

TANZANIA / JUDGMENT

# Ally Kibasisi Lelengo

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA MOROGORO DISTRICT REGISTRY  
AT MOROGORO CRIMINAL APPEAL NO 21863 OF 2024 (Appeal from the decision of the District  
court of Mvomero at Mvomero in Criminal Case No 8892 of 2024) BETWEEN ALLY KIBASISI  
LELENGO APPELLANT VERSUS REPUBLIC RESPONDENT

## JUDGMENT

MRUMA,<sup>3</sup> In the District Court of Mvomero at Mvomero the Appellant Ally Kibasisi was charged with the offence of Stealing Certain Animal Contrary to Section 258 and 268 of the Penal Code Cap 16 RE 2022. During the trial It was alleged that on 17<sup>th</sup> day of October 2023 at Ranch Area, Wami, Sokolne Village within Mvomero District In Morogoro Region the Appellant did steal two goats and two sheep valued at Shillings 700,000/= the property of one Teteni Kllundo. The Appellant denied the charge. In the bid to prove Its case the prosecution called a total of four 1 witnesses and tendered one documentary evidence and one physical evidence to prove their case. After a full trial the learned trial magistrate was satisfied that the prosecution did prove its case beyond reasonable doubt, convicted the Appellant and proceeded to sentence him to serve five years imprisonment. Appellant was aggrieved by the conviction and sentence and has appealed to this court on the following grounds

1. That the learned trial court magistrate grossly misdirected himself to enter conviction relying on the insufficient evidence of the prosecution/
2. The trial court magistrate deliberately misdirected himself to convict him on the offence of cattle theft without taking into account that the prosecution fails to prove the case beyond reasonable doubt.
3. That, the learned trial court magistrate deliberately erred in law and fact for failure to note the defectiveness of the charge. The particulars of the offence were the repletion of the technical words making the statement of the offence. The particular of the offence did not state all necessary elements of the offence of cattle theft.

4. That, the learned trial court magistrate erred in law and fact to rely his conviction on the improperly taken and recorded cautioned statement. Neither Appellant cautioned as required under section 53 of the Criminal Procedure Act Cap 20 (RE 2022) nor any facility for communicating with a lawyer, relative or friend testified by PW4 to be available.
5. That the trial court magistrate erred in law and fact for convicting the appellant relying on the cautioned statement which was different with the evidence of PW1.
6. The trial court magistrate erred in law and fact to convict the appellant basing the conviction on the visual identification which was not water tight to eliminate all mistakes of identity.
7. The trial court erred in law and fact to hold that the evidence of the prosecution corroborated by the evidence of PW5 and the fact that the appellant was properly identified without taking into regards that PW5 did not tender the purported motor circle to relate the testified. At the hearing of this appeal the Appellant appeared in person and was unrepresented. Being a layman and as expected he had nothing material to explain to the court. He simply asked the court to allow his appeal and free him because according to him he did not commit the alleged offence. On the part, the Respondent/Republic was represented by Ms Veronica Chacha, learned State Attorney who hesitantly opposed the appeal. The learned State Attorney noted that it was misdirection on the part of the trial magistrate to convict the Appellant for the offence of Stealing under section 265 of the Penal Code while he was not charged with that offence. She however quickly added that the misdirection was rectified on the date of judgment because charge sheet was amended and a new charge of Cattle theft was read over and the Appellant was Invited to plead to it. On proof of the case, the learned State Attorney submitted that on the evidence on record the prosecution did prove its case to the tilt. She said that the complainant PW1 and one Safi Julius who were at the scene managed to identify Appellant by using light from a torch (Exhibit PI). She referred this court to a famous decision of the Court of Appeal in the case of Waziri Amani Versus R(1980)TLR 250. Submitting with respect to a caution statement, the learned State Attorney conceded that the trial court was wrong to admit the said statement without conducting an inquiry and she argued this court to expunge the statement from the record and rely on the oral testimony of the witness. I have carefully gone through the records of the trial court, the grounds of this appeal and the submissions of the learned State Attorney. I determining the appeal I beg to start with the complaint about the charge sheet which is the foundation of any criminal case. As started at the outset of this judgment the Appellant was charged with the offence of stealing certain animal purportedly contrary to section 168 (1)(3) of the Penal Code Cap 16 R. E. 2024. On 26/06/2024 when the case was called on for judgment the prosecution successfully prayed to amend the charge sheet under section 234 (1) of the Criminal Procedure Act. The charge was accordinly amended to read Section 268 instead of section 168 (1) & (3) of the Penal Code. Thereafter the new charge was read over and properly explained to the Appellant he pleaded not guilty to the offence and when he was addressed under section 234(2)(b) he replied thus: hao mashahidi wah'okuja sina kingine cha kuwauHuza labda kama wanaketa wengine'^ Immediately thereafter

judgment was passed and the Appellant was convicted for the offence of stealing certain animal contrary to section 168 (1) (3) of the Penal Code and was convicted for cattle theft purportedly under sections 258 and 268(1) of the Penal Code. Let me start with the charge sheet. A charge is a formal complaint or foundation of a criminal prosecution usually in writing made before a court of law alleging that a particular person has committed an offence or offences with a view to putting in motion criminal law process that is with a view to moving the court to inquire into or try the case and it is the first document on a case. The purpose of a charge is to inform the accused and the court with sufficient clarity the allegations against him (See Magistrate's Manual by B.D. Chipeta retired Judge Law Africa Reprint 2014 page 8) As started herein above in the first charge which was read over to the Appellant, he was charged with the offence stealing certain animal contrary to section 168 (1) (3) of the Penal Code Cap 16 R.E. 2022]. There is no doubt that that charge was defective. Throughout the trial, the Appellant and the court proceeded on apprehension that the Appellant was being charged under Section 168 (1) and (3) of the Penal Code. Section 168(1) of the Penal Code provides that:- "Any person who being legally liable either as a master or mistress to provide for any apprentice or servant necessary food , clothing or lodging wilfully and without lawful excuse or neglect to provide the same or unlawfully and maliciously does or cause to be done any bodily harm to the apprentice or servant so that the life of that apprentice or servant Is endangered or that his health has been or Is likely be permanently Injured Is guHty ofan offence" The particulars which accompanied the charged offence stated that the Appellant was being charged that on 17^^ day of October 2023 at Ranch area within Wami Sokoine Village in Mvomero District in Morogoro Region did steal two goats and two sheep valued shillings 700,000/= the property of one Teten Kilundo. I have no doubt that there was mix up of sections of the law which create the offence charged in both charge sheets. As can be seen while particulars of the offence suggest an offence of animal stealing, the section of the law cited in the first charge sheet creates a distinct offence relating to master not providing for servant or apprentice. In the second or substituted charge the cited sections of the law, that is to say sections 258 and 268 of the Penal Code do not create any offence. The question is whether the defects prejudiced the Appellant. The learned State Attorney argued this court to find that the defect was curable under section 388 of Criminal Procedure Act. In my view the defect is not curable. The trial magistrate was duty bound to watch out for such errors for they are likely to cause confusion. According to the well- known dictum of Curlewis JA in R Versus Hepworth 1928 AD 265 at 277:- "/I criminal triai is not a game....a judge's position is not merely that of an umpire to see that the ruies of the game are observed by both sides. A judge is an administrator ofjustice, he is not merely a figure head, he has not oniy to direct and control the proceedings according to recognized ruies of procedure but to see thatjustice is done" A trial magistrate being a person holding the scale between the contending parties is expected to determine objectively and dispassionately the case before him with the view of reaching a just conclusion of the matter. I understand that the responsibility of the correctness of the charge lies on the door-step of a public prosecutor or complainant but since a magistrate is the person who finally decides the case, it is his duty to ensure that charges filed in his court

are correct both in form and content. In Ugandan case of *Uganda Versus Keneri Opidi* [1965] EA 614 the facts were that the accused pleaded guilty firstly for failing to display an L plate and secondly for being a learner driver driving while not accompanied by a competent driver. The first count was laid under section 9 (b) 123 of the Traffic Ordinance 1951. The question was whether the defect prejudiced the Accused. As it turned out, there was no section 9 (b) of the Traffic Ordinance only section 9 (which itself did not create an offence). The Court held that the error was a fundamental one of law in that the accused was charged with non-existent offence, and that such error was not curable by section 347 of the Uganda Criminal Procedure Code which is in para materia with our section 388 the Criminal Procedure Act. The court added that the particulars of the offence, however clearly stated, of themselves could not create an offence. The convictions were set aside. In the present case, as it was in *Opidi's* case [Supra], section 168 (1) and (3) does not exist and even sections 258 and 268 (1) which were cited in the amended and substituted charge do not create the offence of cattle theft with which the Appellant was convicted. The offence of theft is created by section 265 of the Penal Code which provides that:- "Any person who steals anything capable of being stolen is guilty of theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to Imprisonment for seven years". Sections 258 and 268 of the Penal code used by the trial magistrate to convict the Appellant do not create any offence of stealing. While section 258 of the Penal Code defines what is theft, section 268 of the same code prescribes punishment for stealing certain animal. That being the case it is my finding that it was utterly wrong to convict the Appellant under sections 258 and 268 of the Penal Code. As regards the amendment and substitution of the charge sheet which was done on the date of judgment purportedly under the provision of 234 (1) and (2)(a) of the Criminal Procedure Act, the question that arises is whether or not such substitution was irregular and if yes, whether it constituted a failure of justice on the part of the Appellant. Section 234(1) of the Criminal Procedure Act provides that:- "Where at any stage of a trial it appears to the court that the charge is defective, either in substance or form, court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case, the required amendments cannot be made without injustice and also Under the provisions of sub-section (2) (a); after the amendment or substitution or addition of the charge it is mandatory for the court to call upon the accused person to plead to the charge and under sub-section

- (2) (b) and (c) court may permit re-call of witnesses for purposes of further cross-examination or examination in chief with reference to any alteration or addition to the charge. The term trial is not defined in the Criminal Procedure Act, but Black's Law Dictionary 10<sup>th</sup> Edition by Bryan A. Garner defines it as:- "A formal judicial examination of evidence and determination of legal claims in adversary proceedings" The question that follows is whether a date set for judgment is in the stage of the trial. In my view it is not. It is not because a case is fixed for judgment after closure of the defence case and when there is no any further examination of

evidence or witnesses. Thus, amendment of the 11 charge that was done on the date of judgment. As to the question whether there has been a failure of justice, the Court of Appeal and this court have in a number of decisions recognized that in an exceptional case the irregularity may be of such a kind that it per se result in a failure of justice. The test to be applied to determine whether there has been a failure of justice is simply whether the Court hearing the appeal considers on the evidence (and credibility findings if any) unaffected by the irregularity or defect that there is proof of guilty beyond reasonable doubt. If it does so consider there was no resultant failure of justice. In the case at hand I have already find as a matter of fact that the Appellant was charged for contravening section 168 (1) of the Penal Code which does not exist and that even section 168 which does exist does not create the offence of stealing certain animals which the particulars of the offence were predicated. It caters of failure by a master to provide for servants and apprentices, thus there were variance between the charge and the evidence adduced in support of it. Because criminal justice is not a hide and seek game, it was the obligation of the trial magistrate in the interest of justice and particularly so when the accused is a lay person and not legally represented to hold the scale of justice between the prosecution led by an expert of law and the accused 12 (a lay person) while guarding against conduct which could create impression that he/she was descending into the arena of conflict in order to enable him/her to determine objectively the way the balance tilts. The learned trial magistrate overlooked this aspect of his duties and obligations and treated the Appellant, a lay person as a legally represented person and hence caused injustice on the part of the Appellant. The learned state attorney urged this court to invoke section 388 of the Criminal Procedure Act, as was of the view that, trial magistrate simply misdirected himself to convict the Appellant for cattle theft instead of stealing an animal. Section 388 provides that; Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of 13 justice, the court may order a retrial or make such other order as it may consider just and equitable. As stated the Appellant was charged with a different offence which is not cognate to the, offence of cattle stealing or stealing a certain animal. In such circumstance the provision of section 388 can't come into to cure the mischief done by the prosecution and the court. In the upshot, I am satisfied that the Appellant's conviction was arrived from unfair proceedings of the district court. I allow his appeal quash the proceedings and conviction and set aside the sentence meted against him. I order the Appellant to be set at liberty unless he is held for any other lawful cause. It is so ordered. OF O C 'V (.5 A.R. U JUDGE 11.11. 2024. 14

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