

TANZANIA / JUDGMENT

Mudinang Scaned

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14 May 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MANYARA AT BABATI CRIMINAL APPEAL NO. 4563 OF 2024 (Originating from Criminal Case No.
125/2023 of the Hanang' District Court at Katesh) MUDINANG
GIDAMOMOYED.....APPELLANT VERSUS THE REPUBLIC.....
RESPONDENT

JUDGMENT

6th & 14th May, 2024 Kahyoza, J.: Mudinang s/o Gidamomoyed (the appellant) was charged with the offence of cattle theft contrary to section(s) 265 and 268(1) of the Penal Code, [Cap. 16 R.E 2022] before the District Court of Hanang'. He pleaded guilty. Following the appellant's plea of guilty, the court convicted and sentenced him to serve fifteen years of imprisonment. Aggrieved on both conviction and sentence, the appellant raised five grounds of complaint; one, that, the trial court erred not to find his plea was equivocal; two, that, trial court did not draw the memorandum of agreed facts in compliance with section 192(1)(3) of the Criminal Procedure Act, i [Cap. 20 R.E 2022] (the CPA); three, that, the court erred not to hold that the appellant did not comprehend the proceedings for lacking of legal representation; four, that, the trial court erred for not complying with section 235(1) of CPA; and five, that, the trial court erred to convict the appellant on the plea of guilty which was not proved beyond all reasonable doubt. Was the plea equivocal? The facts depict that the appellant was convicted upon his own plead guilty. He was charged for stealing two herd of cattle. After the court read the charge the appellant admitted that he stole two herd of cattle, the property of his father. Consequently, the Court convicted and sentenced him to serve fifteen years of imprisonment. The appellant's first ground of appeal is that his plea is equivocal. During the hearing of the appeal, the appellant had nothing to add, rather prayed for this court to consider the grounds of appeal. Replying to the complaint in the first and fifth complaints, Ms. Rose Kayumbo, State Attorney submitted that, the appellant's plea of guilty was unequivocal, thus, he is barred under section 360(1) of the CPA to appeal against his conviction. The appellant pleaded guilty to the charge and to the facts establishing the elements of the offence the offence of Cattle theft. She contended that the appellant could only appeal against the sentence. To support her contention, she cited the case of in Elias Shauri vrs. R, Criminal Appeal No. 657 of 2020 tanzlii [2023] TZCA 17662. As the record bears testimony, the appellant was convicted upon his own plea of guilty. The law is settled, that is section 360 (1) of the CPA, that, no person convicted on his own plea of guilty shall be allowed to appeal against

conviction. He can only appeal against the sentence. Section 360 (1) the CPA states- "360.-(I) No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence." Having been convicted upon his own plea of guilty, the appellant has a right to appeal against the extent or legality of the sentence. I am aware of the fact that the Court of Appeal and this Court have in cases without number pronounced themselves that section 360 (1) the CPA is general rule. There may be exceptional circumstances under which a person convicted upon his own plea of guilty may appeal against conviction. A few cases to mention, which held that section 360 (1) the CPA, provides a general rule, are Laurence Mpinga v. Republic [1983] T.L.R. 166, Peter Kombe v D.P.P. Cr. Appeal No. 12/ 2016 (CAT, Mbeya Registry (unreported) and Josephat James v. Republic, Cr. Appeal No. 316 of 2010, CAT, Arusha Registry (unreported). In Josephat James v. R., the Court of Appeal stated that under certain circumstances an appellate court may entertain an appeal arising from a plea of guilty where:

- (i) The plea was imperfect, ambiguous or unfinished and, for that reason, the lower court erred in law in treating it as a plea of guilty; (ii) An appellant pleaded guilty as a result of a mistake or misapprehension; (iii) The charge levied against the appellant disclosed no offence known to law; and (iv) Upon the admitted facts, the appellant could not in law have been convicted of the offence charged. (See Laurence Mpinga v. Republic, (1983) T.L.R.) It is incumbent upon this court to determine as to whether this appeal falls within the category of exceptions to the general rule. It has been argued by the appellant that the purported plea of guilty was equivocal. The same was opposed by Ms. Rose Kayumbo that plea was unequivocal. I had a cursory review of the record, the appellant pleaded guilty to the charge and after the facts were read to him, he also pleaded guilty. The facts established all elements of the offence of cattle theft. Section 228 (1) and (2) of the CPA states that the trial court can convict an accused person if that accused person admits the truth of the charge. It states that after the accused admits the charge, the court must record his admission in the words he uses. It provides that- "228. -(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.
- (2) where the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary." The Court of Appeal's recent decision in Emmanuel Ambrous V. R., Court of Appeal Criminal Appeal No. 555 Of 2017 CAT (Unreported) held that "an accused can only be convicted on his own plea of guilty if the court is satisfied that his plea is unequivocal " Based on the above authorities, and after having scrutinized the charge, its particulars, as well as the facts of the charged offence, I am satisfied that the statement of facts clearly disclosed and established all the essential ingredients of cattle theft. Like the trial court, I am satisfied that the plea of guilty is unequivocal. Consequently, the appellant's complaint that his plea of guilty was equivocal is baseless. For that reason, the appellant had no right to appeal against conviction. He could only appeal against the sentence. Was the sentence

justifiable? The trial court after convicting the accused person with the offence of cattle theft contrary to section(s) 265 and 268(1) of the Penal Code sentenced him to serve fifteen years' imprisonment. Section 268(1) of the Penal Code creates the offence and prescribes the punishment to be imposed. It reads thus- "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." Reading the above section, it is obvious that the trial court imposed a maximum sentence or he took it that the sentence provided was the minimum sentence. He may have mistaken it that the phrase "shall be liable to imprisonment for fifteen years" connotes a mandatory term of fifteen years custodial sentence. To the contrary, the phrase implied that the court has discretion to impose a sentence that it fits the circumstances and justifiable. The Court of Appeal in *Jafari Juma vs R.,* (Criminal Appeal 252 of 2019) [2023] TZCA 216 (3 May 2023) held that- "Time and again we have emphasized that, the phrase "shall be liable to imprisonment for a term of thirty years" which we have emboldened above; does not impose the custodial term of thirty years as the mandatory penalty. It gives discretion to the trial court, subject to its sentencing jurisdiction, to sentence the offender up to the maximum of thirty years' imprisonment depending upon the circumstances of the case after considering all mitigating factors. See; *Sokoine Mtahali @ Chimongwa v. Republic,* Criminal Appeal No. 459 of 2018 (unreported) in which we drew inspiration from the decision by the erstwhile Court of Appeal for East Africa in *Opoya v. Uganda* [1967] E.A. 752 on an appeal originating from Uganda in which the court interpreted the phrase "shall be liable to" as follows: "It seems to us beyond argument that the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words; they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it." I find, for reason stated above that the trial court misconstrued the phrase to connote, a minimum sentence, that the sentence was not justifiable. It was therefore excessive. I set it aside. The appellant, being a first offender who pleaded guilty was entitled to lenient sentence, thus, I sentence him to a term of three years. The sentence shall commence running from the date of the appellant's conviction. It is ordered accordingly. Dated at Babati, this 14th day of May 2024 * J.R. Kahyoza JUDGE Court: Judgment was set to be delivered virtually and delivered in the absence of parties who could not connect to the virtual court. B/C Ms Fatina Haymale (RMA) present J.R. Kahyoza JUDGE 14.05.2024 8

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