IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

CRIMINAL APPEAL NO. 32 OF 2023

(Appeal from the decision of District Court of Same at Same dated I8th May, 2023 in Criminal Case No. 84 of 2023)

ELIA S/O LEMSUMBA..... 1ST APPELLANT

MOONO S/O MADAME@ NATETWA.....2ND APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

17th October & 19th December, 2023

A.P.KILIMI, J.:

At the District court of Same at Same, in Criminal Case no. 84 of 2023, the appellants mentioned above were arraigned for five counts namely; first; unlawful entering into the forest reserve contrary to section 84(1) (a) and section 84(5) of the Forest Act No. 14 of 2002 "hereinafter Forest Act". Second; unlawful introduction of domestic animals into the forest reserve contrary to sections 26(n), 84(3), and 84(5) of the Forest Act read together with section 351(1) (a) and (b) of the Criminal Procedure Act, Cap 20 R.E 2022.

In the third count, both were charged with unlawful destruction of forest vegetation contrary to section 26(i) and section 84(5) of the Forest Act, Fourth count; was unlawful disturbing the habitat of component of biological diversity contrary to section 188(c), 66, 67, 68 and section 193(1) (a), (b), (2), (4) and (5) of the Environmental Management Act, No. 20 of 2004 and in fifth count; is unlawful erecting of building structures within the Forest Reserve contrary to section 26(1) and section 84(5) of the Forest Act.

The particulars of the above offences allege that on the 26th day of April 2023 at Chambogo Forest Reserve within the Same district in Kilimanjaro region all appellants entered into the said Forest Reserve without license or written authority with domestic animals to wit two hundred and thirty-five (235) herds of cattle for grazing purposes without license or written authority, then those herds of cattle therein did destroy forest vegetation hence disturbed the habitat of components of the biological diversity to wit flora and fauna. Moreover, having introduced therein the said herds of cattle the appellants erected building structures to wit, two (2) cattle kraals within the Forest Reserve. Upon the trial court heard on merit the prosecution and appellant, decided by convicting and sentenced the appellant, also issued order in respect to the said herds of cattle.

The background facts giving rise to this appeal may be briefly stated as follows: On 26/04/2023 at around 8:00 hours in the morning one Thabiti s/o Hussein@ Mwilenga being on normal patrol at Chambogo Forest Reserve accompanied with Vence s/o Anderson@ Mmbwambo, Ruben s/o Magesa and Kelvin s/o Ramadhan both being on duty as conservation forest officers. They heard lowing of cattle, they decided to search for such sound, they reach the scene and found two cattle kraals built in the Forest reserve, one of the cattle kraals had cows and other cows were grazing near the area. They went closer and surrounded the area, were they managed to arrest the appellants. They asked them if they have permits of entering, building and grazing in the Chambogo Forest Reserve, they had none. Thereafter, they collected all the cows that were grazing and put them all in one of the cattle kraals which were built in the Forest Reserve. The same were counted and found to be two hundred and thirty-five (235) cows. Then they seized them.

In their defense the first appellant denied that he never took his livestock to the Chambogo forest reserve also said all prosecution witnesses lied and was arrested on the road, also the first and second appellant contended that on the fateful date was arrested together with his cows

moving on the road, he also disputed the testimonies of prosecution witnesses, the map of the crime scene and pictures taken thereat.

As said above the trial court convicted the appellants in all counts, whereas the first appellant sentence him to serve two years term of imprisonment in each count. While the second appellant was sentenced to pay fine of Tshs 300,000/= (Three hundred thousands or serve two years imprisonment in defaults for each count. Furthermore, the trial court issued forfeiture order to all 235 cows to the United Republic of Tanzania in terms of section 351 (1) (a) and (b) of the Criminal Procedure Act, Cap 20 RE. 2022 ("CPA") and proceeded to appoint Court Broker to conduct public auction forthwith.

Aggrieved by the proceeding, judgment, conviction, sentence and confiscation order, the appellants have knocked the door of this court basing on the following grounds discerned in amended petition of appeal;

1. That, the trial magistrate had an interest to the charge causing failure to record defense story as testified, and proper analysis of defense case as means to defeat any possible chance of appeal against manufactured allegations and cooked evidence.
2. That the trial court erred in law and fact by convicting and sentencing Appellants out of incurable defective indictment occasioning grave miscarriage of justice and double jeopardy.

3. That, the trial court erred in law by failure to considered broken chain of custody, and failure to fully comply with mandatory provisions including section 231(1) and section 311 of Criminal Procedure Act CAP 20 .RE 2022.
4. That the trial magistrate erred in law and fact by convicting and sentencing appellants based on the weakness of defense case, and prosecution evidence out of witnesses with interest to serve and unevaluated discrepancies going to the root of the case.
5. That, the trial court erred in law and fact by passing an omnibus conviction and sentence before mitigation.
6. That, the trial magistrate erred in law and fact by adding his own words not appearing in court proceedings, violation of provision regarding confiscation of cattle and denying audi arteram partem for confiscation proceeding.
7. That prosecution failed to prove the charge beyond reasonable doubt.

At the hearing of this appeal Mr. Innocent Msaki, learned advocate, appeared for the appellants, while the respondent being a Republic was represented by Ms. Edith Msenga assisted by Ms. Wanda Msafiri both learned State Attorneys.

Submitting in the first ground Mr. Innocent Msaki stated that the trial Magistrate did not evaluate properly evidence and was bias to prosecution because was against the authority of **Leonard Mwanashaka vs. Republic** Criminal Appeal No. 226 of 204 High Court Dar-es-Salaam. Which has ratio that in evaluation of evidence both sides need to be considered.

In respect to second ground, the counsel referred the case of **Ally Hamad Bakari vs. Republic** Criminal Appeal No. 335 of 2017 High Court at Dar-es-Salaam specific at page 3, and claimed that the appellants were not given time to prepare for their defence, he explained it that the record shows it was almost three hours after Ruling of a case to answer, thus the counsel claims that is short time which cause miscarriage of justice. Further said, it is a principle that the person shall not be punished twice of same offence and prayed this court to consider the **Joanita Joel Mutalemwa vs Christina Kamugisha Tushemeleirwa** [2022] TZHC 9866 (TANZLII) at page 10. This the counsel said according to page 16 the first appellant was already charged with the same cows 100, and the other 135 was for second appellant, thus referred section 27 (2) of the penal code and disputed the sentence awarded was not legally proper.

Arguing in respect to ground number three, Mr. Msaki contended that the chain of custody was not proper, he said in arresting there were no independent witness in filling certificate of seizure, to support his point he sought a support of the case of **John Paschal and one other vs. Republic** Criminal Appeal No. 615 of 2020 at page 10.

In regard to none observance of section 231(1) of CPA, Mr. Msaki contended that both appellants their charge was not read and was not given chance to call witness which was against to law, he further added failure of the above procedure is fatal and renders the decision nugatory. To buttress this position, he invited this court to see the case of **Emmanuel Richard vs. Republic** Criminal Appeal No. 369 of 2018 CAT at Dar-es-Salaam at page 3, 4, and 11.

Arguing in respect to ground number four, Mr. Msaki said the trial court based on weakness of defence case. He further said the trial Judgment did not consider defence evidence, therefore ended on biased conclusion which caused miscarriage of justice. To support his assertion, he referred this court the cases of **DPP vs. Musa Khatibu Sembe** Criminal Appeal No. 130 of 2021 and **Abel Masiliti vs. Republic** Criminal Appeal No. 25 of 2015 and **Shabani s/o Adam Mwajule and Another vs. Republic** Criminal Appeal No. 131 of 2019 at page 6, 8 and 7.

In respect to fifth ground, Mr. Msaki argued that the trial court passed omnibus condition and sentenced before mitigation. In this case first appellant was convicted 10 years in different counts, therefore he was required to be convicted on each count. Also, he added that according to

section 26 of Forest Act no. 10 of 2002 and section 84(1) of same act provides convict shall be fined 30,000/= and except 1 million or not exceeding 2 years in default, therefore the trial court conviction a sentenced of 10 years in total was incorrect.

In respect to ground number six, Mr. Msaki contended that the trial Magistrate add his own words on confiscation proceedings, the confiscation was done contrary to procedure of CPA which require right to be heard to be observed which is under Article 13(6) (a) of the constitution. According to this case, the owner of the cattle was not the one arrested, so those arrested were mere grazing persons. Therefore, according to section 351 of CPA before order of confiscations, there must be public announcement of things require to be confiscated, which was insisted in the case of **Amani Buleo Mafuru vs. Republic** Criminal Appeal no. 52 of 2022 at page 3, 9, 10, 11 and 12.

Mr. Msaki in this ground further submitted that, in above case it was observed the procedure under section 351 must be complied with, but in this court the owners of the cattle were not given notice, no notice of Auction done by the court broker, even no record of the court showing that those cattle was sold to who, also added in respect to second appellant, even if

paid fine, his cattle was not returned, but rather confiscated which was not proper in law.

In respect to ground number seven, the counsel submitted that prosecution must prove beyond reasonable doubt, he urged this court to look on the evidence that was not proved beyond reasonable doubts, he further said even by lacking independent witness was a doubt to be taken to the advantage of the appellants, thus prayed therefore the appeal be allowed and conviction and orders be quashed , also the counsel prayed this court to call Criminal Case no. 72 of 2023 and satisfy its legality, correct and conviction in that which we say is double jeopardy in this case.

Responding to above submission Ms. Edith Msenga learned State Attorney argued in respect to first ground that the trial considered both sides, and urged this court to see page 13 and 9 of trial court Judgment, and further said at page 13 it evaluated the defence evidence and saw did not create doubt. In respect to case of **Leonard Mwanashaka** (supra) said the same is distinguishable because in this case, it has examined evidence of two sides and gave reason to such effect.

In second ground, she objected and contended that according to section 231 of CPA, the law does not say which time should be given, the law say will be given chance to defend by oath and witness. In the proceeding of the court page 29 at 33 nowhere appellants raised that they need extra time for defence, therefore prayed this ground be dismissed.

In respect to issue of double jeopardy, the State Attorney said it is true, person is prohibit to be punished twice, but does not prohibit if he repeat the same offence not to be punished, she then said in this matter at page 16 of Judgment, it explained that the first appellant repeated the offence, that is why he was charged, therefore the issue of jeopardy does not apply, thus in law the first appellant repeated an offence, and he cannot be condoned because of first conviction.

Contending in respect to ground raised the issue of chain of custody, when the allegation was no independent witness. The learned State Attorney said when the incident occurs in remote area the law dispenses of having independent witness. She further said since certificate of seizure was prepared under section 93 of Forest Act Cap. R.E. 2022 which does not state the issue of independent witnesses and even the form does not provide for such requirement, the seizing exercise was correct.

In respect to issue whether the appellant did not read afresh their charge before the defence, the learned State Attorney admitted that it was not read, therefore agreed the court goes contrary to section 231 of CPA. But contended that the fact that the trial Magistrate wrote section 231 (1) of CPA have been complied with, she urged this court to see the said omission did not prejudice the appellants because the charge were read to them at the start of the case and later on preliminary hearing therefore this omission is cured under section 388 of CPA.

Arguing in respect to confiscation of herds of cattle, she said the law govern confiscations is section 351 of CPA, this apply when the accused person is found committing the offence and necessary the owners under section 351 (2) of CPA, if the order was made for confiscation, anybody aggrieved is required to claim within 6 months after the said order was issued. Therefore, parties not party to the case was required to bring claim to set the order, then the case could be determined instead of bring this application in this appeal. Thus, prayed this ground be dismissed for want of merit.

Contending in respect to sentence that was issued in omnibus, she submitted that according to the Judgment a list of counts was listed and

there were five counts. Therefore, according to the sentence of the trial court at page 16, the trial Magistrate convicted on each count two years, therefore when is added is ten years. In respect second appellant also was convicted on each count for 2 years or fine 300,000/=, he paid fine Tshs. 1,500,000/=, then the said sentence was legally proper.

In rejoinder Mr. Msaki contended in comply with the provision of section 231, the same must be recorded as the substance of the court. In respect of independent witness argued the prosecution cannot rely on sketch map and casts doubt. Mr. Msaki further contended that, owners were not notified, even the auction was done without following procedure. And finally on issue of sentence he argued that, each count must be stated its sentence specifically and which law used.

I have considered the above rival submissions in respect to the grounds of appeal, before I proceed to analyze what was evidenced at the trial court in that regard, I wish to highlight that it is a trite law the first appellate court is empowered to step into the shoes of the subordinate court, have its own consideration and views of the entire evidence and give decision thereon or do what that court failed to do if no patent failure of justice was not caused. (See **D. R. Pandya vs Republic**., [1957] E. A. 336, J**uma**

Kilimo vs. Republic, Criminal Appeal No.70 of 2012, and **Mussa Hassan Barie and Another vs. republic**, Criminal appeal No. 292 of 2011 (all unreported).

Starting with the first ground of appeal, here the appellants have faulted the trial magistrate for being biased against them by failing to record and analyse their defence evidence. However, the counsel for appellants did not argue on failure to record, but argued only on failure to analyse them. First, the record is clear as seen on pages 30 to 33 where the appellants' testimonies were recorded. Since, it is the principle of law that court records are deemed authentic and cannot be easily impeached. (See **Halfani Sudi vs Abieza Chichili** [1998] TLR 527, thus appellants failure to argued on this allegation shows was not sure of what they stranded in this claim.

In respect to failure to analyze evidence by the trial court, in my perusal to the trial court, to my view the evidence of the appellants were analyzed as follows; on page 30 the first appellant simply denied to have committed the charged offences and contended that the prosecution witnesses lied against him. However, he was also recorded to have apologized to commit the above offences at the end of his testimony. This

in my view was a contradiction on his part because having denied to have committed the offence it was unbecoming of him to apologize at the same time. This contradiction in my opinion raises a question of credibility of his testimony which also was apprehended by the trial court. The trial court also noted in its judgment inconsistency in his testimony when appellants were being cross examined as seen on page 30, 31 and 32 of the trial court's typed proceedings.

At page 14 of the trial court judgment considering the defence evidence observed that;

> *"As I have said albeit earlier that I failed to believe the accused persons for good and cogent reasons. I have observed and assessed the demeanour of all witnesses hence I am in the position of revealing who is an agent of truth or not. See the case of Shaban Daud vs. Republic, Criminal Appeal No. 28 of 2000 (unreported).*
>
> *It was the evidence of* ***DW1 that he did not commit the offence but later told the court to forgive him and admitted on the cross-examination that the photograph was taken and it bears his face and that of 2nd accused person****. Therefore, having observed them closely I knew there were no*

agents of truth who also denied the charges while the available ***evidence proved that they were living in the forest reserve with their cattle and also built the two cattle kraal within the Chambogo forest reserve."***

[Emphasis added]

From the above, I am settled the trial considered inconsistencies of appellants in their testimony which culminated to create untruthfulness in their testimonies after also considered their demeanours. Since it is a trite law that on issues of credibility of witnesses is in the monopoly of the trial court, therefore the trial magistrate in this matter was at the best position. (See **Shaban Daud v. The Republic,** Criminal Appeal No. 28 of 2000 (unreported)

In the premises, I am convinced that the trial magistrate did properly analyse evidence of both sides and came up with decision balanced. Henceforth his decision cannot be said to have been biased reached. I thus find this ground lacking merit and it is hereby dismissed.

On the second ground was specifically for first appellant that he was punished twice on the same offence (double jeopardy) and argued that was contrary to the law. Indeed, the concept of double jeopardy basically prevents an accused person from being tried or punished twice on the similar charges based on the same facts. This rule is provided in the Penal Code, Cap 16 R.E 2022 under section 21 which states;

> *"A person shall not be punished twice, either under the provisions of this Code or under the provisions of any other law, for the same offence".*

I have considered the evidence, there is no any evidence the appellants proved that this was second punishment on the same charge sheet, as correctly argued by the respondent state Attorney, that the issue of jeopardy does not apply when accused repeat to commit the same offence at different time as evidenced by the prosecution at page 15 and for reference I reproduce the aggravating factors established by the prosecution;-

> *"Prosecutor; Your honour,* ***the 1st accused is a common offender and that last week he was convicted of the same offences in respect of Criminal case No 72 of 2023 at Same District****. Your honour, the accused was sentenced for the same offence on 17/4/2023.*

Your honour, we pray for severe sentence of the 1st accused person ***and we think the previous sentence did not teach him a lesson at all thus why he has repeated taking the livestock to the Forest Reserve."***

[Emphasis added]

Having considered the above, the cited cases by the appellant's counsel are distinguished and I am settled that the first appellant failed to substantiate the truthfulness of what is being alleged in this ground of appeal. Consequently, I find this ground also devoid of merit and is hereby dismissed.

On the third ground of appeal, the appellants counsel protrudes two version of claims, first that there was no independent witness in filling the certificate of seizure and second the trial court failure to observe section 231(1) of CPA, that the charge sheet was not read to the appellants and was not given chance to call witnesses, the act which was against to law.

To start with the first version of claim above, I think this should not labour me much, I have considered the circumstances of search and seizure

conducted in the forest and not at the village or residential area, thus all witnesses to the said arrest and seizure were forest officers, I am settled under the above circumstances common sense dictates it was very difficult to get an independent witness. Therefore, I agree with Ms. Msenga when she argued that when the incident occur in remote area the law dispense of having independent witness. It is therefore my considered opinion; the trial court was right in holding that the absence of independent witnesses during search and seizure of the exhibits in question did not render the search and seizure invalid. In view thereof this version of claim must fail and is hereby dismissed.

In respect to the second version, the record of the court cannot be easily impeached as said above, with respect to the appellant who is a learned brother did not take his duty to read the trial court record at page 29 of the typed proceeding which provides;

> *"1st **Accused: Elia** s/o **Lemsumba***
> *Your honour, I will defend my case without any witness. I pray the court to enter my defence.*
> ***2nd accused Moono** s/o **Madame***
> *Your honour, I will defend my case without any witness.*

Court: *The provision of section 23 1(1) (a) and (b) of the Criminal Procedure Act, Cap 20 RE. 2022 has been Complied with.*

M.A. HAMZA-SRM

4/5/2023"

The above shows appellants themselves said they will have no witnesses; thus, it was wrong as per principle of court record for the appellant's counsel to argue that they were not given chance to call witness, therefore is claim is meritless. In respect to the charge to be read. It is true according to the record the charge was not read to the appellant at this stage.

However, I have considered that the charge sheet was read to them on the first step of proceeding when they entered at the trial court, later at Preliminary Hearing stage, thus I am settled they were informed particulars of the offence and the offence for which they were tried with, not only that the whole prosecution evidence at the trial court introduced out detailed account on how the appellants committed the offence charged. Therefore, having that in mind, in my opinion the facts that the charge was not read to them after the trial court ruled out that they have a case to answer, the said

omission did not occasion any failure of justice to both parties and is curable under section 388 (1) of the Criminal Procedure Act, Cap 20 Revised Edition 2022 the CPA. In the circumstances above, I found the whole of ground number three devoid of merit and is hereby dismissed.

On the fourth ground the appellants complained that the trial court had erred by basing its decision on weakness of defence case. I have gone through the trial court judgment and the same clearly shows how the trial magistrate made analysis of the evidence on record to arrive to his decision. This is displayed from page 10 to 14 of the trial court judgment where the trial magistrate evaluated the evidence of prosecution towards establishment of particular offences. He did so by highlighting the ingredients of each offence in relation to the evidence tendered by the prosecution to establish the same and the defence raised by the appellants.

To elaborate the above, briefly the prosecution evidence stated clearly how appellants were arrested within the forest, Thabiti Hussein@ Mwilenga (PW1) tendered certificate of search and seizure as evidence which was admitted and marked as PE 1, this was not refuted by the appellant.

Lishael Kitomary (PW3) used special instrument using software to take the map of the crime scene which also shows coordinates, and also picture shows the appellants in front of Kraal having herds of cattle, He tendered them and were not objected by the appellant, hence admitted by the trial court as PE3 and PE4 respectively. I had time to peruse the said exhibits, the map shows the date and time taken, also coordinates which are 37m 370064 UTM 9547362, and shows that the appellants were arrested at 1.93 Kilometers from the border of Chambogo forest reserve, also it is apparent the evidence and exhibits above were not refuted by the appellants at the trial.

In my view of the above evidence, I am settled the prosecution evidence on record, did prove beyond reasonable doubt that the forest officers mentioned above arrested the appellants within the statutory boundaries of the Chambogo Forest reserve.

Moreover, Ignas Rogasian@ Hamisi**,** (PW4) an Ecologist from TFS testified how he did environmental assessment and valuation, he tendered a report which shows the destroyed ecology vegetation to the value Tshs 23,600,000/= also the same was tendered and admitted as PE5 which was not disputed by the appellants at the trial.

In the premises, I am convinced by that the trial magistrate made analysis of the evidence on record to arrive to the decision and I am of the considered view that the allegation that he based his decision on the weakness of defence case is baseless and wanting, thus all cases referred by the appellant's counsel are distinguishable under the above circumstances. I therefore, find this ground to be baseless and without any merit thus it is accordingly dismissed.

Coming to the fifth ground, the appellants' counsel faulted the trial magistrate for passing an omnibus sentence. Having read the submission of the counsel for the appellants. I must say, the concept of an omnibus sentence is created when a single sentence is passed for more than on offence of which an accused person has been convicted at a single trial. Now to test the legality of the sentence passed, looking at the trial court judgment at page 16 to 17 where the court passed its sentenced in respect to the appellants it states;

> "*For the 1st accused person one Elia s/o Lemsumba; I hereby sentence him to serve* ***two years term of imprisonment in each count*** *as convicted"*.

> *"The 2nd accused person is the 1st offender and pleaded mercy of this court; he told the court that he will not commit any offence. In that end, I hereby sentenced the accused person* ***to pay fine of Tshs 300,000/= (Three hundred thousands) or serve two years term of imprisonment in defaults for each count*** *as convicted". It is so ordered.* ***The term of imprisonment shall run consecutively.***
>
> [Emphasis added]

From the sentences above, I see no issue of omnibus sentence arises, but the issue rising above is the legality of awarding sentence consecutively and concurrently. In law Consecutive sentences run one after the other. These may include, where offences arise out of unrelated circumstances or incidents; Whereas, Concurrent sentences are usually imposed upon an offender who has committed offences arising from the same series of transaction. This means the offender will serve those sentences at the same time. (See **Shomari Mohamed Mkwama vs. Republic** [2022] TZCA 644 and **Ramadhani Hamis @Joti vs. Republic** [2019] TZCA 486 (Both in TANZLII). Moreover, sentences in respect to fine cannot run concurrently. (See Section 36 of the Penal Code [Cap. 16 R.E. 2022].

I am aware the second appellant above paid fine, that was right as ordered by the trial court to run consecutively, but in respect to the first appellant the record shows the trial court at the end of both sentence above said the sentence to run consecutively, if that also applies to first appellant to my view the trial court was flawed. This is because, I have considered the circumstances of this case, where all five offences were committed in the same transactions, and as correctly considered by the trial court that he was a recidivist, thus I hereby order the sentence to the first appellant to run concurrently and not consecutively. It is for the foregoing reasons this ground of appeal is allowed to that extent stated.

With regard to ground number six, Mr. Msaki alleged that the confiscation was done contrary to procedure of the CPA which require right to be heard to be observed. The procedure of confiscation is provided under the provision of section 251 (1) (a) and (b). This provision states and I quote for ease of reference;

> *351.-(1) Where a person is convicted of an offence and the court which passes sentence is satisfied that any* ***property which was in his possession or under his control at the time of his apprehension****-*

(a) has been used for the ***purpose of committing or facilitating*** *the commission of any offence; or*

*(b) was intended by him to be used for that purpose, that p****roperty shall be liable to forfeiture and confiscation*** *and any property so forfeited under this section shall be disposed of as the court may direct.*

[Emphasis added]

Based on the provision above the law, the issue to be considered by this court is whether the above requirements were considered by the trial court. According to the record, is the public prosecutor who initiated the prosecution of the said herds of cattle. The trial court upon such prayer its records reveal as hereunder;

Court: - The accused persons ***are asked why the cattle or livestock to wit 235 cows should not be forfeited*** *to the united Republic of Tanzania. The accused person replies as follows: -*

1st Accused: - Elia s/o Lemsumba

Your honour, I pray the court ***not to forfeit my cows.*** *The cow's source of everything to our daily life and children depends on them for*

school fees and everything. I pray the court to consider and allow me to pay fine for each the cows.

2nd accused: - Moono 5/0 Madame@ Natetwa

*Your honour, **I pray to the court not to forfeit the cattle but to provide fine**. We depend on our livestock always for our life to proceed.*

Again, as said above, this is the court record of the trial court, the above, evidenced that the appellants were afforded a right to be heard before the trial court issued an order for said livestock to be forfeited. None of the appellants said that the cattle did not belong to him. I have considered the above law and the prosecution evidence on record. I am satisfied that the said livestock were in possession of the appellants and indeed had control of them at the time of their apprehension.

In respect to the cited case of **Amani Buleo Mafuru vs. Republic** (supra), the circumstances are totally different with this matter, in that case the applicant was not charged but owned the motor vehicle, then himself filed before the court an application to set aside confiscation order. In that case the charged persons were illegal immigrants, who in the view of the

court, were not in possession or in control of the motor vehicle in question. The driver and the owner were not charged. Thus, the court observed that, in those circumstances, the order affected the applicant who was the owner, thus he had the right to be heard.

In this matter at hand as evidenced above appellants introduced to own the said livestock and were in their control. It was also evidenced by the prosecution above, that are the appellants who took the livestock and built cattle kraals for keeping and feeding the livestock in the Forest Reserve. This means the said livestock were used to facilitated the commission of the offence charged hereinabove. Therefore, I am settled that the trial court was right to issue the said order. Nevertheless, for any person who was not a party to the case and had an interest in the said livestock, in my view justice dictates either, before the forfeiture order was made could have made application to that effect or may move the same trial court to set aside its order of forfeiture. For the foregoing reasons, I find also this ground devoid of merit and is accordingly dismissed.

Lasty, in the seventh ground, the appellants' counsel contended that the prosecution had failed to prove the charge beyond reasonable doubt. So far, this ground was dealt and answered when this court was dealing with

ground number four above, wherein the appellants complained that the trial court erred by basing its decision on weakness of defence case. In this ground I analysed the prosecution evidence and find out the prosecution did its duty enshrined by the law. Nonetheless, to add more in cross examination done by the Public Prosecutor to the appellants, the appellants seem to admit that they committed the offence charged. For ease of reference at page 31 of the typed record the first appellant testified as follows;

> *" There is no road. I signed the certificate of search and seizure. The certificate of search and seizure of exhibit was also tendered.* ***It is the second time I came here to this court with the same charge. I was convicted by this court.*** *The court should take that I am not first offender. I* ***have committed the same offence again.***"
>
> [Emphasis added]

Whereas at page 32 of the same record when the second appellant was cross examined testified as follows;

> *"I was arrested with my fellow one Elia s/o Lemsumba. We were told to stand in front of* ***the cattle at the forest*** *and the photographs were taken by Thabiti s/o Hussein. I can see proper.*

*There are cattle kraals on the picture and the cows are on the picture. There are cattle closed. **It is within the forest reserve. The first witness told the court, I signed and I did not ask him any question. I did not have a permit to enter in the forest reserve** and I don't know the place."*

[Emphasis added]

In view of the above stated and the reasons advanced in ground number four above when analysing prosecution evidence, I am convinced this ground also lacks merit and therefore dismissed.

Meanwhile in this ground Mr. Msaki prayed that this court to call Criminal Case no. 72 of 2023 and satisfy its legality, correct and conviction, this is the case he says is double jeopardy to this matter. Despite the same was not raised as specific ground in this appeal but inserted in his submission, in my view, in accordance to the evidence of the first appellant highlighted above and the exasperating factors by the prosecution, proves that, the mentioned case was another case which convicted the first appellant earlier even before this matter started at the trial court, thus, in my opinion it was not double jeopardy as claimed. Therefore, counsel prayer is flawed to this court which is exercising its appellate duty.

Having discussed as above, it is my considered view that the charge against the appellants was proved to the required standard of law in criminal cases. It follows therefore that this appeal is without any merit and it deserves to be dismissed, which I do, subject to the variation of the sentence of the first appellant ordered to run concurrently instead of consecutively.

It is so ordered.

DATED at **MOSHI** this 19th day of December, 2023.

X

JUDGE
Signed by: A. P. KILIMI

Court: - The Judgment delivered today on 19th day of December, 2023 in the presence of Mr. Ramadhan Kajembe, learned State Attorney and Innocent Msaki, learned Advocate for both appellants, also all appellants present.

Sgd: A. P. KILIMI
JUDGE
19/12/2023

Court: - Right of appeal explained.

Sgd: A. P. KILIMI
JUDGE
19/12/2023