

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB – REGISTRY

AT MBEYA

DC. CRIMINAL APPEAL NO. 172 OF 2023

*(Originating from the decision of the district court of Mbarali at Rujewa in Misc.
Criminal Application No. 11 of 2023)*

DAVI JOHN MAVEJAAPPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION1ST RESPONDENT

EUGEN TEMIGUNGA KISONGA T/A

FAGION BROKERS & AUCTIONEERS ACT CO. LTD2ND RESPONDENT

JUDGMENT

Date of hearing: 17/4/2024

Date of judgment: 27/5/2024

NONGWA, J.

The appellant was unsuccessful in Misc. Criminal Application No. 11 of 2023 of the district court of Mbarali in which he claimed refund of proceeds of 110 herds of cattle sold in public auction vide Misc. Criminal Application No. 8 of 2023 of the district court of Mbarali.

Background of the case is that on 27/3/2024 at Vikaye village Park Rangers of Ruaha National Park arrested and seized 110 herds of cattle which was allegedly found grazing in the national part. On 29/3/2024 the DPP, first respondent under certificate of urgency filed *ex-parte* Misc. Criminal Application No. 8 of 2024 for forfeiture to the Government of Tanzania and sale by public auction the unclaimed 110 herds of cattle. Orders sought were granted. Then, the appellant filed Misc. Criminal Application No. 11 of 2023 in which he claimed to be the owner of the forfeited 110 herds of cattle and prayed to be refunded the proceeds obtained after sale.

The first respondent disputed the claim of the appellant save for the date the 110 herd of cattle was seized and that no person appeared to claim it.

In the district court the application was disposed by written submission, the appellant in his submission argued that he was the owner of the 110 herds of cattle which was forfeited and sold, therefore he claimed to be refunded the proceeds estimating that each health cow would fetch Tsh. 2,000,000/=

In her reply written submission, the state attorney was unconvinced that the appellant proved to be the owner of 110 herds of cattle, the reason being the appellant was not sure with the number of cows he

owned and which was forfeited. Also, that there was no proof of the market value of each cow.

In his ruling, the magistrate was was impressed by the first respondent submission that the appellant did not prove to be the owner of 110 herds of cattle which was arrested, forfeited and sold in public auction as evidence in the affidavit which indicated that he owned 100 cows. The application was thus dismissed.

The decision aggrieved the appellant who filed petition of appeal, through his advocate consisting of six grounds; **one**, that the trial court erred in law and fact by dismissing the application on ground that the appellant had only 100 cows and not 110 cows while the same was pleaded that his cows was detained and escorted to Ruaha National Park by force of Ruaha National Park Rangers who were holding gun and the appellant was not given chance until when the rangers counted the cows; **two**, that the trial court erred in law and fact by dismissing the application on ground that the appellant was not the lawful owner of 110 cows while neither the court or respondent told the court who was the lawful owner of the said cows other than the appellant who made effort in securing interest of his property or failing to refund the 100 cows that is alleged to have proved in reaching just decision because such number of cows had owner. **Three**, that the trial court erred in law and fact by dismissing the

application without considering the second respondent to submit the report of auction conducted as the law dictates and who did not contest the application filed, **four**, that the trial court erred in law and fact by dismissing application while procedure for declaring the 100 cows as unclaimed properties was not properly followed such as to affix the notice in conspicuous of the said cows for the real owner to appear; **five**, the trial court erred in law and fact by failing to consider and properly analyse the appellant's affidavit filed and his chamber summons in reaching the conclusion; and **six**, that the trial court erred in law and fact by failing to properly name law and authorities referred in dismissing the application.

When the application was called for hearing, the appellant was represented by Mr. Faraji Mangula, learned counsel whereas the 1st respondent by Deusdedit Rwebagira, state attorney. the second respondent did not enter appearance though duly served with summons. Parties prayed and the court granted appeal to be heard by way of written submission.

In his submission counsel for the appellant started with background of the matter which I have found not necessary for this appeal and then after reproducing grounds of appeal, combined ground one, two, four and five while ground three and six were argued separately.

Arguing the amalgamated grounds, Mr. Mangula submitted that the appellant was not afforded right to be heard because application for forfeiture was heard *ex-parte* despite the appellant making several efforts to be joined to the application. That right to be heard is a fundamental constitution right under article 13(6)(a) of the Constitution of the United Republic of Tanzania.

Counsel for the appellant went on to state that there was no any effort by the first respondent to locate the owner of the cows and any allegation to that effect was lies. He submitted that the trial court failed to afford the appellant right to be heard as indicated in the proceedings from when the application was filed, heard and *locus in quo* conducted.

He contended that on 28/3/2023 the appellant served a letter to Rujewa police station and justice of peace that he was the owner but the matter was finalised without involving the appellant.

Counsel for the appellant submitted that the matter in the district court proceeded without issuing court summons and affixing it in local government offices or conspicuous places. He cited the case of **Mohamed Nassor ova Ally Mohamed** [1991] TLR 133 in which the court insisted issuance of summons in accordance with section 100, 101, 102 and 103 of the Criminal Procedure Act Cap 20 R: E 2022. Counsel also, referred to the case of **Mwanjiwa Mdashi vs DPP**, Misc. Criminal

Revision No. 3 of 2021 [2022] TZHC 370 (TANZLII) to persuade the court on the requirement of issuing summons.

In ground three on absence of auction report, it was submitted that the second respondent did not submit report as ordered by the court and the law governing unclaimed property which is forfeited. Mr. Mangula argued that it was irregularity which has to benefit the appellant.

In respect of ground six that no law or authority was cited for decision of the magistrate, it was submitted that the application was dismissed without naming the case or authority which was referred making the appellant's right to respond on appeal minimal.

From the submission made in respect of all grounds as intimidated earlier, counsel for the appellant prayed the appeal to be allowed and order of refund of proceeds of 110 cows sold in public auction be issued.

Responding to the above submission, state attorney stated that there were efforts to locate the owner of the 110 cows including reporting to Rujewa police station vide reference number RUJ/IR/429/2023 but in vain. It was further submitted that the appellant did not prove that the 110 cows forfeited belong to him because the annexure to his affidavit was confusing. Explaining, the state attorney argued at the police station the appellant reported the missing of 100 cows but in his affidavit, he mentioned 110 cows. State attorney argued that right to be heard was

not violated as there was efforts to trace the owner of 110 herds of cattle without any success.

Regarding non-issuance of summons under the provisions of sections 100 to 103 of the CPA, it was submission of the state attorney that notice was issued to the public and affixed in conspicuous places.

Replying to ground three that the second respondent did not submit report to the court, it was argued by the state attorney that it was availed, filed in court and that it did not vitiate proceedings of Misc, Criminal Application No. 11 of 2023

On failure to cite authority in dismissing the application, the state attorney submitted that court decision is made after considering submission and evidence, the decision is the outcome of the two. He added that there is no law requiring citation of section of laws or case law in the decision.

Concluding his submission, state attorney argued that the appellant did not prove that he was the owner of the 110 herds of cattle which was forfeited and sold in public auction. He stated that the court had a duty to balance interest of both parties, the wronged and wrongdoer.

In rejoinder, Mr. Mangula said that the appellant reported the missing of the cows to police vide reference RUJ/RB/547/2023 and there

was no criminal case for impersonating as the owner of the 110 cows. Other submission was the repetitions of his submission in chief thus not necessary to recite it here.

Having considered the trial court record, grounds of appeal and rival submissions, the only issue for my determination is whether the appeal has merits. I have considered the conjointly ground one, two, four and five together with arguments in that respect and found that it raises two complaints; that the appellant was not afforded right to be heard and sale was made and that summons was not issued.

This appeal has its origin in Misc. Criminal Application No. 11 of 2023 parties being Davi John Maveya vs Director of Public Prosecution and Eugen Temigunda Kisonga, as depicted in the title of parties, the application was filed by the appellant.

Starting with right to be heard, record of the trial court at page 2 of the typed proceedings indicate that appellant's counsel prayed to argue the application by way of written submissions, which received a welcome hand by the state attorney and at page 3 the court drew the scheduling order for filing written submissions. In compliance with the scheduling order, the appellant filed 25/3/2023, reply from the state attorney on 8/4/2023 and rejoinder on 15/4/2023. These all demonstrates that the appellant was heard fully in Misc. Criminal Application No. 11 of 2023

subject of this appeal, unless the complaint is referring to another case which is not subject of this appeal.

Regarding failure to issue summons, it is the respondents who were to be served with summons, the first respondent accepted service of summons and appeared to contest the application of the appellant while the second respondent refused the summons. These are well explained in the proceedings of the district court. I have failed to understand if parties were known and were served with summons, for what purpose the court could issue summons to general public as contended.

Although parties burned much fuel in these grounds, but it was a misconception of the records of the lower court subject of this appeal. Record is clear that the appellant was given fully hearing on the matter after he filed submission as ordered by the court. Further the respondents were known to the appellant and served them with summons, making the complaint that summons was not issued kicks of the dying horse. In the final analysis though the arguments were strong and attractive but in a wrong track. I therefore dismiss the amalgamated ground one, two, four and five.

In ground three that report of auction was not availed to the court, counsel for the appellant submitted that report of auction was to be given to the court as ordered and in accordance with the law. On the other

hand, the state attorney said it was not necessary though he argued that it was availed to the court.

From the application documents, the report which counsels were referring was not part of the matter which arose in the trial court. This is a new ground which cannot be addressed for the first time in appeal. In the case of **Nurdin Musa Wailu vs Republic**, Criminal Appeal No. 164 of 2004 cited in Galus Kitaya vs Republic (Criminal Appeal 196 of 2015) [2016] TZCA 301 (15 April 2016; TANZLII) the court held that:

'...usually, the Court will look into matters which came up in the lower courts and were decided. It will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal.'

The same applies to the current appeal, in the trial court the appellant applied for refund of proceeds of 110 herds of cattle which was sold in public auction, in the course the issue of ownership of the 110 herd of cattle surfaced and the decision of the magistrate was based on that aspect. Claim of the second respondent vanishing the court with the report of public auction was not part of the claim for the court to decide and it was not raised even in the submissions of the parties. That being the case, the issue of filing report of auction by a court broker is a new issue which was not decided by the trial court and therefore this appellate

court cannot acquire and assume jurisdiction over the factual issue which was not decided by the trial court. Ground three is equally dismissed.

The last complaint is that the trial court did not cite the law and the case law in dismissing the application. In the submission it was argued that the failure denied the appellant to respond to the appeal hence denial of right to be heard. The state attorney respondent that there was no law which required the provision of law or case law to be cited in the decision.

Although the complaint of the appellant is not straight forward but it seems is questioning ruling of the magistrate for failure to cite any law and case for his decision. Complaint of the applicant's counsel can best be dealt by looking at section 312(1) of the CPA, it provides;

'312(1) Every judgment under the provisions of section 311 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.'

It follows then that the law requires for the judgment of the court to contain the point(s) for determination, the decision and the reasons for that decision. Although the above provision mention judgment it applies

to all decision of the court when resolving a controversy between the parties.

As right pointed by the state attorney there is no law which mandates the magistrate or judge to cite the provision of the law or case law on which he relies for the decision. Decision of the court on the point lies with the reason. In the case of **M/S St. Anthony Secondary School vs Lukumbulu Investment Co. Ltd**, Civil Revision No. 388/16 of 2022 [2024] TZCA 123 (23 February 2024; TANZLII) the court stated;

'It is to be observed that the strength of any decision lies on its reasoning. Reason is the soul and spirit of a good judicial decision without it there cannot be any valid decision.'

The eminent question is, was there any reason for the decision to dismiss the application of the appellant. In the ruling the magistrate as seen at page 3 of the ruling considered the affidavit and submission of the parties and was satisfied that evidence of the applicant was referring to 100 cows and not 110 cows. Then the magistrate held;

'For this case, it is well seen that the applicant owned 100 cows and the 110 cows which were arrested, forfeited and sold in public auction did not belong to the applicant since he failed to prove the same to this court, as it is well established principle that a party who alleges must prove as in the case of'

The above incept is clear that the magistrate provided reason for his decision as it was his view that the appellant had failed to prove that he owned 110 cows. This is more so because it was clear by the magistrate that the appellant in his affidavit was not clear how many cows he owned. That said, I dismiss ground six.

From the above discussion, I find the appeal lacks merit, it is thus, dismissed in its entirety.



A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

V.M. NONGWA
JUDGE
27/5/2024

Dated and Delivered at Mbeya this 27th May 2024 in presence of Mr. Lordgard Eliaman State Attorney for the Respondent and in absence of the Appellant and his Advocate.

A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

V.M. NONGWA
JUDGE