

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 187 OF 2022

(Originating from the District Court of Kibaha at Kibaha in Criminal Case No.

38 of 2021 Hon. F.L Kibona, RM, dated 27th of September, 2022.)

HASHIMU MOHAMED KINANDA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

6th February, 2023 & 27th March, 2023

POMO, J.

Hashimu Mohamed Kinanda, the appellant herein, together with Shabani Ramadhani Luhi who is not a party to the appeal, were arraigned before the District Court of Kibaha at Kibaha (the trial court) facing a charge of stealing animals contrary to section 265 and 268 of Penal Code, [Cap 16 R.E 2019]. The allegations by the prosecution during trial was that on 10th day of May, 2021 at Muheza Tangini area within Kibaha District, in Coast Region, the two did steal 25 cows valued at fifty Million Tanzania Shillings (TZS. 50,000,000/=) and 7 goats valued Three hundred thousand shillings

(TZS. 300,000/=), the property of Rajabu Maulid. The prosecution paraded 12 witnesses and tendered 5 Exhibits to prove their case. Having heard the evidence, the trial court was satisfied the republic to have proved the offence against the appellant beyond reasonable doubt but failed so to do to Shaban Ramadhani Luhi consequently acquitted him. It proceeded to sentence the Appellant to serve five years jail sentence. Dissatisfied with the decision the appellant has fronted 15 grounds of appeal against both conviction and sentence of the trial Court. Below, I reproduce the grounds of appeal: -

- 1. THAT, the Honourable Trial Magistrate erred both in law and facts by convicting and sentencing the appellant without considering that the ownership and value of the animals purported to be stolen and owned by one **RAJABU MAULID** were not established and proved to the required standard thereby creating doubts in the prosecution case.*
- 2. THAT, the Honourable Trial Magistrate erred both in law and facts by convicting and sentencing the appellant without considering that the Chain of custody of all prosecution Exhibits was broken down and improperly admitted in evidence therefore the same was to be expunged from the record.*
- 3. THAT, the Honourable Trial Magistrate erred both in law and facts by convicting and sentencing the appellant while the prosecution failed to call material witnesses in which the Court could have (sic) to draw the adverse*

inference for such failure by the prosecution and the appellant deserved an acquittal by the Trial Court.

- 4. THAT, the Honourable Trial Magistrate erred both in law and facts by convicting and sentencing the appellant while there variances between charge sheet and evidence hence the appellant could have been acquitted by the Trial Court.*
- 5. THAT, the Honourable Trial Magistrate erred both in law and facts by convicting and sentencing the appellant without considering the Prosecution evidence meted with material doubts which could have been resolved in favour of the appellant hence he deserved an acquittal by the Trial Court.*
- 6. THAT, the Honourable Trial Magistrate erred both in law and facts by convicting and sentencing the appellant while the appellant was not supplied with the complainant Statement to understand the complaints which resulted from the charges against him to enable him to get well prepared and marshal his defence.*
- 7. THAT, the Honourable Trial Magistrate erred in both law and facts by failure to comply with mandatory requirements set out under section 210 (3) of the Criminal Procedure Act, [Cap 20 R.E: 2022] which coached in mandatory terms hence making the whole Prosecution's testimonies with no evidential value.*

8. *THAT, the Honourable trial magistrate erred in both law and facts by convicting and sentencing the appellant based on substituted charge sheet contrary to the order of amendment of the former charge sheet as per trial Court's proceedings hence prejudices the appellant.*
9. *THAT, the Honourable Trial Magistrate erred both in law and facts by convicting and sentencing the appellant without considering that the appellant was not found in possession of any animal (s) or skin of the purported stolen animals and no evidence established beyond reasonable doubt that the appellant was the one who stole the purported stolen animals.*
10. *THAT, the Honourable Trial Magistrate erred both in law and facts by convicting and sentencing the appellant without considering the mitigation factors which are couched in mandatory terms.*
11. *THAT, the Trial Magistrate erred both in law and facts by convicting and sentencing the appellant without considering his defence adduced during the trial.*
12. *THAT, the Honourable Trial Magistrate erred in both law and facts by failure to enter the conviction statement in the proceedings and sentence statement in the judgement of the Court hence irregularly and illegally confining the appellant in prison.*

13. THAT, the honorable Trial Magistrate erred both in law and facts by sentencing the appellant without considering the minimum sentence provided under the Minimum Sentence Act hence prejudicing the appellant.

14. THAT, the Honourable Trial Magistrate erred both in law and facts by failure to evaluate the evidence properly adduced by all parties during the trial at the Trial Court hence reaching the erroneous decision which prejudices the appellant.

15. THAT, the Honorable Trial Magistrate erred in both law and facts by convicting the appellant while the prosecution failed to prove the case against the appellant beyond reasonable doubt.

During hearing of this appeal, the appellant was represented by Messrs Selemani Matauka and Philemon Mganga, learned advocates while the Respondent Republic was represented by Clemence Kato, learned State Attorney. In disposing the appeal, both parties agreed to proceed by way of written submission and accordingly they complied with the schedule.

In determining the appeal, I find it worthy beginning with the 12th ground of appeal which reads thus: -

12. THAT, the Honourable Trial Magistrate erred in both law and facts by failure to enter the conviction statement in the proceedings

and sentence statement in the judgement of the Court hence irregularly and illegally confining the appellant in prison.

Arguing in support of this ground of appeal, Mr. Matauka for the appellant is of the submission that, it is the matter of law under **section 235 (1)&(2) of the Criminal Procedure Act, [Cap 20 R.E: 2022] (Hereinafter "CPA")** that the Court once it finds the accused guilty, then it must convict and sentence him. He then stressed that, there is no conviction statement in the proceedings and no sentence statement in the judgement of the trial Court. To buttress his contention, he cited two decisions of the Court of Appeal in **Masota Jumanne vs. The Republic**, Criminal Appeal No. 137 of 2016, CAT at Tabora and **Shabani Hussein @ Makora & Another vs. The Republic**, Criminal Appeal No. 287 of 2019, CAT at Bukoba (Both unreported). In both decisions, the Court of Appeal had insisted on compliance with section 312 (2) of the CPA and held it to be fatal defect in case of non-compliance.

On the other hand Mr. Kato, learned state attorney for the respondent resisted the appellant's submission arguing that the Appellant's counsel is not aware of the provision of **section 312 of the CPA** on the contents of the judgment. According to him, a judgement contains points for determination, the decision and reasons for the decision. And that, from the

content of the provision, the judgment does not contain sentence statement. On his side, there is no mention in his submission on the issue of conviction.

On my part, the law as provided under section 312 of the CPA, clearly provides on the contents of a judgment. Section 312 (1) of the Act requires a judgment, among other things, to contain the decision of the court. It specifically states:

"Every judgment under the provisions of section 312(1) shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."

In my considered view, subsection 1 of the said section 312 of the CPA should not be read in isolation of subsection 2 of section 321 of the CPA whenever conviction is entered by the court against the accused. For clarity, let the said subsection (2) of section 312 of the CPA speak by itself. I reproduce it: -

*"In the case of **conviction**, the **judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.**"* [Emphasis is added]

Taking a look to the trial court judgement of which this appeal relies, it is unfolded truth that the same contains a conviction statement contrary to what had been submitted by Mr. Matauka. The conviction is vivid at page 13 of the trial court judgement. I reproduce the conviction part of the judgment: -

*"...I accordingly find the 1st accused person guilty of the offence (sic) stealing animal contrary to section 265 and 268 (1) of the Penal Code Cap 16 R.E 2019 and **I duly convict him forthwith and acquit the 2nd accused person.**"* End of quote

From the above except, there is no gainsaying per that judgment that conviction was entered by the trial court against the appellant. nevertheless, irrespective of mandatory legal requirement provided under section 312(2) of the CPA compelling the judgment to contain sentence, the impugned trial court judgment doesn't contain the five years sentence the appellant is serving. A valid judgment worthy it must contain conviction and sentence.

(See **Benard s/o Lamerck vs. Republic**, Criminal Appeal No. 117 of 2019, HCT at Mbeya, **Paulo Nyambele vs. Republic**, Criminal Appeal No. 196 of 2019, HCT at Sumbawanga, **Mohamed Athumani vs The Republic**, Criminal Appeal No.45 of 2015, CAT at Dar es Salaam (All unreported).

Omission to indicate the sentence in the judgment is a fatal and incurable irregularity. In other words, it leads to a nullity judgment and no appeal can stem from it. (See the cases of **Jonathan Mluguani vs. Republic**, Criminal Appeal No. 15 of 2011, **Ruzibukya Tibabyekoma vs. Republic**, Criminal Appeal No. 218 of 2011 and **Juma Jackson @ Shida vs. Republic**, Criminal Appeal No. 254 of 2011 (All Unreported).

In **Shabani Iddi Jololo and 3 Others Vs Republic**, Criminal Appeal No.200 of 2006 referred by the Court of Appeal in **Emmanuel Kabelele Vs Republic** , Criminal Appeal No.419 of 2015 CAT at Tabora (Unreported) at page 5 stated thus : -

"Conviction is one of the pre – requisites of a judgment in terms of section 312(2) of Criminal Procedure Act which states:

*"In the case of conviction, **the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment which he is sentenced**".*

Guided by the above observation, I hereby allow the 12th ground of appeal, although on a different account, that the trial court judgment is invalid to the extent of not containing the punishment with which the appellant stand sentenced to serve five years jail sentence such omission being contrary to section 312(2) of the Criminal Procedure Act, [Cap 20 R.E.2022].

The above 12th ground alone suffices to dispose of this appeal and as such I find no need to dwell into determining the rest of the grounds of appeal.

Consequently, I hereby order as follows: -

1. The trial court judgment is hereby quashed due to its invalidity for not containing the sentence meted to the Appellant
2. That, since the trial court found the appellant guilty of the offence and convicted him then I order the trial magistrate or his successor in office to compose a judgment complying the legal requirement set under section 312(1) & (2) of the Criminal Procedure Act, Cap 20 R.E. 2022 by including the punishment the Appellant is sentenced with.

3. Meanwhile, the Appellant shall remain in custody and will be summoned by the trial court for judgment pronouncement composed in compliance of section 312(2) of the CPA
 4. the Appellant may wish to lodge his appeal afresh in accordance with the law and time to appeal shall commence from the date when a proper judgement of the trial court is pronounced to the Appellant
 5. For the interest of justice, the date of sentence of the accused shall remain the same date as he was put under confinement on the first time.
 6. I further order judgement be composed and pronounced expeditiously
- It is so ordered.

Rights of appeal explained

DATED at **DAR ES SALAAM** this 27th day of March, 2023.



MUSA K. POMO

JUDGE

27/03/2023

Judgment delivered on this 27th day of March, 2023 in presence of the appellant and Seleman Matauka, learned Advocate for the Appellant and also in presence of Clemence Kato, learned state attorney for the Respondent Republic



MUSA K. POMO

JUDGE

27/03/2023

