

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**CRIMINAL REVISION NO 4 OF 2021**

**JAMES MARWA GIRIRI.....1<sup>ST</sup> APPLICANT**

**LINUS CHACHA NYAMHANGA.....2<sup>ND</sup> APPLICANT**

**JEREMIAH MASWEGA MARWA.....3<sup>RD</sup> APPLICANT**

***VERSUS***

**THE REPUBLIC.....RESPONDENT**

*(Original Criminal Case No. 455/2017 of the District Court of Tarime)*

**JUDGMENT**

*15<sup>th</sup> & 19<sup>th</sup> July, 2021*

**Kahyoza, J**

**James Marwa Giriri, Linus Chacha Nyamhanga** and **Jeremiah Maswega Marwa**, the accused persons, were arraigned before Tarime district court on the **28/7/2017** with the offence of cattle theft alleged stolen on the **23/4/2013**. They were first convicted on the **17/1/2019** by District Court of Tarime and sentenced to a conditional discharge and ordered to pay 10 herds of cattle to the complainant.

Aggrieved, they appealed to the High Court in Criminal Appeal No. **22/2019**. This Court (Galeba, J. as he then was) found that the trial court did not comply with section 214 of the

Criminal Procedure Act, [Cap. 20 R.E. 2019] (the **CPA**). The case moved from Hon. Kahimba, RM to Hon. Mugendi, RM, the successor magistrate, without recording reasons for transfer. The Court set aside conviction and sentence. It also quashed the proceedings from 28/6/2018 when trial commenced before the successor magistrate. It ordered the trial to start from where it ended before the successor magistrate set her hands in the proceedings. It desisted from determining whether it was a fit case not to order re-trial. The reason was that the Court did not invite the parties to comment whether the order for retrial will give the prosecutor an opportunity to fill the gap in its case or not. However, it ordered the resident magistrate in-charge to speed up the trial.

As the record bears testimony, the resident magistrate in-charge of Tarime District Court, Hon. Veronica Mugendi happened to be the successor magistrate who had previously failed to comply with section 214 of the **CPA**. The resident magistrate in-charge, Hon. Mugendi, the successor magistrate, took over and re-heard the evidence as the High Court directed. She, again, found the accused persons guilty, convicted and sentenced them to serve two years' imprisonment for the offence of cattle theft contrary to sections 258 (1) and 268(1) & 3 of the Penal Code [Cap. 16 R.E 2019].

Aggrieved, the accused persons appealed to this Court. They withdrew the appeal. In the order withdrawing the appeal, I ordered Revision proceedings to be opened *suo mottu*, to consider

the error regarding the sentence. The error was conspicuous on the face of record. The accused persons were convicted with the **offence of cattle theft** which is a scheduled offence. The minimum sentence of the offence of cattle theft is five years' imprisonment. See section 5(b) of the Minimum Sentences Act [Cap. 90 R.E. 2002].

I invited the parties' advocate and the state attorney for the Republic to address me regarding the propriety of the sentence. The accused person's advocate, Mr. Makowe and the Respondents' State Attorney, Mr. Temba, complied. Before handing down this Court's determination regarding the sentence, I found another irregularity in the original record. All that time I was working on the copy of judgment. The trial court's record revealed that the trial magistrate did not sign the judgment. The trial court's judgment was dated but not signed. The law section 312(1) of the CPA provides that:-

*"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 there on 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".*

Given the above position of the law, I invited the accused persons' advocate and the State Attorney to address me on the impact of failure to sign the judgment and on the way forward.

The accused person advocate Mr. Makowe referring to section 312 (1) of the CPA, submitted that the judgment, which is not signed is a nullity. He contended that he failed to find precedents regarding the consequences of failure to sign a judgment and referred this Court to cases of the Court of Appeal which considered the consequences of failure to convict. He cited the cases of **Mohamed Athumani v R.**, Criminal Appeal No. 135/2016 (CAT Unreported) and **Mtangi Masele v R.**, Criminal Appeal No. 115/2016 (CAT Unreported). He contended that the Court of Appeal in both cases invalidated the judgment as well as the sentence for the trial court's failure to enter a conviction. Arguing by analogy, Mr. Makowe contended that the effect of failure to sign the judgment is to expunge the judgment.

The Republic's State Attorney, Mr. Byamungu concurred with the accused persons' advocate Mr. Makowe that the unsigned judgment was a nullity. Like Mr. Makowe, Mr Byamungu submitted that he was not able to find any precedent on the area but he found the decision of the Court of Appeal referring to the court's failure to sign the proceedings. He cited the case of **Yohana Musa Makuri & Another v. R.**, Cr. Appeal No. 559/2015(CAT Unreported). He submitted that the Court of Appeal held that proceedings not signed are not authentic. He added that the

judgment, which is not signed do not form part of the record. He contended that the trial magistrate countersigned each page of the judgment but forgot to sign the judgment. He contended that the Parliament under section 312 of the CPA, meant to sign the main body of the judgment and not to countersign pages of the judgment.

It is true as the record bears testimony that the trial magistrate did not sign the judgment. She simply countersigned on each copy of the judgment, after printing it. Thus, there is no signed judgment on the record. Unlike my learned friends, I am not travelling in the virgin land, I found a Court of Appeal decision to the effect that failure to sign and date the judgment offends the mandatory requirements of the law under section 312(1) of the CPA, which renders the purported judgment a nullity. It cannot be remedied by the mere signing and dating. For that reason, I concur with the submissions by my learned friends, Mr. Makowe and the State Attorney, Mr. Byamungu that the unsigned judgment is a nullity.

The Court of Appeal pronounced itself in **Patrick Boniphace V. R** Cr. Appeal No. 2/2017 (CAT unreported) where the court held

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*"In the matter at hand, since the judgment of the trial court was not signed and dated by the trial magistrate who*

*conducted the trial, there was no judgment to be appeal against before the High Court.”*

It is therefore settled that failure to sign a judgment renders it a nullity. I therefore, find that the judgment in criminal case No. 455/2017 before Tarime district court is the nullity. Consequently, the sentence imposed is also a nullity.

I now consider the way forward. The accused persons' advocate contended submitted that this Court having found that there is no judgment, it may take the Court of Appeal position either in **Mtangi Masele v R** (supra) that is to consider the evidence and determine whether a retrial is in the interest of justice or in **Mohamed Athumani v R.**,(supra) that is to return the record to the trial magistrate and order him to compose the judgment.

The Republic's State Attorney had different views from the accused persons' advocate. He submitted that this Court should not revisit the evidence as it is not upon this Court to write the judgment. He submitted that the record of the trial court is before this Court to consider to enhance the sentence and not otherwise.

In his rejoinder, Mr. Makowe advocate submitted that since the position of the Court of Appeal in **Mtangi Masele v R** (supra) is the latest he was praying this Court to follow that position.

I have just found that the judgment was nullity for want of signature. The issue is what is the way forward. It is settled that the principle as to whether or not to order a retrial was laid down by the Court of Appeal in the case of **Fate Hali Manji V. Republic** [ 1966] 1. EA 343 that-

*"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."*

It is now settled that before ordering a retrial the court has to consider whether there is evidence that it will be appropriate to order a retrial. See the case of **DDP v. Wambura Mahenga @ Kisiroti** Cr. Appl No. 282/2017 published on the website, [www.tanzlii.org](http://www.tanzlii.org). [2021] TCA 189, the Court observed that-

*"We are now called upon to answer whether or not it in the interest of justice to order a retrial."*

In another case of **Mage Kalamu v. R.** Cr. Appeal No. 265 of 2019 published on the website [www.tanzilii.org](http://www.tanzilii.org) [2020] TZCA 1877, the Court consider the prosecution evidence and stated that-

*"On the basis of the foregoing reasons, we find that since the prosecution case was hinged on the evidence of Pw2 which, for the reasons stated above, is wanting in terms of credibility, an order of retrial will not be for the best interests of the case. In the circumstances, we order that the appellant be released from prison forthwith unless she is otherwise lawful held".*

Given the above authorities of the Court of Appeal, before ordering a retrial the court has to consider whether re-trial is in the interest of justice. I went through the record and found that the evidence of the prosecution witnesses, E. 7055 CPL James, (**Pw1**), Samwel Mwera @ Marwa (**Pw2**), Alex Jaseph @ Samwel (**Pw3**) and Matiko s/o Chacha @ Mamba (**Pw4**) was to the effect that a group of people with traditional weapons wanted to arrest Samwel Mwera @ Marwa (Pw2), while he was in his farm. He escaped. They surrounded his cattle which were grazing during the day. They took them to the village office. The accused started auctioning them. Samwel Mwera @ Marwa (Pw2) went to the office with the police where the village chairman returned 10 herds of cattle and one sheep to him. However, during the cross examination Samwel Mwera @ Marwa (Pw2) deposed that the herds of cattle were taken by the Ritongo lead by the accused

person. Later, four herd of cattle were handed to Samwel Mwera @ Marwa (Pw2) (three cattle handed on the 26/4/2013 and one cattle returned on the 30/4/2013). The accused executed the handing over document. Samwel Mwera @ Marwa (Pw2) complained that 10 herds of cattle not returned.

The accused persons' defence was that they were not among persons whose seized Samwel Mwera @ Marwa (Pw2)'s herds of cattle as at that time they attending the Ward Development Council's (the WDC) meeting. They summoned Kaleb Samwel (Dw4) the Secretary of WDC who confirmed that the accused persons were attending the WDC meeting. The defence summoned also Chacha Mwera (**Dw5**) who was the among people who found Samwel Mwera @ Marwa (Pw2)'s cattle destroying bricks within the compound owned by the college. As part of the Ritongo, Chacha Mwera (**Dw5**) took Samwel Mwera @ Marwa (Pw2)'s herds of cattle to the village office.

Looking at the evidence of both sides I was not able to find first that it was proved beyond all reasonable doubt that the accused persons stole Samwel Mwera @ Marwa (Pw2)'s cattle. The prosecution did not prove one of the element of stealing that is an intention to deprive the owner of his cow permanently. The Ritongo took Samwel Mwera @ Marwa (Pw2)'s cattle as a punishment for grazing into the college compound and destroying bricks. There is evidence tendered by prosecution to show that the Samwel Mwera @ Marwa (Pw2)'s cattle were seized by Ritongo. It

is exhibit P.1 which Samwel Mwera @ Marwa (**Pw2**)'s tendered. The Ritongo sold them so as to compensate for destroyed bricks. After the Samwel Mwera @ Marwa (**Pw2**) paid for the destroyed bricks, the first accused ensured the retained or sold herds of cattle are returned to the him. The part of the document reads-

*"Husika na mada tajwa hapo juu.*

***Kutokana na tukio ambalo Ritongo walilitenda tarehe 23/04/2013 kwa madai kuwa Samwel Mwera amewapasulia matofali waliyonunua kwa michango na nguvu zao. Walimkamatia ng'ombe na mahojiano mjadala ulio fanyika kwenye ofisi ya Mtendaji Kata VEO na Samwel Mwera. Pia kufatia maelekezo ya OCSD- Nyamwaga. Ushauri wake umezingatiwa wa kurudisha ng'ombe hizo.***

*Aidha Ritongo wameshirikishwa na wamefikia makubaliano ya kutafuta suruhisho la kudumu. Ili kuepukana na migogoro isiyo na mwisho mzuri, pia Samwel Mwera amekubaliana." (emphasis is added)*

In addition, there is no evidence to establish that the accused persons were present when the Ritongo seized Samwel Mwera @ Marwa (Pw2)'s cattle. The trial magistrate did not indicate why she decided to neglect the accused persons' defence. I also noted with dismay and concerned the fact that the offence was alleged committed on 23/3/2013, however, the charged were preferred against the accused persons on the 28/7/2017. The

accused persons are leaders who all the time where present. I am alive that criminal cases have no time limit, however, such a delay has much to be desired. The Court of Appeal in **Majaliwa Ithemo V. R.**, Criminal Appeal No. 197 of 2020 (CAT unreported) held that

*"... an unexplained delay in arresting the suspect leads doubts in the credibility of a witness see, Samwel Thomas v. R, Criminal Appeal No. 23 of 2011, Michael Msigwa v. R, Criminal Appeal No. 216 of 2019 and Elias Yobwa Mkalagale v. R, Criminal Appeal No. 404 of 2015 and Azizi Athumani Buyogera v. R, Criminal Appeal No. 222 of 1994 (all unreported)"*

The prosecution evidence is wanting and the accused person have been tried twice, in the circumstance of the case, it is not in the interest of justice to order a re-trial. There is no evidence to order a retrial. The courts have developed the principles guiding retrial. See **Ahmend Ali Dharamsi sumar V R** (1964) EA 481, **Tamano V. R** [1969] 126, where the defunct Eastern Africa Court of Appeal held that-

*"1. The overriding purpose of retrial is to ensure that justice is done in case before the court. A serious error committed as to the conduct of a trial or the discovery of new evidence, which was not obtainable at a trial are the major consideration for ordering a retrial. The court that had tried the case must be able to correct the*

error as to the manner of trial, or to receive evidence that was then not available. However, that must ensure that the accused is not subjected to double jeopardy, by way of expense, delays and inconvenience by reason of the trial.

2. Other considerations are where the original trial was illegal or defective the rule of law is that a man shall not be twice vexed for one and the same cause (*nemo bis vexari debet pro eadem cause*), where an accused was convicted of an offence other than the one with which he was either charged or he ought to have been charged, the strength of the prosecution's case, the seriousness or otherwise of the offence, whether the original trial was complex or prolonged, the expense of the new trial to the accused, **the fact that any criminal trial is an ordeal for the accused, who should suffer a second trial, unless the interest of justice so require and the length of time between the commission of the offence and the retrial and whether the evidence will be available at the new trial.** (emphasis is added)

The Court also further held in **M'kaneke V. R** [1974] E.A 67 that-

*"Retrial should not be ordered because of insufficiency of evidence, where it will obviously result into injustice that is where it will deprive the accused/ appellant of a chance of an acquittal."*

The Court of Appeal in case of **Chacha Mati @Magige V. R.** Cr. Appeal No. 562/2015 added to factors stated in the case of **Fate Hali Manji** (supra) the following factors. *"We may add to these factors that an order for retrial would not be made where, on the whole of evidence, the conviction is unsustainable. This will guard against the prospect of giving the prosecution a chance to fill in gaps in its evidence at the trial."* See **Mathias Julius V. Republic** CA Cr. Appeal No. 498/2015 CAT (Unreported).

In the matter at hand, it is the trial court which occasioned the irregularity in the proceedings or while composing the judgment. The cursory consideration of the evidence revealed that there was no evidence to establish the offence of cattle theft. I am of the settled mind that, an order for retrial is unnecessary as it will not serve any interests of justice to either side.

In the end, I declare the judgment a nullity, quash and set aside the conviction and sentence. I further, order the accused persons to be set free unless otherwise held in the prison for any other lawful cause. The interest of justice in this case does not require ordering trial de novo. There is no evidence to establish the offence of cattle theft.



A handwritten signature in black ink, appearing to read "Kahyoza".

**J. R. Kahyoza**  
**JUDGE**  
**19/7/2021**

**Court:** Judgment delivered in the presence of Mr. Makowe advocate for the accused persons and Mr. Byamungu, State Attorney for the Republic via teleconference. B/C Mr. Makunja present.



**J. R. Kahyoza**

**JUDGE**

**19/7/2021**