

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA**

PC. CRIMINAL APPEAL NO. 20 OF 2022

MWALIMU SONGO.....APPLICANT

VERSUS

MATAJI LESSI MUHANGARARESPONDENT

(Arising from the Judgment of Kondoa District Court at Kondoa)

Dated 25th day of November, 2020

In

Criminal Appeal No. 21 of 2020

.....

JUDGMENT

Date of last Order: 30th October 2023

Date of Ruling: 10th November, 2023

SARWATT, J:

This is an appeal against the judgment of Kondoa District Court in Criminal Appeal No.21 of 2020, which was entered against the appellant.

It was alleged that on the 19th November,2018, at Gongu village within Chemba District in Dodoma Region, the respondent stole one cow valued at Tshs. 400,000/= the property of the appellant. The respondent pleaded not guilty, and after a full trial, the respondent was found guilty as charged, and the Primary Court convicted and sentenced him to serve five years (5) imprisonment. The respondent was aggrieved and filed an

appeal to Kondoa District Court. The appeal was heard ex parte after the appellant failed to appear before the Court, and the judgment was pronounced in the favour of the respondent. Being aggrieved with the decision of the 1st appellate court, the appellant appeared before this Court seeking justice through his appeal petition, which contained two (2) grounds of appeal.;

- 1. That the first appellate Court erred in law and fact by acquitting the respondent herein while the appellant was not accorded hearing.*
- 2. That, the first appellate Court erred in law and fact by acquitting the respondent while the case against the respondent was proved beyond reasonable doubt.*

On the 30th of October, 2023, parties appeared before this Court to argue the appeal. The appellant enjoyed the service of Mr. Isaya Nchimbi, Learned Advocate, whereas Ms. Rachel Kalinga Advocate, appeared for the respondent.

The Counsel for the appellant moved the Court with an argument in the first ground of appeal; the appellant did not get the opportunity to prosecute his case. The right to be heard is a Constitutional right; if such a right is denied, the decision becomes a nullity. He added that, at the

District Court, the appellant had no knowledge of a case against him before the Court. He cited the case of **David Mushi v Abdallah Msham Kitwanga, Civil Appeal NO. 286 OF 2016**, Court of Appeal at DSM at pages 17-19 to support his point that the party must be given the right to be heard. He therefore concluded that failure to comply with the right to be heard at the trial court then the decision is nullity.

According to the second ground of appeal, he submitted that the case at the Primary Court was proved beyond reasonable doubt. The evidence of the Appellant at Primary Court on pages 2 to 5 of the proceedings shows that the appellant managed to identify the stolen cow through some marks in the said cow. The appellant also said the stolen cow was found at the respondent's kraal, and this was supported by the evidence of SM2, and the said evidence was never denied by the respondent. He argued further that it is the position of the law that failure to cross-examination amounts to acceptance. He cited the case of **Sebastian Michael and Another v The Director of Public Prosecutions, Criminal Appeal No. 145 of 2018, Court of Appeal** to cement his point. He further submitted that SM4 also identified the stolen cow, and the respondent never cross-examined. The evidence of SU2, who was the respondent's witness, shows that he was given the cow

to the respondent. Also, SU3 stated that the stolen cow was paid as his sister's dowry. To him, the respondent's evidence was very weak, and there is doubt on how the respondent possessed the cow. He, therefore, prayed the 1st appellate Court's decision be quashed and upheld the decision of the Primary Court.

In the reply submission regarding the first ground of appeal, Ms. Rachel Kalinga, Counsel for the respondent, argued that the appellant did not show how that right to be heard affected him. She added that the cited case by the appellant did not fit the situation. She prayed the first ground of appeal be dismissed.

Regarding the second ground of appeal, she submitted that the appellant gave no evidence showing that he owned the stolen cow. The evidence states that the cow is red, while the charge sheet shows the cow's colour is simba. The burden to prove was on the appellant but did not prove the case. She prayed for the decision of the District Court to be upheld.

In rejoinder, Mr. Isaya Nchimbi reiterated his submission in chief and added that at the Primary Court, SM3 proved that the appellant's cow was stolen and the appellant had managed to identify the cow by mark, in as far as the charge sheet concerned, the same does not contradict the

evidence. To him, the case at the Primary Court was proved beyond reasonable doubt. He therefore, prayed this appeal be allowed.

After hearing the submissions of the parties and reading the proceedings of the trial court and the impugned decision, I will start to discuss the first ground of appeal as follows: the gist of the complaint by the appellant in his first ground of appeal is that the first appellate Court erred in law and fact by acquitting the respondent herein while the appellant was not accorded hearing. This being an appeal from the District Court, it falls under Section 359 (1) of the Criminal Procedure Act, which provides the right of appeal to the appellant.

However, section 365 gives the following directions: -

"365.-(2) Where notice of time, place of hearing cannot be served on any person because he cannot be found through the address obtained from him by the Court under section 228 or 275, the notice shall be brought to his attention in the manner prescribed by section 381."

According to the position of the law above, the issue to be determined here is whether the appellant was accorded the right to be heard. It is clear that a right to be heard is so fundamental that the decision arrived at in violation of it will be nullified. The Court of Appeal

observed this in the case of **Ibrahim Said Mrabyo@ Maalim and Another v The Republic, Criminal Appeal No. 256 of 2015.**

In the case at hand, for easy reference, I will reproduce what transpired on the trial court records as per page 3 of the typed proceedings;

"Date: 27 /10/2020

Coram: Hon. M. M. Mvungi-RM

Appellant: Present

Respondent: Absent

c/c : Elizabeth

Court: For mention

-The Respondent is absent

-Summons be issued to the respondent via the court process server of Paranga Primary Court.

Order:

-Mention on 06/11/2020

- Summons be issued to the respondent via the court process server of Paranga Primary Court.

Date: 6/11/2020

Coram: M. M. Mvungi-Rm

Appellnat; Present

Respondent: Absent c/c Hafsa

Court: For mention-The respondent is absent

Order:

-M on 13/11/2020

-Summons to be issued to the respondent via the court process server.

Date: 13/11/2020

Coram: Hon. M.M. Mvungi -RM

Appellant: Present

Respondent: Absent

RMA: Hafsa

Court: The matter is coming for mention.

The respondent in this case did not appear regardless of the summons issued to him. According to the affidavit endorsed by court process server Ramadhani Salum Mocho, shows he effected the summons to respondent in presence of Gonga Village Executive Officer and appeared

the respondent was absent and the exact place to procure him was unknown.

Hence the Court will proceed ex parte bearing in mind the Applicant is in jail for days for the respondent to appear will prejudice the appellant rights.

Order

-Hg on 19/11/2020

-AFRIC."

According to what transpired on the trial court record as quoted above, the trial Magistrate proceeded appeal ex parte for the reason that the appellant failed to appear at the hearing date after summoned.

This Court also went through the proceedings and the summons issued in Criminal Appeal No.21 of 2020 and found that summons were issued to the respondent on 27th October 2020 and 13th November 2020. The trial court proceedings show that there was an affidavit of the court process server to effect summons to the respondent. On page 3 to 4, the record reads as follow;

"..... According to the affidavit endorsed by court process server Ramadhani Salum Mocho, shows he effected the summons to respondent in presence of Gongga Village

Executive Officer and appeared the respondent was absent and the exactly place to procure him was unknown.

Through the trial court record, I found no affidavit sworn by the process server to prove that the service to the appellant was duly affected in accordance with the law. Mere words that there was an affidavit endorsed by the process server to show that he was affected summons to the respondent and the place to procure him was unknown cannot be admitted by this Court. It is also clear that the purpose of a summons is to inform the party that there is a suit filed in Court against him or her and that he or she must reply.

Article 13(6) (a) of the Constitution provides the right to a fair trial as a fundamental right. The Article states that;

"13 (6) (a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."

However, fundamental right was also observed by the Court of Appeal in many cases, including the cases of **Samweli Gitau Saitoti@ Saimoo @ Jose and 2 Others v The Director of Public prosecutions, Criminal Application No. 73/02/2020, Ausdirill Tanzania ltd v Mussa Joseph**

Kumili and Another, Civil Appeal No. 78 of 2014 and Mbeya-Rukwa Autoparts and Transport Ltd v Jestina George Mwakyoma(2003) T. L. R 252.

In the case of **Abbas Sherally and Another v Abdul S. M. M Fazaiboy, Civil Application No.33 of 2002**, it was observed by the Court of Appeal that;

" The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

In the instant case, I am of the view that the appellant was not accorded the right to be heard. Therefore, the first ground of appeal has merit. Based on what I have discussed above and since the decision of the District Court reached in violation of the appellants' constitutional and statutory rights to be heard is a nullity. For those reasons, this ground is sufficient to dispose of this appeal, and I see no need to discuss the remaining ground of appeal.

This appeal is allowed, and I hereby quash and set aside the appellate court's decision and proceedings and order the case to be remitted to the Mtondo District Court to re-hear the appeal before another Magistrate.

It is so ordered.



S. S. SARWATT

JUDGE

10/11/2023

DATED at DODOMA this 10th Day of November, 2023.



S. S. SARWATT

JUDGE

10/11/2023