IN THE HIGH COURT OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 9 OF 2023

(Arising from Resident Magistrate Court in Criminal Cas No. 258 of 2019)

NGEMELA ATHANAZI..... 1st APPELLANT
ATHANAZI KAYINJA..... 2nd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

2nd June 2023 & 13th June 2023

This is an appeal challenging the decision in **Criminal Case No. 258 of 2019** issued by Resident Magistrate Court of Bukoba at Bukoba delivered on 22 December 2020. The 1st and the 2nd Appellants were along with two others, charged with three counts. The 1st and the 2nd counts concerned the Appellants and they were offences of cattle theft contrary to **Section 268(1) and (3) of the Penal Code Cap 16 of 2019 RE**. The other 2 persons charged with the Appellants faced the charges of Receiving a stolen property, but they were acquitted. The convicted with two counts of cattle theft where they were alleged to have stolen a number of cattle in various periods of time. Upon

conviction, both Appellants were sentenced to serve five (5) years imprisonment.

The judgment and conviction by the Resident Magistrate Court aggrieved the appellants, hence preferred the present appeal encompassed with ten (10) grounds as follows; -

1. That, the Trial magistrate grossly erred in law and fact to try, convict and sentence the appellants, contrary to Section 137 of the criminal procedure Act cap 20 RE;2019.
2. That, the Trial Court erred in law and fact to convict the appellant whereas the same case was tried and set the appellants free in the **Case No. 15 of 2017 of Kasambya Primary Court.**
3. That, the complainant appealed to the district court, where he lost the appeal and decided to vitiate justice by instituting a fresh case at Resident Magistrate 's Court, contrary to the law.
4. That, the Trial magistrate erred in law and facts by not considering the evidence of the appellant in his defense.
5. That, the Trial magistrate erred in law and fact to convict the appellants with cattle stealing offence, while the evidence adduced in court insists on being found with stolen cattle.

6. That, the trial Court erred in law and in fact by considering insufficient evidence in convicting the appellants without any eyewitness to support the evidence.

7. That, the Trial court did not have jurisdiction to try a case which had already been tried before a court with competent jurisdiction otherwise, he would have appealed to the high court.

8. That the trial Court erred in her judgment by convicting and sentencing appellants, without complying to the mandatory requirements of **section 312 (2) of the Criminal Procedure Act.**

9. That, the Trial magistrate fatally erred in law and fact to convict the appellants on such a framed case with a lot of prejudice and personal interests by the prosecution side, whereby a charge of cattle theft was fraudulently premised to be complained by republic instead of the real complained by republic instead of the real complainant the so called KACHINGA FRANSISCO who claims to be the victim.

10. That the prosecution failed to prove the case beyond reasonable doubt.

The Appeal was disposed of by oral submissions. The Appellants appeared in person while the Respondent was represented by Mr. Aman Kilua, State Attorney.

On hearing, the 1st appellant submitted that all grounds form basis of the appeal. He thus prayed for the Court to adopt his grounds of appeal to form part of his submissions and to allow the appeal.

The 2nd respondent as well adopted the grounds for appeal as part of his submissions and added that previously they were acquitted at Primary Court, then they were arrested again, and a new case was opened where they were sentenced to imprisonment.

In reply, the respondent was represented by Mr. Amani Kilua, learned state attorney. Challenging the appeal, Mr. Kilua combined and argued together grounds 1, 2 and 3. According to Mr. Kilua, these grounds focus on the decision of the Primary Court. He stated that **Section 137 of the CPA** provides that if a person is acquitted or convicted by a Court of competent authority he can't be charged on the same ground. He said that since it appears that the District Court declared the Primary Court to have no jurisdiction, grounds 1, 2, & 3 holds no merit.

On the 4th ground, that the appellant's evidence was not taken into consideration, Mr. Kilua submitted that according to page 7, 8 and 9 of the Judgment, the District Court considered the evidence and convicted the Appellants.

Concerning the 5th ground that the Appellants were convicted on theft while the offence they were charged with was being found in unlawful possession of property, Mr. Kilua submitted that the Appellants were charged with both offences of theft and unlawfully possession of stolen property and at the end they were convicted with theft.

On the 6th ground that they were convicted without having eyewitness to testify, Mr. Kilua submitted that since they failed to explain how they got the cattle of the complainant, he is of the view that the allegation regarding eyewitness goes with no merits.

About the 7th ground on jurisdiction of the Court, Mr. Kilua argued that he has already explained that the District Court decided that the Primary Court did not have jurisdiction.

On the 8th ground that the judgment was contrary to **S. 312 (2) of the CPA**, Mr. Kilua submitted that both conviction and sentence were imposed in accordance with the law.

On the 9th ground that the case was cooked for being spearheaded by the Republic, Mr. Kilua submitted that it is the duty of the Republic to conduct prosecutions.

Concerning the last ground that the case was not proved beyond reasonable doubt, Mr. Kilua stated that the case was proved beyond reasonable doubt because the stolen cattle were found with the 3rd & 4th accused persons who said that they were sold to them by the appellants. He admitted that at the time the 1st accused was convicted, he was below the age of majority, as he was 17 years old.

In rejoinder the 1st appellant emphasized that, he was 17 years when the matter was instituted in the District Court. The second respondent insisted that the investigation tell the outright lies he as, he never came to seize any cow in their village.

Having heard parties' submissions, and having gone through the record and evidence adduced in the lower court, the issue which features is **whether the Appeal has merit to warrant interference with the judgment of the Resident Magistrate Court of Bukoba in Criminal Case No. 258 of 2019.**

In answering the above issue all the grounds of appeal will be considered. Starting with the **first** ground as to whether the appellants' conviction and sentence were contrary to **Section 137 of the CPA,** the record reveals that the appellants were acquitted by Primary Court where they were charged under the same offences in **Criminal Case No. 53 of 2017.** The decision aggrieved the Complainants in the Primary Court who appealed to the District Court with vide **Criminal Appeal No. 15 of 207**. The decision of Primary Court was quashed, on the reason that the Primary Court had no jurisdiction, since the matter involved a juvenile. The District Court allowed parties to lodge the matter afresh if so wish. For that reason, the matter was instituted afresh in the Resident Magistrate Court which was the Court with jurisdiction vide the impugned proceedings. Under such circumstances the Appellants' claim that there was a double punishment is misconceived since the matter in the Primary Court was nulified. These findings answer grounds No 2, 3 and 7 on the reason that they fall under the same issue claiming to have been charges twice.

Regarding the 6th ground where the Appellants are asserting to have been convicted basing on insufficient evidence to prove the offence of theft due to lack of eyewitness, Mr. Kilua contended that, there was no

need of calling other witnesses because the Appellants were found with the cattle claimed to have been stolen. The parties' contention on this point is based on the question as to whether the prosecution managed to prove the case against the appellants during the trial. In addressing this question, it is well known principle that, in criminal case the one who alleges must prove beyond reasonable doubt. The meaning of beyond reasonable doubt has been defined in the case of **Magendo Paul & Another v. Republic** (1993) TLR 219 cited in **William Ntumbi v. Director of Public Prosecution,** Criminal Appeal No. 320 of 2019, Court of Appeal of Tanzania, at Mbeya,(reported in tanzlii) where the Court held that: -

> *"For a case to be taken to have been proved* ***beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."***

From the above quotation, the highlighted portion of the authority directs that for the matter to be termed, being proved beyond reasonable doubt, its evidence must be strong against the accused to warrant conviction. All doubts must be cleared for any reasonable person to believe that the offence was really committed.

The complainant **(PW1)** testified in the District Court that his 6 heads of cattle were found missing, firstly 5 of them on November and later in December 2016 another one head of cattle went missing. He stated that he reported the incident at the Police station, and started a search of his missing cattle. PW1 testified further that upon searching one head of cattle was found at the residence of Athanas Kahinja (2nd Appellant). He continued to state that the information on the recovery of one head of cattle was reported back to police which started follow up where 1st Appellant was discovered to have been aware of the whereabout of the other cattle. This discovery lead to the recovery of other heads of cattle three sold to one Sadath who was the third accused person (DW3), two of them to one Roma who was the 4th Accused person (DW4). This evidence was supported by PW1's son (PW2) who narrated the same story as well as PW3 who was the hamlet chairman of Kashwabo who was asked to witness the police interrogation to the 2nd Accused. It appeared that Roma resold the cattle alleged to have been sold to him by the 1st accused to PW4, who assisted to recover the said cattle and he testified to have bought the two head of cattle from Roma (DW3). PW5 was the police officer who interrogated the accused persons leading to the recovery of all the heads of cattle asserted to have been stolen from PW1.

The above prosecution evidence established prima facie case since it indicated that the cattle passed through the hands of the appellants and then became distributed by sell in other persons which led to the discovery of all of six stolen heads of cattle. It was this evidence which convinced the Trial Magistrate to convict both appellants as charged.

However, the Appellant had their defence. The defence of DW1 and DW2 was that DW1 worked with the complaint grazing his heads of cattle on an agreement of getting paid one head of cattle per year and that the cattle came into the possession of the 1st Appellant as a remuneration for three years and therefore he got 3 heads of cattle. This defence is not helpful to the 1st Appellant because if he had worked for three years and paid three heads of cow, he never explained how he came into possession of six the heads of cattle scattered in the hands of various individuals. However, the defence has created a serious doubt to the 2nd Appellant who was expecting to have at least three heads of cattle as remuneration for his son's employment. The pursers of the cow (PW4 and PW3) mentioned the 1st appellant as their seller of the heads of cattle.

The defence of the Appellants may have created a doubt on the involvement of the second appellant in the commission of the offence.

This is because the thieves were not arraigned at the scene of crime. Yet there is a claim that the 1st appellant expected remuneration of at least 3 heads of cattle. The 2nd appellant was found with only one head of cattle in his premises, and he believed that it was that remuneration agreed to be paid to his son. More evidence was needed to connect the *mens rea* of the 2nd Appellant with the commission of the offence.

I have gone through the judgment of the trial court and noted that the trial court did not consider the evidence of the defence. Could it have considered it, the 2nd appellant could not have been convicted due to the aforesaid doubt.

From the above analysis, it is my finding that there was sufficient evidence to convict the 1st appellant as per the required standard as established in ***MAGENDO's Case(supra)***, However, such evidence was not sufficient to prove the case beyond reasonable doubt against the second appellant. The 2nd appellant was therefore wrongly convicted.

This analysis answers ground 4, 5, 9 and 10 as they are all founded on the same issues of evidence evaluation.

Concerning the 8th ground on conviction and sentence not in compliance with **Section 312 (2) of the CPA,** I find it worth to visit the provision. It provides:-

> *312(2). 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.*

The above provision formulates some standards to be met in issuing judgement and sentence. Mr Kilua claimed that the conviction and sentence were in accordance with law.

Having gone through the trial court record, it is apparent that the trial Magistrate convicted and sentenced the Appellants according to the charge sheet or as they were charged as indicated at page 10 and 11 of the Trial Court judgement. However, the Resident Magistrates Court did not cite its provision respectively. This is an irregularity but the Court of Appeal has already set the way forward as was discussed in the case of **Abubakari Msafiri v. The Republic,** Criminal Appeal No. 378 of 2017, Court of Appeal of Tanzania, at Bukoba, (reported in Tanzlii), at page 15, it was held that;-

"...we are aware of section 312 (2) of the CPA under which it is provided that in 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 is convicted and the punishment to which he is sentenced. In the instant case, though there were some ailments in conviction and sentencing the appellant, as we have alluded to above, still we find that where it was stated by the trial court that the appellant was convicted as charged and also where the proper and lawful sentence was passed, then the ailments cannot be fatal or not curable."

From the above authority, I am bound to follow the position that the error done by Trial Magistrate should not vitiate the whole findings, on the reason that its curable.

Mr. Kilua raised a concern of the age of the 1st Appellant. The 1st appellant as well alerted this Court that at the time he was convicted, he was 17 years old and therefore it was not appropriate to be sentenced to serve the custodial imprisonment. It is undisputed that the 1st appellant was arrested, convicted and sentenced from 12th December 2021 till today 8th June 2023. From parties' submission it is not disputed that the 1st appellant being of 17 year at the time of conviction, he was

a minor and had to be sentenced as juvenile offender. Instead, he was sentenced as an adult. This was a serious error on the part of the trial court he almost served more than two years in adults' prison, **contrary to Section 4 (2) of the Law of the Child**, which provides; -

> *"4. (1) A person below the age of eighteen years shall be known as a child.*
>
> *(2) The best interests of a child shall be a primary consideration in all actions concerning children whether undertaken by public or private social welfare institutions, courts or administrative bodies."*

Therefore, basing on the above provision the trial Court ought to have considered the interest of the child before sentence. Since the 1st appellant was under the age of majority he ought to have sentenced to an alternative sentence as per **section 119 (1), (2), of the Law of the Child Cap 13 of 2019 RE**. It provides:-

> *"119.-(1) Notwithstanding any provisions of any written law, a child shall not be sentenced to imprisonment.*
>
> *(2) Where a child is convicted of any offence punishable with imprisonment, the court may, in addition or alternative to any other order which may be made under this Act-*

(a) discharge the child without making any order;

(b) order the child to be repatriated at the expense of Government to his home or district of origin if it is within Tanzania; or

(c) order the child to be handed over to the care of a fit person or institution named in the order, if the person or institution is willing to undertake such care."

From the above provision the best interest of a child was not a custodial sentence but an alternative from the above listed. It is therefore my finding that the Resident Magistrate Court erred in convicting the 1st appellant into custodial sentence.

From the above analysis the issue as to whether the appellant has adduced sufficient grounds for this court to interfere with the decision of the trial Court is answered affirmatively.

Consequently, the Appeal is allowed. The conviction and sentence against the 2nd appellant is hereby quashed and set aside. The 2nd Appellant is therefore released forthwith unless held for another offence. Since the 1st Appellant was a juvenile, and that he has already served a two years imprisonment while he was minor, I hereby verry the

sentence against the 1st appellant by discharging him without making any other order. It is so ordered.

Dated at Dar es Salaam this 13th day of June 2023.

KATARINA REVOCATI MTEULE

JUDGE

13 /06/2023

Court:

Judgment delivered this 13th Day of June 2023 in the absence of the 1st Appellant and Respondent, and in the presence of the 2nd Appellant

KATARINA REVOCATI MTEULE
JUDGE
13/6/2023