen. He went on that, on 5th July 2020 he received the call from the police that they managed to find 8 cows at *Machinjioni* area in Geita. PW1 stated that, since he was at Biharamulo, he went at Geita police station on 8th July 2020 and found his stolen cows.

In his testimony PW2, stated that, he is living at Maharamba and that PW1 is the son of his brother. He added that, he gave PW1 his 7 cows who were kept on his shed. He went on to state that some of his cows had marks on their left legs, some were redish in colour, others had mixed colours (madoadoa) and some have "25" marks. He further stated that, he received information from PW1 that his cow were stolen, he



rushed to PW1's residence and thereafter they have reported the matter at police station.

On his part PW3, a police officer stated that on 28th June 2020 he was assigned to take the caution statement of the appellant who was in a lock up by that time. He went on that, the appellant was arrested at 3.00 pm and that he recorded the appellant's caution statement starting from 4.00 pm and ended at 5.00 pm. PW3 stated that, he also recorded the caution statement of the of the fourth accused who was brought to the police station on 4th July 2020. On the other hand, PW5 stated to have recorded the caution statement of DW3 and the same was admitted as exhibit before the trial court.

Furthermore, PW4 stated that on 21st June 2020 he received information that a person namely Martine was caught with two stolen heads of cattle alleged to have been stolen at Lwenge village in Geita. He then took the accused to Geita police and interrogated him. Upon interrogation, Martine told him that there were stolen cows from Mgusu and he had involved in stealing those cows with his fellows namely Emmanuel Juma, Daudi and Mussa Emmanuel. Since PW4 was familiar to Emmanuel Juma, DW3, it was easy for him to arrest DW3 at Machinjioni. After interview, DW3 wrote his statement and stated that, he was given



those cows by Elisha, DW4. PW4 went on to state that he was informed by DW4 that the cows were sent to Musanyiwi Msomi who is also familiar to him. He therefore, called him and upon being interrogated, he admitted to have received four cows from DW3 who told him that they were part of his inheritance.

PW4 went on to state that, he went at Masanyiwa's cows shed with certificate of seizure and found four cows. Among them, three cows were reddish in colour and one was whitish. He thereafter, followed all the procedure of filling certificate of seizure and the same was admitted as exhibit P3. The court and all the accused person got an opportunity to see the seized cows. PW4 added that, he called the OCS of Mgusu to know if there was any reported case of cattle theft, the OCS told him they received a complaint from PW1 that his cattle were stolen. Then, he requested PW1 to go at Geita for identifying the seized cows in which he identified three cows that were seized in exhibit P3. He added that one of the cows, the whitish one died because of sickness before being identified by PW1 and he was given the skin. The three heads of cattle and skin of dead cow were received and were marked as exhibit P4 collectively and P5.

In his testimony, PW6 stated that on 5th July 2020 around 4.00 pm he was at his place of work and he saw a young man, DW3 with four cows



of different colours of which two were reddish, one with mixed colours and another one in whitish. After greeting, DW3 told him that he was selling those cows for Tsh 1,200,000/=. After the negotiations they agreed at the price of Tsh 600,000/=. PW6 asked DW3 if he possessed the requisite cattle permit, he replied that the permit was with his uncle. PW6 became suspicious and notified a police officer namely Isack who upon arrival arrested the accused person. PW6 stated that, later on the three cows were identified together with one skin of the dead cow.

In his defence, DWI stated that he was being arrested on 28/06/2020 at Nyamadoke village around 1.00 a.m and sent to Geita police station. On the following day, he was sent at police officers mess and he was kept in custody. He denied to have been involved in cattle theft and he did not know why he was connected to cattle theft. DW 2 stated that, he was being arrested on 23rd June 2020 around 7.00 a.m and sent to police station. Then, the police ordered him to accompany them to his butcher but he informed them that he does not have a butcher and he was not selling meat. He was later on associated with cattle theft and arraigned before the trial court.

On his part DW3 stated that he was being arrested on 23/06/2020 and sent to police station. He denied to have participated in cattle theft



and alleged that the case was cooked. DW4 stated that, he received a call on 3rd June 2020 that his mother passed away and on 4th June 2020 he went to Sirari to attend funeral ceremony and he came back at Geita on 27th June 2020. He was being arrested on 28th June 2020 when he was at his office and was kept in custody until on 29th June 2020 when he was released on bail. He was arraigned before the trial court for the offence of cattle theft together with his co-accused persons including the appellant. DW4 wished to rely on the defence of alibi, but the same was rejected because he did not give prior notice to the trial court.

After the full trial, the trial court convicted the appellant together with the 3rd and 4th accused and sentenced them to 15 years imprisonment. The appellant, being dissatisfied with the trial court's decision, has knocked the doors of this court with what appears to be 5 grounds of appeal but 6 in total as number 4 being in repetitive.

His grounds of appeal are as follows;

1. That, the trial court erred in law and facts by admitting the cautioned statement (Exh. P1) of the Appellant herein while the same was recorded in contravention of the law.
2. That, the trial court erred in law when the trial magistrate proceeds with the case without recording the witness statements while the

same contravene section 210(3) of the Criminal Procedure Act, Cap 20 R.E 2019.

3. That, the trial magistrate erred in law by convicting the Appellant herein without being given an opportunity to call his wife as a witness during the trial within the trial hearing.
4. That, the trial court erred in law and facts by failure to consider and evaluate the defence evidence while the same was recorded in contravention of the law.
4. That, the trial court erred in law and facts by convicting the Appellant herein while the stolen property i.e cows was improper, uncertainties and with reasonable doubts.
5. That, the trial court erred in law and fact by convicting the Appellant herein while the prosecution side did not proof their case beyond reasonable doubts.

The appellant prays the appeal to be allowed, the conviction and sentence be set aside.

During the hearing of this appeal, the appellant was represented by Mr. Paul John Hongo learned advocate, while the Respondent enjoyed the



service of Ms. Magreth Mwaseba, Senior State Attorney and the appeal was argued orally.

The appellant's advocate started submitting on the first ground of appeal that, the trial court misdirected itself by admitting caution statement (Exhibit P1) and recorded it without following the procedure of law. That, the appellant's cautioned statement was taken out of time as required by the law. He went on that, the accused was arrested on 6/7/2020 and his cautioned statement was taken on 8/7/2020 which is out of the 4 hours as prescribed under the law. The counsel cited section 50(1)(a) of the Criminal Procedure Act. Cap 20 R.E 2019, and the case of **Geoffrey Isdory Nyasio V R**, Criminal Appeal No. 270 of 2017 on page 15 and 16 to cement his argument.

On the second ground, the appellant's counsel submitted that, the trial magistrate misdirected herself by proceeding with the case without recording witness statement contrary to section 210(3) of the Criminal Procedure Act Cap 20 R.E 2019. He submitted that the above provision requires a magistrate or judge to record witnesses' statement and read over the recorded statement something that was not done by the trial magistrate as per the requirement of the law. He submitted that, on that basis the whole proceeding is fatal. He went on to cite the case of



Malando Charles Madyuni V Republic, Criminal Appeal No. 210 of 210 and the case of **Kababu Matiku V R**, Criminal Appeal NO. 288 of 2018, HC at Mwanza.

On the third ground, Appellant counsel submitted that, the trial magistrate erred in law by convicting the appellant without giving him an opportunity to call his wife as a witness during the hearing of a trial within a trial. That, the appellant requested for his wife to be called to state his condition and the magistrate refused.

On the fourth ground, Appellant counsel submitted that the magistrate erred in law and fact by convicting the appellant while the stolen property was improperly identified as there was uncertainties and reasonable doubt. That, the allegedly stolen cows were questionable on colours as the proceeding on page 3 shows that the cows had "25 marks" on left-hand legs and others said they were reddish in colour while others had mixed colours (madoa doa). He further submitted that, there was no any exhibit tendered to substantiate on colours of the cows and therefore the above identification was cooked.

On the fifth ground, the appellant's counsel submitted that the trial court erred in law and facts by convicting the appellant while prosecution side did not prove its case beyond reasonable doubt. That, the

prosecution did not prove its case as there was a lot of doubts on allegedly stolen cows and the conviction based on non-adherence of the law regarding taking of accused caution statement and during hearing. He finalised his submission by praying this court to allow the appeal and set aside the conviction and sentence and the appellant be set free.

Responding to the appellants submission, Ms. Mwaseba state attorney started by supporting the conviction and sentencing of the appellant in lower court. She then went on to submit on the first ground that, the caution statement of the appellant was taken within time as page 16 of the proceeding shows appellant's statement was taken on 28/6/2020 according to PW3, and the same was corroborated by the appellant himself as reflected on page 48 of the proceeding and therefore the said ground was an afterthought and should be dismissed.

On the second ground, the respondent counsel argued that, proceedings were properly taken and appellant's counsel misdirected himself and even the case supplied by the advocate are not relevant at our case at hand and therefore this ground lack merits. She further submitted that there is no failure of justice under S. 388(1) of the Criminal Procedure Act, Cap. 20 R.E 2019 and prayed for this ground to be dismissed.



On the third ground, the respondent counsel submitted that, the proceeding does not show if the appellant requested for his wife to be called as a witness. That the appellant defended himself as per page 20 of the proceeding and he did not request for his wife to be called. The respondent counsel prayed for the ground to be dismissed.

On the fourth ground, the respondent counsel submitted that the court satisfied itself as to the colour of the cows to be reddish and whitish in colour as the cows were brought before the court for identification as it is reflected on page 28 of the proceeding. That, page 12 of the proceeding also corroborates that evidence by describing the colours of the cows together with the evidence of PW6 who bought those cows from the appellant as reflected on page 42 of the proceeding. The respondent counsel prayed for the ground to be dismissed as it is not merited.

On the last ground, the respondent counsel submitted that, prosecution side had proved their case beyond reasonable doubt as seen throughout the entire proceeding and the accused cautioned statement as he confessed to have committed the said offence. The respondent counsel winded his submission by praying this court to dismiss the appeal as the appellant was properly convicted and sentenced.



In rejoining respondent's submission, the appellant's counsel cemented that appellant's caution statement was taken out of time as reflected on page 20 of the proceeding as it shows that the appellant was arrested on 28/6/2020 and kept locked up at Geita police station, he was sent to police mess on 29/6/2020 and therefore the caution statement was out of time.

He also reiterates that, witness statement did not comply with section 210(3) of the Criminal Procedure Act, Cap 20 R.E 2019. Lastly, he submitted that cows were not brought before the court and rather it was the cow's skin as per courts proceedings. He wined his submission by reiterate his prayers that this appeal be allowed, conviction and sentence be set aside and the appellant be set free.

After both parties' submission this court remains with one issue as to whether this appeal is merited. In answering this issue, I will determine each ground as argued by parties. Starting with the first ground of appeal, I concur with the appellant's counsel that time for recording of caution statement must adhere to the law as provided under section 50 (1)(a) of the Criminal Procedure Act Cap 20 [R.E 2019].

The law requires the interview of an accused person to commence within four hours after his arrest. This is also visible in the case of **Anold**



Loishie@ Leshai V R, Criminal Appeal No. 249 of 2017 CAT at Arusha, as the court stressed the strict compliance of the provision of section 50(1) of the CPA. The time for interview was also lightened in the case of **Geofrey Isdory Nyasio V R** (Supra) as rightly cited by the appellant's counsel.

The appellant's counsel averred that the appellant was arrested on 6/7/2020 and his caution statement was taken on 8/7/2020 as opposed to the prescribed time under the law something which was opposed by the respondent's counsel who submitted that the caution statement was taken on 28/6/2020 and also corroborated by the appellant himself. Going through the trial court's proceedings, firstly PW3 narrated to have interviewed the 1st accused who is now the appellant on 28/06/2020 starting from 4:00 pm up to 5:00 pm and added that the accused person was arrested on 28/06/2020 on 3:00 pm implying to be the same day the appellant was arrested. Moreover, the records show that the appellant did not cross examine the witness on the said time and he even narrated to be arrested on the same date of 28/6/2020 during his defence when trial within a trial was conducted. Keeping in mind that the failure of the appellant to cross examine on this important matter imply that, the fact



is true, this also can be seen in the case of **Rashidi Sarufu Vs R**, Criminal Appeal No. 467 of 2019 CAT at Iringa.

This court visited the caution statement that was admitted as Exhibit P1 and find it dated 28/6/2020 taken from 4:00 pm to 5:00 pm. Furthermore, during the appellant's defence he only mention the date he was arrested to be 28/6/2020 and brought to Geita Police station without stating whether he was interviewed or not. From this finding it is clear that the appellant's caution statement was taken within time as opposed to what was submitted by appellant's counsel and therefore it was rightly admitted in court and for this reason, I dismiss this ground.

On the second ground, appellant's counsel fault the trial court judgement for the magistrate failure to record witness statement contrary to section 210(3) of the Criminal Procedure Act, Cap. 20 [RE 2019]. Section 210(3) of the Criminal Procedure Act, Cap. 20 R.E 2019 provides that:

210(3) the Magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence.



From that provision, appellant's counsel alleges that, the trial magistrate did not adhere to the requirement as it is required on the above provision and so the whole proceeding is fatal. The counsel for appellant supported his assertion with the case of **Malando Charles V R** (supra) and **Kababu Matiku V R** (supra). I concur with the respondent's counsel that the cited cases by the appellant's counsel are both irrelevant to our case at hand as both cases concerned about taking of witness's evidence to be in narrative form and in first person and not to be in reported speech.

However, I went through trial court's records and find that it is true that there was nowhere that the magistrate took the liberty to inform the witnesses of their rights under section 210(3) of the Criminal Procedure Act, Cap. 20 RE. 2019 that the recorded evidence could be read over to them if they wish so and any comment thereto be recorded. However, I incline to the respondent's submission that there was no any failure to justice regarding the omission by the magistrate under section 210(3) of the CPA. The reason behind my inclination is that, through the courts records I did not find anywhere were the witnesses requested for their evidence to be read over and the magistrate refused that request. That is to say, there was no any failure of justice to that situation.



The decision of the Court of Appeal in the case of **Masoud Mgesi v R**, Criminal Appeal No 195 of 2018, CAT at Dar es salaam (unreported) when faced with a similar situation had this to say:

"... It is the witness who has the right to complain against the trial court's failure to read evidence to him. It is also evident from the above cases that the complaint can only be fatal where the authenticity of the record is in issue. There is nothing on record that there was any complaint before the trial court that the appellant exercised his right to have his evidence read over to him. Similarly, the authenticity of the record is not in issue."

Guided by the above decision, it is my firm view that the omission of the trial court to comply with the requirement of section 310(3) of the Criminal Procedure Act, Cap 20 R.E 2019 did not occasion failure of justice in any manner considering the fact that the appellant got an opportunity to cross examine the prosecution witness.

As it was rightly held in the case of **Shaban Mrondo v R**, Criminal Appeal No 282 of 2010 (unreported) that the irregularity on non-compliance with section 210(3) of the Criminal Procedure Act, Cap 20 R.E 2019 is inconsequential, it is curable under section 388(1) of the Criminal Procedure Act, Cap 20 R.E 2019. And so, for that reason I invoke section 388(1) of the Criminal Procedure Act, Cap 20 RE. 2019 to cover such



omission done by the magistrate and dismiss the second ground of appeal.

On the third ground, the appellant counsel faults the trial court conviction on the reason that the appellant was not given an opportunity to call his wife as a witness. The respondent counsel contended on this ground by submitting that the appellant did not request to call his wife as a witness. It is my considered view that, the appellant had a duty to call his wife as a witness if he felt that she was an important witness. Moreover, it is not the duty of the court to call witness unless the court sees it necessary. This is also reflected under section 112 of Evidence Act which states that;

"The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by the law that proof of that fact shall lie on any other person."

From the wording of that provision, it is clear that the appellant had a duty to call his witness whom he thinks will prove his assertion. And therefore, it was not the duty of court to call that witness unless he requested the assistance of court for his wife to be called and the court refused.



Besides, throughout the trial court's record there is no indication that the appellant requested for his wife to be called to testify and the magistrate refused. Hearing of defence in inquiry proceeding is seen on page 19 and 20 of the typed proceeding and the proceeding does not show if the appellant requested for his wife to be called to testify. On page 20 of the trial court's proceedings, the appellant prayed to close his case after he had defended.

The position of the Court of Appeal is clear on the failure of a party to call a material witness. In the case of **Boniface Kundakiza Tarimon v R**, Criminal Appeal No 350 of 2008 (unreported) as quoted by approval in the case of **Paschal Yoya @ Maganga v R**, Criminal Appeal No 248 of 2017, the Court held that:

"... It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible one."

Consistent with the above holding, this ground also lacks merit and it is hereby dismissed.

On the forth ground of appeal, the appellant's counsel submitted that there was uncertainties and improper identification of the alleged



stolen cows. From the court's records, the stolen cows were identified by PW1, PW2 and PW4 who also tendered Exhibit P4. From the evidence narrated by PW1 and PW1, they witnessed that cows had identification marks as "MK" and "25 marks" on their legs and they were reddish in colour and others were whitish. Also, the trial court's records reveal further that Exhibit P4 were 3 heads of cattle with the same colour as narrated by PW1 and PW2. For that reason, I find no contradictions as to the identification of the stolen cows and I proceed to dismiss the fourth ground of appeal.

On the last ground of appeal, that the prosecution case was not proved beyond reasonable doubt, it is my considered view that the prosecution proved their case beyond reasonable doubt. The reason behind being that, the caution statement was taken within time as it is rightly reflected on the trial court's proceedings and Exhibit P1. The prosecution managed to properly identify the stolen property which were some of the stolen cows as reflected on Exhibit P4. And lastly the appellant failed to raise any reasonable doubt on prosecution case or prove his defence that he did not commit the offence. For that reason, I dismiss the fifth ground of appeal as well.



For the reasons explained above, I find that the trial court findings were proper, for the offence of cattle theft was proved beyond reasonable doubts. I therefore proceed to uphold the decision of the trial court and dismiss the appeal in its entirety.

Right to appeal fully explained.



A handwritten signature in blue ink, consisting of stylized initials and a surname.

M. MNYUKWA
JUDGE
25/2/2022

Judgment delivered in the presence of parties' counsel.

A handwritten signature in blue ink, identical to the one above.

M. MNYUKWA
JUDGE
25/2/2022