

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CONSOLIDATED CRIMINAL CASES APPEAL No.92 & 96 OF 2021

(Arising from the District Court of Serengeti at Serengeti in Criminal Case No. 163 of 2020)

MARWA JOSEPH @ MUHERE

GODFREY MEWAMA @ KITERECHA } **APPELLANTS**

Versus

REPUBLIC **RESPONDENT**

JUDGMENT

21.02.2022 & 03.03.2022

F.H. Mtulya, J.:

The **District Court of Serengeti at Mugumu** (the district court) in **Criminal Case No. 163 of 2020** (the case) on the 14th day of June 2021 convicted Mr. Marwa Joseph @ Muhere (the first appellant) and Mr. Godfrey Mewama @ Kiterecha (the second appellant) for the offence of animal stealing contrary to section 265 and 268 (1) & (3) of the **Penal Code** [Cap. 16 R.E. 2019] (the Code) and were sentenced to fifteen (15) years imprisonment.

The facts presented before the district court show that forty six (46) herds of cattle were stolen from Mr. Samwel Werema on the 10th day of March 2019 at noon hours within Nyichoka Village in Serengeti District of Mara Region. Following the theft incident, four (4) persons were arrested and connected to the offence. The four (4) persons were: the first appellant, second appellant, Mr. Gamaina

Mtera @ Chacha (Chacha) and Mr. Nanai William @ Goshashi (Nanai). After a full hearing of the case, Mr. Chacha and Mr. Nanai were acquitted for lack of evidence to prove the case against them.

The circumstances which led to the arrest of the four (4) persons and arraignment of the same to the district court to answer the charges of stealing animals are well explained by Mr. Samwel Werema (PW1) that:

...I recall on 10/03/2019 about 03:30pm, I was grazing my animals...I discovered that 46 herds of cattle were missing...On 11/03/2019, I went to Mugumu Police Station to report the matter. I also reported the matter to different people in my village...on 17/03/2019, I received information from Paulo Msongo that he saw my two cattle at a slaughter house at Mugumu Township...I told him to report to police station and the two cattle were taken to Mugumu Police Station. My cattle had mark C from stomach to the thigh in the right side, V torn into ears and 11 at the tail...I come to police station and identified my two cattle...I found one bull at the 4th accused person's premises. I asked him where he got my cow and explained to me that he bought it at Mugumu auction on 01/09/2019...from the 2nd accused person ...the 2nd accused person explained to buy the cattle from the third accused person...on 17/12/ 2019, I received

information that one cattle was dead and they were kept into government pound.

Mr. Paulo Msongo and a watchman at the slaughter house, Mr. Issaya Peter @ John were brought at the district court to testify as prosecution witness number four and three respectively. PW3 in brief testified that the first appellant had brought into his slaughter house two herds of cattle attached with permit on 17/03/2019 hence allowed him to keep them for slaughtering on the next day. PW4 on his part testified that on 17/03/2019, he went at the slaughter house and found two cows of Marwa Joseph Muhere and the watchman (PW3) had informed him the cows were brought by the first appellant for slaughter on the next day.

According to PW4, he reported the matter to the police station and the two cattle were taken to police station and the next morning the first appellant was arrested at his home residence in Nyichoka village. After registration of evidence of PW1 to PW4, only one exhibit of cattle transport permit was tendered by Mr. Fanuel Muyambe, (PW2), Hamlet Chairman, and was marked PE. 1. In his testimony, as depicted at page 18 of the proceedings of the district court, PW2 testified that he drafted the permit without inspecting the cattle marks.

The facts were also silent on what transpired with regard to seizure of cattle procedures and carcass of the one cow who was

reported dead by PW1. Again, since completion of PW4 testimony on the 5th day of October 2020, no any other witness who was summoned until 20th April 2021, when a police officer, F. 3785 Det. /Corporal Proches appeared for testimony and tendering of exhibits. The reasons of six (6) months delay is well explained by Det./Ssgt. Paschal (PP) on 19th April 2021, as is displayed at page 30 of the typed proceedings of the district court in the case, that:

...our exhibits are not prepared since the witness is coming from leave. We pray for another hearing date.

The exhibits to be prepared...

It was unfortunate that Det. /Ssgt. Paschal remained silent on which type of exhibits which were prepared by Det. /Corporal Proches. However, during the preliminary hearing on 3rd June 2020, as depicted at page 12 of the proceedings of the district court, the prosecution, prayed to invite seven witnesses and three exhibits, namely: three herds of cattle, seizure note and permit of transportation of cattle.

On the 20th April 2021, Det. /Corporal Proches was summoned to appear as prosecution witness number five (PW5) and testified briefly that the first appellant was arrested on 17th March 2019 at the slaughter house where he went to slaughter the cattle. Apart from his evidence, which were largely on his investigation of the matter, he also tendered cautioned statement of the Mr. Nanai

(exhibit PE. 2), cautioned statement of the second appellant (exhibit PE. 3), cattle postmortem report (exhibit E. 4), and two cattle (exhibit PE. 5).

On their defence, the first appellant testified that he was arrested at his home residence on the 18th March 2019 and was not informed of the reasons of arrest hence was questioned to reply the charges of cattle stealing at the district court. The prosecution did not cross-examine him on dates discrepancies, as is depicted at page 42 of the proceedings at the district court. On his part, the second appellant testified that he sold a cow marked *00* at the right thigh to Mr. Nanai on 17th July 2018, but was told to have sold a stolen cow on 20th September 2019. According to the second appellant, he bought the cow in an auction on 11th July 2017 and had a transport permit given to Mr. Nanai who also sold with permit to Mr. Gamaina.

Following the highlighted evidences of the prosecution and conviction of the first and second appellants by the district court, the appellants were aggrieved by the decision hence each one had preferred his own appeal in this court, which were consolidated during the hearing of the appeal.

In order to persuade this court to decide in their favour, the appellant had hired the legal services of Mr. Innocent Kisigiro, learned counsel. When Mr. Kisigiro was invited to take the floor of

this court, he combined the grounds of the two (2) appeals and produced three (3) important complaints, namely: first, identification of the stolen cattle; second, seizure certificate of the cattle; and finally surprises in bringing and admitting new exhibits in the case.

In his brief submission in favour of the appeal, Mr. Kisigiro stated that the record shows that three (3) cattle were recovered from the stolen forty six (46). The cattle were found at two (2) different places, at the slaughter house and Mr. Gamaina's residence. The one who was found at Mr. Gamaina's house, is alleged to have been sold by the Mr. Nanai who bought it from the second appellant.

According to Mr. Kisigiro, the three (3) accused persons were joined by the first appellant to sum up the three (3) cattle, but no exhibit of the one cattle who allegedly found at Mr. Gamaina's house was tendered in the case. To his opinion, all facts show the case was fabricated, as during the preliminary hearing on 3rd June 2020 the prosecution stated that it will bring the three (3) cattle, whereas PW1 testified on 18th August 2020 that he was aware of the expiry of one cattle in government pound since 17th December 2019. Mr. Kisigiro contended further that on 20th April 2021, when PW5 was giving evidence, he produced postmortem report to show that the disputed cattle expired on 17th December 2019, but the exhibit was not part of the proceedings during preliminary hearing, and no-

where the leave of the court and accused person was sought to avoid surprises during proceedings. Additionally, Mr. Kisigiro stated that the exhibit was tendered by a police officer instead of the livestock doctor who prepared the report, and that no plausible explanation was tendered to show difficulties in summoning him. Following these facts, and considering the prosecution took more than six (6) months in preparation of evidence, Mr. Kisigiro thinks that the evidences were cooked as they were not known when the prosecution prayed preparation of the same on 19th April 2019 and in the case , the exhibits were not read before the district court during the preliminary stages of the case.

Mr. Kisigiro complained further that exhibit PE.4 was unknown to the court and accused person until when PW5 came to court to tender after six (6) months without any plausible explanation of the absence of livestock doctor. To Mr. Kisigiro this is a doubt which this court may take note. With the other two (2) cows which were tendered in the district court as exhibit PE.5, Mr. Kisigiro submitted the exhibit does not show how it found its way to the district court from PW1. According to Mr. Kisigiro, the two (2) cattle were driven by PW1 from Mugeta area in Bunda District to Mugumu area of Serengeti District, went through police station and finally to the government pound.

To Mr. Kisigiro, the three (3) cattle which claimed to have been found stolen and found are not supported by any documents showing the process from identification, arrest, seizure, transportation, and keeping of the animals. Mr. Kisigiro stated further that the cattle were changing hands without papers hence it was possible for the cattle to be tempered, and in any case record is silent on whether PW1 identified them in the district court during the hearing.

In order to bolster his argument, he cited the law in section 38 (1) & (3) of the **Criminal Procedure Act** [Cap. 20 R.E. 2019] (the Act) and decision of the Court of Appeal in **Malumbo v. Director of Public Prosecution** [2011] 1 EA 280 and this court in **Nyagete Masasi @ Magasi & Another v. Republic**, Criminal Appeal No. 35 of 2014 contending that the case is full of faults to doubt. .

Mr. Kisigiro further complained on the findings of the district court at page 9 of the judgment which shows that the first appellant was recently found with the two (2) cattle while there are no facts which were tendered to substantiate the matter. According to Mr. Kisigiro, the learned magistrate who sat at the district court imported his own facts to convict the first appellant as the facts on record shows that the cattle were found at the slaughter house and first accused person arrested at his home residence.

The submission of Mr. Kisigiro was protested by Ms. Agma Haule, learned State Attorney, who appeared for the republic. On her part, Ms. Haule submitted that the case against the appellants was proved beyond reasonable doubt and the decision of the district court is proper as per evidence registered during the hearing of the case. In order to substantiate her argument, Ms. Haule stated that: first, the cattle which connects the second appellant expired in the government pound and PW1 & PW5 were summoned to testify and were not cross-examined on the contest registered by Mr. Kisigiro; second, exhibit PE. 4 was tendered and admitted in the case without any protest; and third, the accused persons did not protest tendering of PE. 4 by co-investigator, PW5 who had knowledge of the exhibit. In order to bolster her arguments submitted above, Ms. Haule cited section 240 (3) of the Act and precedent in *Martin Misara v. Republic*, Criminal Appeal No. 428 of 2016

Ms. Haule submitted further that identification of the cattle was done by the owner of the cattle PW1 hence it was impossible for police officers to seize the cattle and produce certificate of seizure in the district court. With chain of custody of exhibits, Ms. Haule submitted that the chain was not broken as the cattle were seized from Mr. Gamaina and slaughter house to police station as it was testified by PW5 and were brought in the district court as exhibits. In

his submission Ms. Haule distinguished properties that can be tempered and those which are difficult to temper with, like cattle.

Similarly, Ms. Haule stated that the prosecution is not bound by the parties or courts of law in its prosecution plans and there is no any fault in tendering new evidences during trial, provided the accused person do not protest. In order to bolster her submission, Ms. Haule cited section 38 (1) and precedents in **Kadiria Said Kimaro v. Republic**, Criminal Appeal No. 301 of 2007 and **Mustafa Darajani v. Republic, Criminal Appeal No. 242 of 2008**. Finally, Ms. Haule submitted that the case was proved beyond reasonable doubt as the appellants were found with the cattle and had no plausible explanations and in any case the evidence of PW1 to PW5 were consistent of each other to convict the appellants.

In a brief rejoinder, Mr. Kisigiro submitted that exhibit PE.4 was admitted without abiding with the law and in any case the record is silent on where-about of the livestock doctor to testify on PE.4. In his opinion, admission of documents in courts is one thing and validity of the proceedings is another, and that the district court as custodian of the law and justice was supposed to intervene to deliver justice to the parties as required by section 240 (2) of the Act.

According to Mr. Kisigiro, all accused persons were lay persons and the court was supposed to let them aware of the documents which have huge impact on their rights. Mr. Kisigiro complained further that the prosecution during preliminary hearing stated to rely in three documents and later prayed to prepare others, which were unknown to the appellants and the district court. In his thinking, Mr. Kisigiro submitted that new evidences were fabricated after all four prosecution witnesses failed to prove the case against the accused persons.

With regard to chain of custody and identification of the cattle, Mr. Kisigiro rejoined that there is nothing on record to show movement of the cattle from when PW1 seized them in Mugeta to police station, government pound to district court. To Mr. Kisigiro, even a person who kept the cattle in a government kraal was not marshalled in the district court to testify the connection and sequence of events in entry and exit of the cattle in his area of jurisdiction. Finally, Mr, Kisigiro stated that the case before the district court had gaps which may benefit the appellants.

On my part, I will start with evidence in PE. 1 which displays the following facts:

Halmashauri ya Kijiji cha Nyichoka

Kitongoji cha Songambele,

S.L.P. 147 Mugumu

16-03-2019

YAH: JOSEPH CHACHA

Mtajwa hapo juu ni mkazi wa Kitongoji cha Songambe. Amefika kuchukua kibali cha kusafirisha mifugo yake kwenda matare. Ng'ombe wawili (2) wote ni majike. Ni mali yake.

Ndimi, F. Mwiyaambe

Mwenyekiti wa Kitongoji Cha Songambe

Kijiji cha Nyichoka.

This exhibit places the first appellant into allegation and conviction by the district court. However, the exhibit has no details of colours or marks to distinguish the two (2) cattle from other cattle, despite several registration of facts and evidences from the prosecution witnesses that the cattle were marked C from the stomach to the thigh in the right leg, V torn into ears, 11 at the tails. Any reasonable person would ask himself, in a circumstances where the society live with cattle theft, to allow such a general statements in a permit to transport cattle. In other words, was a hamlet chairman reasonable to prepare such a general permit in absence of specific marks which distinguish cattle? The reply is obvious not. In any case, it is difficult to establish whether the cattle ferried by the first appellant are the same and similar to those found at the slaughter house.

The seizure certificate which is complained in this court has meaning in that regard. At least to show the cattle transported and cattle seized at the slaughter house. I understand a watchman at the slaughter house, Mr. Issaya Peter @ John (PW3) testified to have received two (2) cattle from the first appellant. However, the name displayed in the permit exhibit PE.1 displays different name of Chacha Joseph. In my opinion, all these discrepancies raise doubts in prosecution case.

On the other hand the unshaken evidence of the second appellant is straight forward. For easy reference of his brief testimony, the following text is extracted:

I recall on 17/07/2018. I became sick. I went to the second accused to ask him to buy my one cow, he agreed...I confessed to sell one cow to the second accused...the cow had mark 00 from the right thigh...the cow was Mtamba. Amos Mwema was my witness. I bought it from the auction on 11/07/2017. The said cattle permit was from Nyichoka Village. I know the seller...I did not confess that I stole the cow. I bought the cow with no mark.

The permit which is alleged by the second appellant was given to Mr. Nanai during the sale agreement as depicted in the evidence of Mr. Nanai (DW2). The same permit was conveyed to Mr. Gamaini (DW4) during the sale agreement of a cow as depicted in the

testimony of DW2 and DW4 registered in the district court on 3rd June 2021. However, the prosecution declined to inquire on this very important piece of information and documents which are crucial to establish whether the same cow who was shifting hands from the first appellant, DW2 and DW4. Similarly, after seizure of the cattle at DW4's residence, no efforts were made to make sure that the shifting of hands from DW4, PW5, government kraal and to the district court is recorded to eliminate any possibility of faults. It is unfortunate that the watchman in the government kraal was not called to testify. Even after the expiry of the cattle in the kraal and examination of the same, no livestock doctor was summoned in the district court.

In short, the process of shifting exhibits without record is highly discouraged by the practice of the Court of Appeal in **Malumbo v. Director of Public Prosecution** (supra) in the following words:

It is important for police to ensure that the exhibits are handled carefully as they are vital evidence. Their preservation, loss or tempering will depend on how they are handled. Since the police never followed Directive Number 31 of the Police General Orders Number 229, the possibility of tempering with the exhibit, particularly when it was under police custody cannot be ruled out. Thus, it cannot be safely said that the evidence identified at the trial was the same

exhibit seized from the appellant at the time of his arrest and search...while Police Orders are guidelines, they are still important and vital guidelines in the smooth administration of justice.

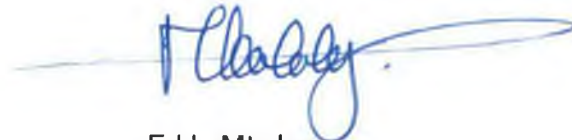
Having noted the above paragraph extracted from our superior court and the faults identified in this appeal, there is no possibility to state that the prosecution had produced good evidence to display commission of the offence beyond reasonable doubt as per requirement of the law in section 3 (2) (a), 110 & 111 of the **Evidence Act** [Cap. 6 R.E. 2002] (the Evidence Act) and precedents in **John Makorobela & Kulwa Makorobel v. Republic** [2002] TLR 296 and **Jonas Nkize v. Republic** [1992] TLR 213. **Said Hemed v. Republic** [1987] TLR 117, **Mohamed Matula v. Republic** [1995] TLR 3, and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005). The identified doubts in this case are to be resolved in favour of the appellants (see: **Mohamed Said Matula v. Republic** [1995] TLR 3).

I have therefore decided to interfere the conviction and sentence meted to the appellants as there are clear misdirections and no-direction on the materials produced in the case at the district court and hereby allow the appeal and order the appellants, Mr. Marwa Joseph @ Muhere and Mr. Godfrey Mewama @ Kiterecha, be

released from prison custody forthwith unless they are held for other lawful cause.

It is so ordered.

Right of appeal explained.

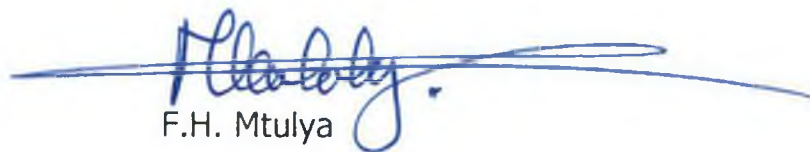


F.H. Mtulya

Judge

03.03.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned Senior State Attorney, Mr. Yesse Temba and in the presence of the appellant's learned counsel, Mr. Innocent Kisigiuro through teleconference.



F.H. Mtulya

Judge

03.03.2022