

**IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

CRIMINAL APPEAL NO. 30 OF 2023

*(Originating from the Resident Magistrate Court of Sumbawanga at Sumbawanga in
Criminal Case No. 18 of 2021)*

SONDA NYEMA LUKINDA @AMOS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

29th November, 2023 & 28th February, 2024

MRISHA, J.

The appellant **Sonda Nyema Lukinda @Amos** has come to this court being aggrieved by the decision of the Resident Magistrate Court of Sumbawanga at Sumbawanga (the trial court) which convicted and sentenced him to serve a sentence of five (5) years in prison in respect of an offence of Stealing Cattle contrary to section 268 of the Penal Code, Cap 16 R.E 2022 (the Penal Code).

Prior to the occurrence of those legal consequences, it was alleged by the prosecution side that on the 13th day of March, 2021 at Kifone

Village within Kalambo District in Rukwa Region, the appellant did steal 55 animals to wit: 55 heads of cattle(cows) valued at Tshs 82,500,000/= the properties of one **Masonga Mandago** (PW6). The appellant denied those allegations as a result; the case went to a full trial after which the trial court found him guilty of the charged offence, convicted and sentenced him as above stated.

His petition of appeal is predicated into eight (8) grounds of grievances, namely,

1. That, the trial court erred in law and fact by convicting and sentencing the appellant while the case was not proved on the required standard.
2. That the trial court erred in law and fact by convicting and sentencing the appellant on offence of stealing animals while the complainant failed to prove or establish the ownership of the said 55 heads of cattle.
3. That the trial court erred in law and fact by convicting and sentencing the appellant on offence of stealing animals while the said 55 heads of cattle were not tendered in court.

4. That the trial court erred in law and fact by convicting and sentencing the appellant based on evidence which contain contradictions which go to the root of the case.
5. That the trial court erred in law and fact by its failure to consider the evidence of bona fide claim of right raised by the accused person.
6. That the trial court erred in law and fact by awarding the compensation of 82,500,000/= or else a total of 55 heads of cattle to the victim without cogent evidence on the same and without any legal justification.
7. That the trial court erred in law and fact by entertaining the criminal case of civil administrative without exhaustion of civil remedies as required by law.
8. That the trial court erred in law by basing its decision on the case from Uganda while there are cases from Tanzania on the same.

The appeal was heard by way of written submissions and both parties were legally represented. Mr Peter Kamyalile, learned advocate stood for the appellant while Ms. Maula Tweve, learned State Attorney represented the respondent Republic.

Submitting in respect of the first and fifth grounds of the appellant's petition of appeal which he proposed to argue together, Mr. Kamyalile referred the provisions of section 258 (1) of the Penal Code and argued that in our present case both elements constituting the offence of stealing which are fraudulently taking and without claim of right were not proved by the prosecution evidence in order to warrant conviction of the appellant.

He also submitted that even in their evidence PW3 and PW4 admitted in their response to cross examination questions that the appellant did not steal those 55 heads of cattle. He went on submitting that with regard to the element of taking the 55 heads of cattle, the evidence of PW1, PW3, PW4, PW4 and PW6 show that those prosecution witnesses told the trial court that it was the VEO and Village Chairman of Kifone Village who ordered one Samwel Mseo (PW3) and Joseph Msela to go and bring those 55 heads of cattle to the village office.

They also testified that the appellant was handled 55 heads of cattle by the Kifone Village government at the village office and the leaders of that village gave him a permit to drive those cattle to his home. According to the appellant's counsel the offence of theft cannot be committed under such circumstances since the whole process of taking

the said cattle involved the village government who took the said animals and officially handled them to the appellant which clearly indicates that the said cattle were not taken fraudulently; hence such element was not proved.

Arguing about the element of bona fide claim of right, Mr. Kamyalile submitted that section 9 of the Penal Code provides that a person is not criminally responsible in respect of an offence relating to property, if the act done by him with respect to the property was done in the exercise of an honest claim of right without intention to defraud.

It was his view that the appellant in the present appeal ought not to have been held criminally liable for the charged offence since his act of taking the alleged stolen cattle was done in the exercise of an honest claim of right without intention to defraud as he believed that the said cattle were belonging to his late father hence part and parcel of his late father in which he became the beneficiary.

To support the above proposition, the learned counsel cited a number of authorities including the case of **Mbegu vs Republic** [1981] TLR 279, **Mussa Kandege vs Republic** (1967) HCD 398 and **Laurian Kabombwe vs Republic** (1967) HCD 147 where it was held that,

"It is not theft to take goods under a genuine claim of right; it is immaterial whether such claim is properly based in law, as long as the accused believes it to be good".

In regard to the second ground of appeal, Mr. Kamyalile submitted that although the charge sheet reveals that the alleged stolen cattle were 55, the evidence of PW6 who is said to be the owner of those cattle, shows that only 35 heads of cattle belonged to him, while the rest which were 20 belonged to his father one Mandago Lukinda who testified as PW8.

As if that was not enough, the appellant's counsel submitted that the evidence of PW1 differs with that of PW6, the alleged owner of 55 heads of cattle because her testimony reveals that all the 55 cattle belong to her and PW6 which raises a reasonable doubt about who is the owner of the said cattle. The case of **Kibwana Salehe vs Republic** (1968) HCD 391 was cited by the appellant's counsel to challenge the credibility of the first, sixth and eight prosecution witnesses on the issue of ownership of the alleged stolen cattle.

In relation to the third ground of appeal, the counsel for the appellant submitted that the prosecution side failed to tender the 40 heads of cattle which were subject of the charge sheet which according to the said counsel rendered the charge sheet unproved. He added that during

a preliminary hearing particularly at page 21 it was submitted that the prosecution would have several exhibits including 40 heads of cattle, but the said intended exhibits were not tendered hence rendering the charge sheet unproved.

To support the above proposition, the appellant's counsel referred the court to the case of **Jonathan Joseph vs The Republic**, Criminal Appeal No. 391 of 2020 (CAT at Tabora, unreported).

As for the fourth ground of appeal, Mr. Kamyalile had it that there was apparent contradiction on the prosecution evidence which goes to the root of the case and it was not resolved. According to him, the first contradiction is on the ownership of the alleged 55 heads of cattle which appears in the testimonies of PW1, PW6 and PW8. Secondly, there is contradiction on the value of the said cattle which is apparent on the evidence of PW6 and PW8.

Also, according to the appellant's counsel the third contradiction is found in the testimonies of PW3 and PW4 who said the appellant did not steal the 55 heads of cattle and other prosecution witnesses who claimed that the appellant stole the said cattle. It was his view that such variance and inconsistency in the testimonies of the prosecution witnesses suggest

that the case against the appellant was fabricated or exaggerated which gave rise to some reasonable doubts about the guilty of the appellant.

In addition to that argument, the counsel for the appellant supported the same by citing the case of **Jeremiah Shemweta vs Republic** [1985] TLR 228 where it was held that,

"The discrepancies in the various accounts of the story by the prosecution witness give rise to some reasonable doubts about the guilty of the appellant"

Arguing about the sixth ground of appeal, the counsel for the appellant submitted that the trial court awarded the compensation contrary to the law which requires that in order to award compensation under section 348 (1) of the CPA three elements must exist; one, the person entitled should have suffered material loss or personal injury; two, compensation would be recoverable by civil suit and three, such compensation is to be as such as the court deems fair and reasonable.

He added that in order to know if the compensation is fair and reasonable, the court must make an inquiry and the convict must be given an opportunity to be heard before an order of compensation is made, failure to do so is fatal and vitiates the compensation order. He supported that argument by citing the case of **Selemani Misusi vs**

Republic (1973) LRT No. 5 and submitted that since the trial court did not conduct an inquiry and denied the appellant the right to be heard before making the order of compensation, that was fatal and vitiated the compensation order.

Submitting in respect of the seventh ground of appeal, Mr. Kamyalile contended that the matter entertained by the trial court was of a civil nature because there was a dispute whether the said 55 heads of cattle belonged to the estate of the deceased or to Masonga Mandago (PW6). He was of the view that what was supposed to be done in such circumstance was to exhaust the remedies in civil case prior to invocation of a criminal process under section 4 (3) of the CPA, but in the present case, it appears that the trial court violated such provision of the law which according to him, was fatal.

Finally on the eight ground of appeal, the appellant's counsel submitted that the trial court erred in law by basing its decision on the case from Uganda while there are cases from Tanzania on the same. It was his submission that it is not allowed to use and based the decision on the precedent from out of Tanzania while there are precedents in Tanzania.

Based on the above submissions and cited authorities, Mr. Kamyalile prayed that the appeal be allowed, the decision of the trial court as well

as the conviction be quashed, the sentence meted out to the appellant be set aside and the appellant be set free.

In response to the first and fifth grounds of appeal, Ms. Maula Tweve submitted that it is trite law that in criminal cases the burden of proof lies on the prosecution and the standard of proof is beyond reasonable doubt. Her position was supported by the cases of **Hamisi Hassani Jumanne vs The Republic**, Criminal Appeal No. 397 of 2021 and **Goodluck Kyando vs Republic** [2006] TLR 369 (all unreported).

Applying the above principle of law to the present case, the respondent's counsel submitted that the prosecution side managed to prove their case against the appellant due to the evidence adduced by PW1 as the eye witness who saw the incidence from the beginning to the end and her evidence depicts that the appellant together with other persons visited her home and the appellant being the leader of the team, entered into the kraal and took 55 heads of cattle to his village.

That the evidence of PW1 was corroborated by the evidence of PW3, another eye witness who tried to advise the appellant not to steal the said cattle but the accused refused. That PW4 also witnessed the game from the beginning to the end as he was also at the crime scene and he was directed by the village leader who is not the owner of those alleged

stolen cattle, to accompany the appellant in driving the said heads of cattle from PW6's home.

According to the learned State Attorney, the act of a sporting the said heads of cattle from PW6's home was done by the appellant without the consent and knowledge of the owner; hence in the circumstance the prosecution case was proved beyond reasonable doubts.

She added that the appellant lied to the trial court when he claimed that the heads of cattle were belonging to his late father because he did not lead any evidence to justify his bona fide claim of right over the same. She also submitted that the trial court did not convict the appellant on the weakness of his defence evidence, but on the prosecution evidence which proved the case against him beyond reasonable doubt as there was sufficient evidence of the eye witness which pointed to the guilty of the appellant.

On the second ground of appeal, Ms. Maula Tweve submitted that according to the evidence of PW6 which was corroborated by PW1, the appellant picked 55 heads of cattle which were in the kraal. Also, the evidence of PW8 shows that he divided his cattle to his children including PW6. Thus, it was her submission that ownership of the said

55 heads of cattle was proved by the prosecution evidence without leaving any reasonable doubt.

Submitting in respect of the third ground of appeal, the respondent's counsel submitted that the evidence of PW1, PW2, PW3 and PW4 shows that those prosecution witnesses were present at the scene of crime when the appellant was picking the 55 heads of cattle and it was a day light which tells that there was ample evidence to justify the appellant's conviction.

In relation to the fourth ground of appeal, Ms. Maula Tweve contended that the prosecution evidence especially that of PW1, PW6 and PW8 was clear and not contradictory; the evidence of PW1 shows that she was present at the crime scene when the appellant drove the 55 heads of cattle to the unknown place.

Regarding the sixth ground of appeal, the learned State Attorney submitted that the trial court awarded the compensation to the victim according to the law and by considering the evidence adduced by the prosecution witnesses. She further submitted that the trial court had power to order the appellant to pay compensation as per section 348 (1) of the CPA.

Concerning the amount of compensation which is Tshs. 82,500,000/=, the respondent's counsel submitted that the same was proved and justified by the evidence of PW6 as it appears at page 57 of the trial court typed proceedings which reveals that all those 55 heads of cattle worth Tshs 1,500,000/= for each.

In regard to the seventh ground of appeal, Ms. Maula Tweve submitted that the Republic filed a criminal case No. 18 of 2021 at the Resident Magistrate Court at Sumbawanga and the charge against the appellant was of Stealing contrary to section 268 (1) and (3) of the Penal Code. Also, the prosecution paraded a number of witnesses before the said trial court in order to prove the charge against the appellant. Hence, the prosecution side managed to meet the requirement of section 4 (1) of the CPA.

As for the eighth ground of appeal, Ms. Maula Tweve submitted that there is no law which prohibits the use of foreign precedent for ensuring justice to be done and seen to be done because the received laws are applicable in Tanzania under section 2(3) of the Judicature and Application of Laws Act, CAP 358 R.E 2019.

Due to the above reasons, the counsel for the respondent Republic submitted that the present appeal lacks merit; hence, she prayed that the same be dismissed for want of merit.

Having gone through the rival submissions as well as the cited cases and provisions of the law, I am of the view that the merit or otherwise of present appeal, can only be disposed of through the first, third and fifth ground of appeal.

In the first ground of appeal the counsel for the appellant has argued that the elements of fraudulently taking the alleged 55 heads of cattle was not proved by the prosecution evidence because there is evidence of PW3, PW4, PW5 and PW6 to show that the appellant was ordered by the Village Executive Officer to go and pick those cattle from the premises of PW6. Also, the evidence of PW3 and PW4 shows that the appellant did not steal the said cattle.

On the other hand, the respondent's counsel has contended that the appellant was seen by PW1 asporting the 55 heads of cattle. That the evidence of PW1 was corroborated by that of PW3 who advised the appellant not to steal the said cattle, but the appellant refused. Also, according to the respondent counsel's submission, the appellant was seen by PW4 while taking the said cattle from the kraal of PW6.

Looking on those contentions, it is my considered opinion that the element of taking or asportation felt short of being proved by the evidence of the prosecution. This is because first, it is undisputed fact that the appellant was directed by the village leaders of Kifone to go and pick the alleged 55 heads of cattle following probate disputed which was reported at the village office. Secondly, under normal circumstance, PW3 and PW4 could not say the appellant did not steal the said cattle, if it could be true that the appellant fraudulently took the said cattle from the kraal of PW6.

Thirdly, under normal circumstances, PW3 could not advise the appellant not to steal the said cattle, but prevent him from doing such criminal act and fourthly, I have gone through the submission of the counsel for the respondent Republic and observed that she has not disputed the fact that the appellant was not alone while taking the said 55 heads of cattle from the kraal of PW6 as he was accompanied by several persons including PW4 and PW5.

In the circumstances, one could have expected the appellant to be jointly charged with those persons, but no explanation was given by the prosecution side why only the appellant was charged with stealing of

those cattle. In my view, that leaves a serious doubt as to the guiltiness of the appellant.

Again, in the fifth ground of appeal, the appellant's counsel has argued that appellant was not criminally liable under section 9 of the Penal Code because his act of taking the said cattle was done in the exercise of an honest claim of right without intention to defraud. Conversely, the respondent's counsel has contended that the appellant lied to the trial court as he did not lead any evidence to justify his bona fide claim of right in respect of the said 55 heads of cattle.

The records of the trial court reveal that when making his defence before the said court, the appellant openly told the trial court that he was sent by his mother (DW2) to pick those cattle from the kraal of PW6 because they were part of his late father's estate. Also, according to the testimony of the appellant, it is stated therein that before going to the premises of PW6 and pick those heads of cattle, he approached the village leaders for a permit to drive those cattle.

His evidence is backed by the documentary evidence that is the village permit to drive cattle from one place to another which was tendered by the appellant and admitted by the trial court as exhibit D1. This is shown at page 82 of the trial court typed proceedings. Not only that, but also it

is on record that the evidence of the appellant that he took the said cattle from the kraal of PW6 believing the same to be belonging to his late father's estate was corroborated by his mother who testified before the trial court as DW2 and also the trial court admitted her letters of administration as exhibit D3, as shown at page 28 of the trial court typed judgment. All these, indicates that the appellant had a bona fide claim of right when he picked the said 55 heads of cattle.

I have also revisited the evidence of PW6 at page 58 of the trial court typed proceedings and observed that upon being cross examined by the appellant's counsel, the said witness admitted that the appellant had a claim that the said 55 heads of cattle were his late father's estate. In the circumstances, it cannot be said that the appellant stole the said cattle from PW6; his defence of bona fide claim of right was therefore proved.

Again, I have checked the reasoning of the trial magistrate in his judgment regarding the defence of bona fide claim of right raised by the appellant. It appears to me that the trial magistrate admitted that actually the appellant raised such defence during defence hearing and that the appellant did not take the alleged heads of cattle on his own volition, but he was instructed by his mother (DW2) to do so.

The only reason the trial magistrate used to dispense with such kind of defence was because according to him, the letters of administration tendered by DW2 and admitted by the trial court as exhibit D3 was issued by Namanyere Primary Court in almost three months after the commission of the charged offence which means before issuance of that document DW3 was not a genuine administratrix of the appellant late father's estate.

Admittedly, it is obvious that the said document was issued by the Primary Court on 17.06.2021 while the act of taking the said cattle was done by the appellant on 13.03.2021. Also, it is crystal clear that the said letters of administration were admitted during trial of the appellant's case on 27.02.2023 without any objection. This means the prosecution counsel was in agreement with DW2 that she was duly appointed by the said Probate Court to be an administrator of one Nyema Mandago Lukinda, the appellant's late father.

However, part of the evidence of DW2 shows that it was on march, 2021 when she sent the appellant to go and collect more than 55 heads of cattle which were kept by PW6 as his junior father. This is shown at page 89 of the trial court typed proceedings where she was recorded to had told the trial court that,

"My husband who is now the late, he was living at Kakoma village, he died on July, 2020. Thereafter at a year 2021 March I instituted a probate and administration of estate of my late husband. At the first process I made follow up of documents but before that we seated a clan meeting and we discussed the beneficiaries and then appointment of the administratrix of estate...On 12/03/2021 I ordered this accused person to go and take the properties of the late husband which were 100 heads of cattle hence 55 heads of cattle to be brought while the other remained thereat, it was at his uncle namely Songa Mandago alias Masonga, those cattle were the properties of Nyema Mandago Lukinda with me his wife."

A message we get from the above piece of evidence from DW2, is that the appellant did not emerge from nowhere and decided to go and pick the said 55 heads of cattle from the kraal of PW6, but he was sent by his mother who made him to believe that the same were part of his late father's estate and as it has been pointed above, he was not alone, but he was with other persons who had the blessings of the village leaders to accompany the appellant in picking those animals.

Unfortunately, the trial magistrate did not bother to consider that important evidence before finding the appellant guilty of stealing. In the

circumstances, it cannot be said that the appellant took the said cattle without bona fide claim of right and fix him with allegations of stealing. Hence, with the foregoing reasons, I find that the first and fifth grounds of appeal by the appellant have merits.

In the third ground of appeal, the appellant has complained that the trial court erred in law and fact by convicting and sentencing him on the offence of stealing animals while the said 55 heads of cattle were not tendered in court.

In supporting that ground of appeal, the appellant's counsel has referred the court to page 21 of the typed proceedings where it is shown that during a preliminary hearing, the prosecution side informed the trial court that it would bring 40 cattle as among the intended prosecution exhibits, but up to the closure of the prosecution case, the same were not tendered as evidence.

According to him, the omission by the prosecution side to tender those cattle and other intended exhibits rendered the charge offence not being proved. He relied on the case of **Jonathan Joseph vs The Republic** (supra) to cement his argument.

In her response to that ground of appeal, the respondent's counsel has insisted that there was ample evidence of PW1, PW2, PW3 and PW4 to

justify the appellant's conviction because those prosecution witnesses saw the appellant while taking the alleged 55 heads of cattle from PW6's kraal. She has cited the case of **Deemay Daati and Others vs Republic**, Criminal Appeal No. 80 of 1994, Court of Appeal at Arusha where it was held that,

"Whatever is meant by the chance witness, it is plain truth that PW3 was at the scene of crime when the appellants made the representation to PW2."

Although the counsel for the respondent Republic has argued that the presence of those eye witnesses was sufficient to ground conviction against the appellant, it is my considered opinion that that evidence alone cannot be said to have supported the conviction of the appellant. I say so because the point of discussion here is on the omission of the prosecution side to tender the 40 heads of cattle as among their intended exhibits and the respondent's counsel has not said anything on that while responding to the third ground of appeal which tells that she agrees with her learned brother that indeed, the prosecution omitted to tender such intended exhibit during trial of the appellant's case.

Since the said cattle were the subject of the charge against the appellant, it was incumbent upon the prosecution side to tender the said

cattle as exhibit in order to prove the allegations levelled against the appellant. In the absence of such intended exhibit, it is obvious that the prosecution evidence left a reasonable doubt and the appellant ought not to have been found guilty of stealing the cattle which were not tendered in evidence during trial. This court's position is fortified by the case of **Jonathan Joseph vs The Republic** (supra) where it was stated that,

"The effect of failure or omission to tender in the item which is the subject matter of the charge, is to render the charge unproved"

There is no dispute that the alleged 55 heads of cattle were the subject matter of the charge against the appellant. Therefore, the principle stated in the above case applies mutatis mutandis to the present appeal. Since the prosecution omitted to tender the 40 heads of cattle as exhibits during trial contrary to their previous promise and without providing any explanation for that omission, it is my settled view that the omission rendered the charge against the appellant unproved. With the foregoing reasons, I am also constrained to find that the third ground of appeal raised by the appellant has merit.

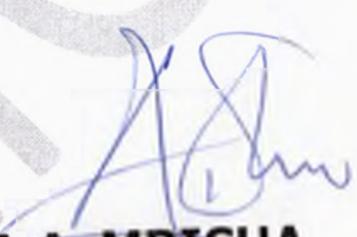
The above deliberation is in my view, enough to dispose of the present appeal. Hence, I do not see any pressing reason to continue dealing

with the rest grounds of appeal as doing so will not cleanse the pinpointed discrepancies which goes to the root of the prosecution case and/or save the prosecution case from flopping.

In the premises, it is my settled view that the present appeal has merit. In consequence thereof, I allow the instant appeal, quash the proceedings as well as the impugned judgment of the trial court and order that the appellant be released from prison custody immediately unless he is held for some other lawful cause.

Regarding the probate dispute in respect of the alleged 55 heads of cattle, I would advise relatives to settle it amicably by using the available lawful means.

Order accordingly.


A.A. MRISHA
JUDGE
28.02.2024

DATED at SUMBAWANGA this 28th day of February, 2024




A.A. MRISHA
JUDGE
28.02.2024