

TANZANIA / JUDGMENT

mhono so nyanguge versus republic

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB- REGISTRY OF MUSOMA AT MUSOMA CRIMINAL APPEAL NO 43 OF 2021 (Originating from Criminal Case No 107 of 2020 of the District Court Serengeti at Mugumu) MHONO S/O NYANGUGE @ BUCHI..... APPELLANT Versus REPUBLIC..... RESPONDENT

JUDGMENT

2(fh October & 3Cfh November 2021 Kahyoza, J.: In the district court of Serengeti at Mugumu, Mhono s/o Nyanguge @ Buchi (Mhono) was charged and convicted with the offence of animal Stealing Contrary to Section 265 and 268 (1) and (3) of the Penal Code, [Cap 16 R.E 2019]. After full trial, the court found the appellant guilty, convicted and sentenced him to serve a custodial sentence of fifteen (15) years. Aggrieved, Mhono appealed to this Court contending one, that the evidence was not sufficient for want of corroboration; two, that the trial court did not afford him an opportunity to call witnesses; three, that the trial court did not consider his defence; and lastly, that the trial court relied on wrong exhibits to convict him. Mhono's complaints raised the following issues: - i

1. Was the trial court justified to rely on the uncorroborated evidence of PW1 and PW2 to convict the appellant?
2. Did the trial court deny the appellant an opportunity to call witnesses?
3. Did the trial court consider the appellant defence?
4. Were the exhibits relied upon by the trial court relevant? Briefly, the background of this case was that on 24/2/2020 two herds of cattle which belonged to Daniel Muhere (Pw1) were stolen. He reported to police station. After three days, that is on 27/2/2020 the appellant was found selling one cow without permit. Daniel Muhere (Pw1) identified the cow found in possession of the appellant as one of his stolen cows. The appellant was arrested and charged. The appellant denied the charge. The trial court believed the prosecution's account found the appellant guilty, convicted and sentenced him to an imprisonment of 15 years. Mhono appeal to this court. The appellant fended for himself during the hearing of the

appeal and he had nothing to add to the grounds of appeal. Mr. Temba, the State Attorney, who appeared for respondent opposed the appeal. I will consider his submission while replying to the issues raised by the appeal. Was the trial court justified to rely on the uncorroborated evidence of PW1 and PW2 to convict the appellant? The appellant's complaint was that the trial court erred to rely on the uncorroborated evidence of PW1 and PW2 to convict him. The respondent's attorney opposed the first ground of appeal. He argued that the evidence of Pw1 was corroborated by the evidence of Pw2 and Pw3 corroborated the evidence of Pw1 and Pw2, that the appellant was found with stolen animal. I noticed from the records of the trial court that there is no eye witnesses hence, the appellant's conviction is based whole on circumstantial evidence. Daniel s/o Muhere @ Nyimwamu (Pw1) testified that on 24/02/2020 in the morning hours, he realized that two herds of cattle were stolen. He reported to Machochwe Police Post. On 27/02/2020 Daniel s/o Muhere @ Nyimwamu (Pw1) received a call from the chairman of Manyate Village that his cow was found. He went with his village chairman to Nyasurura Village. He found one cow with chairman of Nyasurura, which identified one of his stolen cows. He described the mark of the found cow. He deposed that the cow was a bull with red and white colours patches. He added that the cow bore his identification marks, which were a right ear and tattoo impressed on its skin. Mgaya s/o Chacha (Pw2), the chairman of Nyasurura village got information on 27/02/2020 from Elia Laurent that the appellant was selling one cow without livestock permit. He went to the place where the appellant was held. He found him in possession of one bull with white and red patches with cut right ear cut and a tattoo. The appellant told him that the cow belonged to him. He requested a permit from Mgaya s/o Chacha (Pw2). Mgaya s/o Chacha (Pw2) refused to issue a permit to the appellant as he was required to obtain the same from his village chairman. Mgaya s/o Chacha (Pw2) notified Samwel Kerema (Pw3), the chairman of Manyate village. Samwel Kerema (Pw3) notified Daniel s/o Muhere @ Nyimwamu (Pw1) of the fact that his stolen cow had been found at Nyasurura village. Daniel s/o Muhere @ 3 Nyimwamu (Pw1) tendered the stolen and recovered cow for identification and No. F 5692 CpI. Lyangalula (Pw4) tendered a certificate of seizure as exhibit P.E. 1, a document handing over one red colour bull with white patches to Daniel s/o Muhere @ Nyimwamu (Pw1) exhibit P.E. 2 and red colour bull with white patches as exhibit P.E. 3. The appellant testified that he was arrested by the chairman of Nyasurura Village and two militiamen on 27/02/2020 when he was on his way to visit his brother. After his arrest, the chairman took him to the village office where he found one cattle but he did not know anything about the cattle. The appellant's complaint was that the evidence of Daniel s/o Muhere @ Nyimwamu (Pw1) and Mgaya s/o Chacha (Pw2) was not credible enough to warrant his conviction, it required corroborating evidence. I wish to point out at the outset that there is no law, which requires the evidence of Daniel s/o Muhere @ Nyimwamu (Pw1) and Mgaya s/o Chacha (Pw2) to be corroborated. Mgaya s/o Chacha (Pw2) and Samwel Kerema (Pw3) were chairmen of their respective villages. Mgaya s/o Chacha (Pw2) got information that the appellant selling his cow without permit from his village chairman. After Mgaya s/o Chacha (Pw2) realized that the appellant was a resident of Manyate village, he notified Samwel Kerema (Pw3), who was Manyate village chairman. I do

not find any reason not to trust Mgaya s/o Chacha (Pw2) or Samwel Kerema (Pw3) or any reason to treat their evidence with caution. As general rule of practice it is the evidence of a person who has an interest to serve whose evidence require corroboration. It is trite law that witnesses must be trusted unless, there is a cogent reason to question their credibility. The Goodluck Kyando v. Rv [2006] 4 TLR 363 and in Edison Simon Mwombeki v. R., Cr. Appeal. No. 94/2016 (the Court of Appeal stated that- "Every witness is entitled to credence and must be believed and his testimony accepted un/ess there are good and cogent reasons for not believing a witness." I am unable to find any cogent and good reason to disbelieve the prosecution witnesses. There is no proven interest against Mgaya s/o Chacha (Pw2) or Samwel Kerema (Pw3) apart from maintaining peace and order in their villages. Mgaya s/o Chacha (Pw2) and Samwel Kerema (Pw3) deposed how the appellant was arrested, found with a cow suspected to be stolen as he had no permit to sell the cow. The appellant admitted to be arrested at Nyasurura village. He only disputed to be found with stolen cow, although he deposed that he was taken to the village office where he found one cow, which it was alleged he stole. I find the evidence of Daniel s/o Muhere @ Nyimwamu (Pw1) and Mgaya s/o Chacha (Pw2) credible. There was no need of an independent corroborative evidence. Even if, there was a need of evidence to corroborate the evidence of Daniel s/o Muhere @ Nyimwamu (Pw1) and Mgaya s/o Chacha (Pw2), I find the evidence of Samwel Kerema (Pw3) an independent evidence to corroborate the evidence of Daniel s/o Muhere @ Nyimwamu (Pw1) and Mgaya s/o Chacha (Pw2). It is also on record that the appellant was found with a bull which was identified by Daniel s/o Muhere @ Nyimwamu (Pw1) as one the stolen herd of cattle. No. F 5692 CpI. Lyangalula (Pw4) tendered without objection a certificate of seizure as exhibit P.E. 1, a document handing over one red colour bull with white patches to Daniel s/o Muhere @ 5 Nyimwamu (Pw1) which was exhibit P.E. 2 and red colour bull with white patches exhibit P.E. 3. I find the exhibits to form another piece of evidence to corroborate the evidence of Daniel s/o Muhere @ Nyimwamu (Pw1) and Mgaya s/o Chacha (Pw2). Give the above reasons, I find the first ground of appeal baseless. The evidence of Daniel s/o Muhere @ Nyimwamu (Pw1) and Mgaya s/o Chacha (Pw2) was credible. There was no requirement for an independent corroborative evidence. Even if, an independent evidence was required, I find that there was ample, independent evidence to corroborate that evidence of Daniel s/o Muhere @ Nyimwamu (Pw1) and Mgaya s/o Chacha (Pw2) as demonstrated. Did the trial court deny the appellant an opportunity to call his witnesses? The appellant complained that the trail court denied him an opportunity to call witnesses. Mr. Temba, the learned state attorney refuted the allegation that the appellant was denied an opportunity to call witnesses. He submitted that the trial court gave the appellant a chance to summon his witness but the appellant informed the court that he had no witness to call. It is on record that the trial court addressed the appellant in terms of section 231 of the Criminal Procedure Act, [CAP 20 R.E 2019] (the CPA) and the appellant informed the trial court in no uncertain terms that he had no witness to call. The record reads- " COURT: The accused person well address in terms of section 231 of the Criminal Procedure Act [CAP 20 R.E 2019] and he is asked to make reply thereto." 6 Sgd by I.E.Ngaile - RM 07/12/2020 Accused person: I will give evidence on oath. I do not intend to call any other

witness and I have no any exhibit to tender during my defence. Order:-..... Sgd by I.E.Ngaile - RM 07/12/2020" I am alive of the position of the law expounded by the Court of Appeal in Abdallah Kondo v R Criminal Appeal No. 322/2015 (CAT Unreported) that to comply with section 231 of the CPA, a trial court must record what it informs the accused and his answer to it. It held- " Given the above legal position, it is our view that strict compliance with the above provision of the law requires the trial magistrate to record what the accused is informed and his answer to it. The record should show this or something similar in substance with this. "Court: Accused is informed of his right to enter defence on oath, affirmation or not and if he has witnesses to call in defence. Accused response:... '[record what the accused says)." It is obvious that the trial court did not comply with the directive of the Court of Appeal in Abdallah Kondo v R., (supra). However, given the appellant's response quoted above, I am the considered view that the trial court did comply with the requirements of section 231 of the CPA as expounded by the Court of Appeal. Thus, the trial court's failure to write what it informed the appellant in terms of section 231 of the CPA, did not 7 occasion any miscarriage of justice. For that reason, I find the appellant's complaint in the second ground of appeal baseless. Did the trial court consider the appellant's defence? The appellant complained in the third ground of appeal that the trial court did not consider his defence. The state attorney submitted that the appellant's complaint was baseless. He submitted strongly that the trial court did consider the appellant's defence and found it without merit. He prayed the ground of appeal to be dismissed. I wish to state at the outset that the appellant's complaint that his defence was not considered is without merit. The trial court did consider and evaluate the evidence of both sides. It is an established rule of evidence in a criminal trial that an accuse person has no duty to prove his innocence but to cast reasonable doubt to the prosecution's evidence. The trial court weighed the appellant's evidence and rightly so, found it without merit. It observed- " Generally speaking, the defence put forward by the accused person did not raise any doubt to the prosecution evidence that he was found in possession of the stolen cattle, in the case of Joseph Marwa K Republic [2020] TZHC 308, it is was held that "It is a settled law that the accused story does not need to be believed but only to raise a reasonable doubt to the prosecution case" The evidence of Pw2 and Pw3 which reveals that they found the accused person with the said cattle is very corroborative with that 8 of Pw1 and Pw4. I would like to recall what was held in the case Azizi Abdalah U, Republic [1991] TLR 71, that; "The purpose of corroboration is not to give validity or credence to evidence which is deficient or upset or incredible but only to confirm or support that which as evidence is sufficient and satisfactory and credible" Therefore, basing on the weight of the evidence, I do agree with the prosecution that the accused person was indeed found in possession of the stolen property (the bull) recently after the same being stolen." Given the above excerpt from the decision of the trial court, I have no reason to fault the trial court. I am of the firm view that the trial court considered the appellant's evidence and found that it did not cast any doubt to the prosecution's evidence. I find like the trial court that the appellant's defence did not punch holes in the prosecution's case. Consequently, I dismiss the third ground of appeal for want of merit. Were the exhibits relied upon by the trial court relevant? The appellant complained that the

prosecution tendered wrong exhibits. He did not expound his complaint. The state attorney submitted that the evidence tendered were all relevant. He submitted that prosecution tendered a certificate of seizure as exhibit P.E. 1, a document handing over one red colour bull with white patches to Daniel s/o Muhere @ Nyimwamu (Pwl) as exhibit P.E. 2 and red colour bull with white patches as exhibit P.E. 3. He concluded that all exhibits were relevant and prayed the ground of appeal to be dismissed for lack of merit. 9 It is undisputed, as submitted by Mr. Temba, that the prosecution tendered through No. F 5692 CpI. Lyangalula (Pw4) without objection a certificate of seizure (exhibit P.E. 1), a document handing over one red colour bull with white patches to Daniel s/o Muhere @ Nyimwamu (Pwl) (exhibit P.E. 2) and red colour bull with white patches (exhibit P.E. 3). All the above exhibits are relevant. The appellant was charged with the offence of animal stealing and the prosecution's case is that the appellant was found with stolen cow. It was mandatory for the prosecution to tender the cow. The prosecution tendered a seizure certificate, which was signed by the appellant and an independent witness. The prosecution also tendered a document of handing over the bull to Daniel s/o Muhere @ Nyimwamu (Pwl) for custody. It is a practice that exhibits are kept at police station. However, given the fact that the exhibit in this case was a living animal it was very vital to arrange for its safe custody. The police handed the cow to Daniel s/o Muhere @ Nyimwamu (Pwl). The record shows that all documentary exhibits were ready to the appellant in open court. They were properly admitted and the appellant did not object to any of the exhibits. I have no reason to fault the trial court. I find the fourth ground of appeal baseless. I dismiss it. This is a first appeal; thus, the appellate court is required to review of the whole evidence on record. I considered the evidence on record to say the least, the prosecution not only proved the case beyond reasonable doubt but it did so beyond all reasonable doubt. The unshakable evidence is that the appellant was found in possession of recently stolen cow. Daniel s/o Muhere @ Nyimwamu (Pwl)'s two herds of cattle were stolen on 24/02/2020 and the appellant found with one of the stolen herd of cattle on 27/02/2020. Daniel s/o Muhere @ Nyimwamu (Pwl) identified the cow, exhibit P.E.3. He described the indelible marks on the ear and tattoo on the cow's skin. Daniel s/o Muhere @ Nyimwamu (Pwl) identification was unquestionable. The appellant told Mgaya s/o Chacha (Pw2) that the cow belonged to him. The appellant went to Mgaya s/o Chacha (Pw2) for permit to sell the bull, exh. P.E.3. Like the trial court, I find the doctrine of recent possession of stolen property applicable. Joseph Mkumbwa & Another v.R Criminal Appeal No. 94 OF 2007 CAT (Unreported) the Court of Appeal had the following to say regarding the doctrine of recent possession of stolen property:- "7776 position of the law on recent possession can be stated thus: Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis of conviction it must be proved that, first, that the property was found with the suspect; second, that the property is positively the property of the complainant; third, that the property was recently stolen from the complaint; and lastly, that the stolen thing in possession of the accused constitutes the subject of the charge against the accused. It must be the one that was stolen or obtained during the commission of the offence charged. The fact that the accused does

not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements. " li It is undisputable that the prosecution proved all four factors, which form the basis of invoking the doctrine of recent possession of stolen property. For that reason, the appellant was rightly convicted with the offence of stealing animals. In the end, I find the appeal against conviction without merit. I decided to consider the sentence. The appellant was convicted with the offence of animal stealing under section 268 of the Penal Code, Cap. 16 R.E. 2019 and sentenced to 15 years' imprisonment. The section reads:- 268.-(1) Where the thing 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. The sentence imposed was the maximum sentence. The ground of sentencing the appellant with the maximum sentence was that the offence of animal steal was the rampant in the area. The sentence offended the principles of sentencing; One, it is trite principle of sentencing that a maximum sentence should only be imposed when the offence comes close to the worst of its type. In Regina v Mayera (1952) SR 253, the court held that:- 12 "I maximum punishment is reserved for the worst offence of the class for which the punishment is provided. A court, in sentencing for an offence, should consider whether it may not be likely that far worse instances of the same class may in future come before it, and should keep some penalty in reserve in order to be able more severely to punish the greater offences. Thus it is undesirable to punish a first offender who steals a lamb with the maximum penalty.... for then no greater penalty can be inflicted on the hardened criminal, who steals an ox or a horse, or a number of sheep, unless he happens to come within the provision allowing a greater punishment in case of second or subsequent conviction" T\ng, the trial court failed to consider the fact the appellant was the first offender. He deserves to be treated with lenience; and thirdly, there was no evidence to prove that the offence of animal stealing was rampant. In the Juma Muniko Mhere v R.z Criminal Appeal No. 211/2014 the High Court had previously convicted Juma Mniko Mhere with the offence of manslaughter and imposed a maximum sentence. Aggrieved, Juma Mniko Mhere appealed to the Court of Appeal. The Court of Appeal made the following observation- " Before the appellant was sentenced to that maximum sentence, the learned State Attorney, one Mr. Mayenga, had told the learned sentencing judge that the appellant (then accused) was a first offender. AH the same, he pressed for a "stringent sentence" which would serve as a lesson to others, especially In the region from which the appellant hails "in which acts as the present one are rampant." We have noted with 13 consternation, that the learned State Attorney had not given any statistics or data to bear him out in this assertion, "(emphasis is added) It is common that a first offender should be treated leniently. It is trite law that an appellate court will not interfere with the sentencing discretion of the trial judge or

magistrate unless it is evident that the impugned sentence is patently inadequate, illegal or manifestly excessive; See, the decision in, R. V. Mohamedal All Jamal (1948) 15 EACA 126. An appellate court will also interfere where "it is evident that he (trial magistrate) has acted upon some wrong principle or overlooked some material factor. In the present case the trial magistrate imposed the maximum sentence without considering the fact that the appellant was the first offender and without stating the aggravating factors that dictated him to impose the maximum sentence. It ignored the principle that the maximum sentence is for the worst scenario. Thus, this appellate court is justified to interfere with the sentence. The offence of animal stealing is one of the scheduled offences. It falls under the Minimum Sentences Act, [Cap. 90 R.E. 2002] section 5 o the minimum sentence Act reads-.

5. Notwithstanding the provisions of section 4- (a)(i) any person who is convicted of robbery shall be sentenced to imprisonment for a term of not less than fifteen years; (ii) if the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more persons, or if at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to imprisonment to a term of not less than thirty years;
- (b) where any person is convicted of stealing cattle, the court shall sentence him to imprisonment for a term of not less than five years', (emphasis is added) I find that the sentence imposed was excessive. I set it aside and substitute with it a sentence of five years imprisonment under section 268 of the Penal Code read together with section 5 of the Minimum Sentence Act. In fine, I dismiss the appeal for want of merit save for the sentence, which has been reduced to five years' custodial sentence. The appellant shall pay the value of the second cow which was stolen and not recovered. The value of that cow is assessed at Tzs. 500,000/= It is ordered accordingly. 30/11/2021 Court: Judgment delivered in the presence of the appellant and Ms. Agma Haule, S/A for the respondent virtually. B/C Makunja present J. R. Kahyoza JUDGE 30/11/2021 15

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