IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC.CRIMINAL APPEAL No. 78 OF 2019

(Appeal from Criminal Case No. 229/2019 at Kwimba Ngudu District Court)

KAMANI MOSES ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last order: 18.05.2020

Judgment date 22.05.2020

A.Z.MGEYEKWA, J

The Appellant, KAMANI MOSES was originally charged before the District Court of Kwimba at Mwanza with the offense of cattle theft contrary to Section 258 (1) and 268 (1) of the Penal Code Cap.16 [R.E 2019]. He was convicted and sentenced to five years of imprisonment. The

appellant was aggrieved with both the conviction and sentence and therefore filed the present appeal to this court. The prosecution alleged that on the 30th of October 2019 at about 03:00hrs at Manguluma Village within Kwimba District in Mwanza Region, did steal four heads of goats with a total valued at Tshs. 170,000/= the property of one DAUD S/O MAKONO.

Aggrieved by the decision of the District Court of Kwimba, the appellant has preferred the present appeal seeking to impugn the District Court decision on a petition of appeal constituting six grounds of grievances as follows:-

1. *That the trial court erred in law and fact by admitting exhibit PE1 and PE3 without accord an opportunity to the appellant to comment on its admissibility.*

2. *That, the trial court erred in law and facts by admitting exhibit PE2 and PE3 which were obtained contrary to the law.*

3. *That, the appellant was convicted based on defective charge.*

4. *That, the trial court erred in law and In fact to convict the appellant based on the weak evidence of the co-accused which were contradictory in itself and in the circumstance at the case needed collaboration.*

5. *That, the sentence against the appellant was too excessive and illegal.*

6. *That, the charge against the appellant was not proved beyond reasonable doubt as to the evidence by the prosecution was insufficient and wanting.*

The hearing of this appeal was conducted via audio teleconference, Mr. Mshongi, learned counsel represented the appellant while Mr. Castus Ndamugoba, learned Principal State Attorney represented the respondent Republic.

On his part, Mr. Mshongi, learned counsel started to submit on the first ground of appeal, he argued that the trial court faulted itself by admitting the Exh.PE1 and Exh.PE3 without asking the accused if he had any objection. Mr. Mshongi fortified his submission by referring this court to page 13 to 20 of the trial court proceedings and cited the cases the case of Juma Ismail and **Another v The Republic** Criminal Appeal No. 501 Court of Appeal of Tanzania at Mbeya (unreported). He prays this court to expunge Exh.PE1 and Exh.PE3 from the court record.

Submitting on the 2nd ground of appeal, Mr. Mshongi faulted the admissibility of the certificate of seizure (Exh.PE2). He contended that the certificate of seizure was admitted contrary to section 38 of the Criminal

Procedure Act, Cap.20 [R.E 2019] because there was no evidence on record which showed that the certificate of seizure was signed by an authorized person and there was no any receipt which was tendered in court. Mr. Mshongi also faulted the admissibility of Cautioned Statement, he contended that the 1st accused Cautioned Statement (Exh.PE3) was recorded out of time, it stated that the accused were arrested on 31st October 2019 at 18:00 hrs while the 1st accused was arrested on 30th October 2019 at 04:00 hrs and was brought before the Police Station on 30th October 2019 at 10:00 hrs and the Cautioned Statement was recorded at 18:00 hrs. He prays this court to expunge Exh.PE2 and Exh.PE3 from the court record.

On the 3rd ground of appeal, the learned counsel for the appellant argued that the appellant was charged and convicted on the defective charge. He went on to submit that he was charged under section 268 of the Criminal Procedure Act, Cap.20 [R.E 2019] which did not contain any subsection. He went on submitting that the same contravene section 132 and 135 of the Criminal Procedure Act Cap. 20 [R.E 2019] and added that the appellant was prejudiced.

As to the 4th ground of appeal, Mr. Mshongi faulted the judgment of the trial Court that it based its decision on contradictory evidence which was not corroborated. He went on to submit that the prosecution witness testified that he did not know if the alleged stolen goats were caught on the hands of the appellant and he narrated how he takes the goats and PW3 helped him to recover the stolen goats. Mr. Mshongi added that PW1 named the appellant as the owner of the goats. It was his submission that the contradiction goes to the root of the case and the evidence is contrary to Exh.PE3. He urged this court to allow this ground of appeal.

Concerning the 5th ground of appeal, Mr. Mshongi argued that the sentence imposed on the appellant was too excessive and illegal. He went on to submit that the appellant was not caught in possession of the alleged stolen goats therefore the sentence of 5 years imposed on the appellant was too excessive. To buttress his submission, he cited the case of **Johans Sehani v Republic** Criminal Appeal No. 100 of 2007 Court of Appeal at Dar es Salaam. He concluded by stating that the appellant was a 1st offender therefore it was not proper for the trial court to issue a maximum sentence. He prays this court to revise the appellant's sentence.

As to the 6th ground of appeal, Mr. Mshongi argued that the evidence against the appellant was weak was not proved beyond reasonable doubt. He further argued that DW1 evidence was contradictory and none of the prosecution witnesses saw the appellant in possession of the alleged stolen goats. He argued that PW3 was not able to identify the special mark on his goats. He went on to argue that it is important to describe an exhibit before tendering it before the court. To support his argumentation he cited the case of **Hassan Said v Republic** Criminal Appeal No. 264 of 2015 Court of Appeal at Dodoma. It was Mr. Mshongi's further submission that the appellant and the 3rd accused were named by DW1 but astonishing the 3rd accused was found not guilty and was acquitted.

In conclusion, Mr. Mshongi insisted that the prosecution evidence was weak and the case was not proved to the hilt. He prays this court to allow the appeal and set free the appellant.

Mr. Castus Ndamugoba supported the conviction and sentence. In relation to the 1st ground of appeal, Mr. Ndamugoba admitted that the appellant was not asked if he had any objection when the witness was tendering the 1st accused cautioned statement (Exh.PE1). Mr. Namugoba

further argued that the 1st accused was asked if he had any objection and replied that he had no any objection then the trial court admitted the cautioned statement and marked it as Exh.PE3. Mr. Ndamugoba added that the appellant did not cross-examine PW5 that means he had no any objection.

On the second ground of appeal, the learned Principal State Attorney argued that Exh.PE2 relates to search, Mr. Ndamugoba refuted the cited section 38 of the Criminal Procedure Act, Cap.20 [R.E 2019] by stating that the section is inapplicable because it does not include search in the street instead it is related to search in a car, godown or vessels while the goats were found in street. He went on to argue that PW4 was a competent witness to tender the exhibit PW1 and PW2 are the ones who caught the goats and PW4 prepared a Certificate of Seizure and none of the accused raised any objection, thus the same means they conceded. He added that the appellant did not cross-examine PW4.

Mr. Namugoba refuted that the cautioned statement was recorded out of time, he argued that the appellants were arrested by the citizens; PW1 and PW2 then they were brought to the Police Station. He went on to

submit that counting the days of arrest, starts from the time when the accused were at the Police Station. He further submitted that what is stated in Exh.PE3 does not implicate the appellant because the evidence adduced by the appellant was the same as stated in Exh.PE3. He added that the 1st accused evidence was accomplished evidence. He referred this court to section 142 of the Evidence Act, Cap. 6 [R.E 2019], and the case of **Pascal Kitingwa v The Republic** TLR [1994].

On the 3rd ground of appeal, Mr. Namugoba admitted that the charge did not contain a subsection. He added that the proper citation was section 268 (a) and (b) of the Penal Code Cap. 16 [R.E 2019]. Mr. Namgoba urged this Court to apply the overriding principle because there was no any injustice and the appellant was not prejudiced. He added that the defects are curable under section 388 of the Criminal Procedure Act, Cap.20 [R.E 2019].

Submitting on the 5th ground of appeal, Mr. Namugoba strenuously argued that the trial court was fair to impose 5 years sentence because the minimum sentence is 15 years. He went on to submit that the trial court

considered that the appellant was the first offender that is why the punishment was reduced to 5 years.

As to the 6th ground of appeal, Mr. Namugoba argued that the case was proved beyond reasonable doubt because the evidence against the appellant was based on the cautioned statement of co-accused (Exh. PE3) and the evidence of the 1st accused was accomplished evidence, it was corroborated by PW1 and PW2 evidence. He added that the appellant conspired with the 1st accused to steal the goats. He went on to submit that the cautioned statement of the 1st accused was corroborated by PW1 and PW2 evidence.

Rejoining, Mr. Mshongi reiterated his submission in chief and argued that the learned Principal State Attorney admitted that Exh.PE1 was wrongly admitted therefore the same be expunged from the court records. He went on to argue that when the prosecution witness tendered the Exh.PE3 for admission the same was required to be subjected to cross-examination but that was not done. He insisted that the Certificate of Seizure (Exh.PE2) was filled while the prosecution did not conduct any search. Mr. Mshongi argued that the mistake contained in the charge sheet

cannot be corrected by overriding principle or by invoking section 388 of the CPA.

It was Mr. Mshongi's further submission that the issue of accomplish cannot stand because DW1 evidence was tainted with contradictions. Thus, it cannot render conviction towards the appellant therefore he prays this court to disregard DW1 evidence.

In conclusion, he prays for this court to quash the lower court decision and set free the appellant.

Having anxiously and carefully considered the grounds of appeal, the submissions made by the learned State Attorney as well as the proceedings and judgment of the lower Court the central issue for my determination is whether the present appeal is meritorious.

Addressing the first and second grounds of appeal, I had to go through the court records and found the records reveal that the 1st accused cautioned statement (Exh.PE3) was recorded on 30th October, 2019 at 18:00 hrs and on the same day PW4 arrested and brought the accused to the Police station around 08:30 hrs, they did not mention at what time they

arrived at the Police Station but at 13:00 hrs to 14:00 hrs they were informed that the 3rd accused was found. PW5 interrogate the accused person at 18:00 hrs, with the said omission, I intent to believe PW5 recorded the 1st accused statement after 4 hours from the time when he was arrested.

However, I have noted that the certificate of seizure (Exh.PE2) was admitted but it was not read over. The procedure for admission of a document in court is regulated by the Evidence Act, Cap.6 [R.E 2019] whenever a document is intended to be introduced in evidence, it must be read out. This was stated in the case of **Walii Abdallah Kibutwa & 2 Others v R,** Criminal Appeal No. 181 of 2006 and also in the case of **Omari Iddi Mbezi v Republic**, Criminal Appeal No. 227 of 2009 (both unreported). In the trial under scrutiny, on page 9 of the trial court proceedings, it is evidently shown that the Exh.PE3 was not read over to the appellant as required by the law thus the same is a fatal irregularity. Therefore, I proceed to expunge Exh. PE2 from the court records. These grounds are answered in affirmative.

Addressing the third ground of appeal, the appellant was convicted based on a defective charge. This ground moved me to explore and expose the charge sheet which lays the foundation of the prosecution case which rendered the appellant's conviction.

In this case at scrutiny, the charge sheet preferred at the appellant's door reads as follows:

REPUBLIC

VERSUS

1. Joseph S/O Thomas @ Benjamini
2. Kamani S/O Moses
3. Daniel S/O Mashauri

STATEMENT OF THE OFFENCE: Cattle theft c/s 268 of the Penal Code Cap.16 [R.E 2002].

From the above extract, it is clear that the offense of Cattle theft is referred to as section 268 of the Penal Code Cap. 16 [R.E. 2002]. The citation as it appears in the charge sheet does not contain any subsection. As appeared on the charge sheet, the cited section was also the basis of conviction by the trial court. Now I am asking myself whether it was proper for the trial Magistrate to proceed to convict the appellant based on the

incomplete section of the law. To my understanding, an offense should contain a reference to a proper section which includes a subsection ans sub paragraph (s). In the instant case, the correct and proper section or full citation ought to have been cited, according to the evidence available on record, ought to be section 268 (1), (2) and (3) of the Penal Code Cap. 16 [R.E 2019] which reads as follows:-

> " *268.-(1) If the thing is stolen is any of the animals to which this section applies the offender shall be liable to imprisonment for fifteen years."*
>
> *(2) Where any person kills any animal to which this section applies with intent to steal its skin or carcass or any part of its skin or carcass he shall, for the purposes of section 265 and this section, be deemed to have stolen the animal and shall be liable to be proceeded against and punished accordingly.*
>
> *(3) This section applies to a horse, mare, gelding, ass mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig.*

In the case of **Mussa Mwaikunda v R [2006]** TLR 387 and **Isidori Patrice v R,** Criminal Appeal No. 234 OF 2016 CAT (unreported), the Court of Appeal of Tanzania observed that :-

" Having carefully considered the evidence on record, we are of the settled view that an appropriate charge against the appellant ought to have been laid under paragraph (a) of section 132 (2)."

In the instant case the particulars of an offence lack the basic attributes of a charge, which would have informed the appellant the nature of the case he was to answer. This is so because these particulars do not allege the specific intent of the offence. In the light of this glaring defect in the charge, the appellant was not properly tried for and rightly convicted. Guided by the above authorities it is obvious that a charge which does not disclose an offense is incurably defective. In the aid of the current holding in **Issa Sio Charles v R** (supra) that, in the foundation of the case namely the charge is wanting, it is not proper to make an order for retrial as a retrial presupposes a criminal charge to have been in order and in existence. Therefore, this ground is answered in affirmative.

On the 6th ground of appeal, the appellant is complaining that the prosecution side did not prove the case beyond reasonable doubt, I concede with the appellant's ground of appeal that the prosecution failed to prove the case beyond reasonable doubt after all efforts taken to prove the case. It is a cardinal principal of law in criminal cases the prosecution is

required to prove the case against the accused person beyond reasonable doubt as it was held in the case of **Horombo Elikaria v The Republic,** Criminal Appeal No. 50 of 2005 (unreported). In the record, the charge sheet upon which the appellant was convicted is defective. Moreover, the evidence on record are contradictory, I am saying because certificate of seizure was recorded and states that the 1st accused was found with 4 goats with identification marks black with white patterns but PW1, the alleged owner of the alleged stolen goats did not mention how many goats he has lost and he did not identify or mention the mark of his goats. The prosecution evidence creates doubt as to whether the alleged stolen goats belonged to PW1. That means the prosecution side did not prove its case beyond reasonable doubt. Therefore this ground is answered in affirmative.

With the foregoing observation, I find no need to discuss the remaining grounds of appeal, which was raised by the appellants as to do so would be a mere academic exercise. It only suffices to hold that the trial court's conviction against the appellant was not proved beyond reasonable doubt and occasioned to failure of justice on the part of the appellant.

For the foregoing reasons, I have found myself enjoined by law to allow this appeal in its entirety. I quash the conviction and set aside the sentence imposed on the appellant. I accordingly order for their immediate release from prison, unless they are lawfully detained.

Ordered accordingly.

DATED at Mwanza this date 22nd May, 2020.

A.Z.MGEYEKWA

JUDGE

22.05.2020

Judgment delivered on 22nd May 2020, and both parties were remotely present.

A.Z.MGEYEKWA

JUDGE

22.05.2020