

TANZANIA / JUDGMENT

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1 January 2024

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© THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT KIGOMA DC. CRIMINAL APPEAL NO. 000015770 OF 2024 SHABAN FREDRICK COMPLAINANT / APPELLANT/ APPLICANT VERSUS REPUBLIC RESPONDENT / DEFENDANT

JUDGMENT

A. K. RWIZILE, J

Facts

This appeal arises from Criminal case No. 105 of 2023 of Uvinza District Court. The appellant was charged of cattle theft contrary to section 268(1) and (2) of the penal code. The appellant before the trial court did not admit commission of the offence. The respondent tendered 6 witnesses who proved that the same had indeed stolen one bull property of Manoni Simon. He was therefore found guilty, convicted and sentenced to 5 years imprisonment. In terms of the charge sheet laid before him, it was alleged that the appellant on 22nd day of August 2022 at about 0500hrs at Chakulu village within Uvinza District in Kigoma Region, did steal one cow (bull) valued at TZS 3,000,000.00. Facts further show, Manoni (Pw1) owns a herd of cattle. On the fateful morning, he discovered there was no cattle in the cowshed. With Pw2 and other fellows, mounted a search. It took few hours where his cattle were recovered on the grazing ground except one big bull. They followed footprints to the cross-road and could not find anything. When meditating on the route to take, fortunately, a motorcycle driven by the appellant came by carrying meat in the huge basket. Their attempt to stop him did not bear fruits. He was pursued and finally stopped. It was found in the basket, two cattle thighs, and intestines in the basket. On that account, the appellant is alleged to have said, the same was from one Masanja. Without plausible explanation, and upon discovering that the two thighs had a 'B' mark and two lines, suggesting it was the stolen bull, the appellant was arrested, severely beaten by the people and was ultimately reported to the police. He was later charged and convicted as shown. Not satisfied by both conviction and sentence, he has filed this appeal with 5 grounds of appeal shown below;

1. That, the trial court erred in law and facts in holding that, the prosecution side proved the charge against the appellant as by law enjoined.

2. That, the trial court erred in law and facts for having held that, there was legally disposal order of the alleged cow meat while the alleged order and the inventory form (Exhibit P7) were illegally procured. Hon. AUGUSTINE RWIZILE Page. I
3. That, the trial court erred in law and facts by failing to properly scrutinizing evidence on record thereby arrived at the erroneous verdict that the prosecution side established and proved the doctrine of recent possession of the alleged cow meat while it was not and without considering chain of custody of the alleged cow meat.
4. That, the trial court erred in law and facts in admitting and relying on erroneously and illegally procured and tendered exhibits which are liable to be expunged from court's records.
5. That, the trial court erred in law and facts for failure to have considered credibility of the prosecution witnesses which was in flaws giving insufficient, implausible and inconsistent evidence on a number of issues going to the root of the case. Before this court, the appellant was represented by Mr. Sadiki Alikali learned advocate while the respondent was represented by Ms Rehema Mpozemenya learned state attorney. The case was heard by oral submissions as follows;

Submissions:

Mr. Sadiki Alikali advocate for the appellant: First ground: There was no proof of cattle stealing as he was convicted. Section 268(3) of the Penal Code, there must be an animal stolen. The law cited shows animals that may be stolen may include a cow, bull and there is a comma on each mentioned an animal in the law. It is therefore either, a cow or a bull. The charge sheet stated that the appellant stole the cow(bull) which is not an animal known to law. It ought to be either, he stole a cow or a bull. Therefore, the charge sheet was defective, since there is no such an animal and therefore the offence charged does not exist. There is no crime without law and article 13(c) of the URT constitution, provides that no punishment that can be provided if not mentioned by the law. We therefore pray the court rules out there was no offence committed. There must be evidence of the animal expert. There was meat found and it was said there was just pieces of meat. Pw4, the livestock officer testified before the trial court, but did not state his credentials. He simply said, he was with experience of 20 years. He did not prove the case as held in the case of Fundisha Omary vs R, Criminal Appeal No. 592 of 2015 CAT on page 12. second and fourth grounds: The exhibits were tendered and admitted in contravention of the law such as ex. P7 an inventory tendered by Pw5. The execution of P7, the appellant was not fully involved, while he ought to be as held in the case of Buluka Leken Ole and another v R, Criminal. Appeal No. 459 of 2020 on page 14-16. He was to be asked to comment which was not done. The exhibit should be expunged. Other exhibits P2, P3, P4, P5 and P6 tendered by Pw3 were a panga, knife, a basket and a motorcycle. The witness when tendering them did not lay any foundation, he did not describe them before they were shown to him. Third and fifth ground: The trial court did not evaluate the evidence on the doctrine of recent possession. There must be four things as stated in the case of John Nicomed Geay v R, Criminal Appeal No. 73 of 2010 IO on page 12-

13. The points stated under the case law cited were not proved i.e there must be an animal named in the charge sheet and section 268(3) of the Penal Code and that there must be a certificate of seizure, which in this case, it was unlawfully executed. The case was not proved, the appeal be allowed. Page. 2 Hon. AUGUSTINE RWIZILE Ms Rehema Mpozemenya State Attorney for Republic 1st, 3rd and 5th grounds of appeal: The case was proved beyond reasonable doubt. The facts of the case referred to a bull. If there is an error by mentioning another animal, it is rectified under the overriding objectives principle. The animal stated is the bull or cow in terms of section 268(3) of the Penal Code. The evidence pointed out the animal called a bull and not anything else. Pw4 told the court that he is a livestock officer with 20 years experience. It is the fact that he did not state his credentials but proved that the meat found with the appellant was a meat of the cow. He said, the same could not be fit for consumption and so was destroyed. The offence was proved through the doctrine of recent possession and the four things were proved as held in the case of Bulungu Nzungu v R, Criminal Appeal No. 39 of 2018 on page 5-6. The meat was found in the possession of the appellant as testified by Pw1. The stolen bull was proved to belong to Pw1 and proved it had a 'B mark' with two horizontal lines. It made him identify the same. The same was recently stolen as per Pw1. His evidence was supported by Pw2, and other witnesses saw the special marks, as in the evidence of Pw2, Pw4 and Pw5. The charge was proved as per certificate of seizure and an inventory. 2nd and 4th grounds of appeal: Exhibits were tendered and admitted in accordance with the law. Exh. P7 was tendered by Pw5. The appellant was present when the inventory was executed. The exhibits were tendered without objection and there was no dispute, if he was not involved, he could have disputed the same. Other exhibits as mentioned by the learned advocate, the proceedings as per Pw3, he identified them before being tendered. It was clear that the foundation was laid. The certificate of seizure was filled at the police station, and he was taken there by the complainant. All exhibits were handled by him to the police, and it was therefore filled by the police. Mr. Sadiki Aliko advocate for the appellant in a rejoinder. The overriding objective principle cannot cure the defects in the charge sheet. The charge deals with the bull and the cow at the same time. This goes to the root of the matter. The livestock expert did not prove it was a bull. His experience was not backed by any evidence of his credentials. The doctrine of recent possession did not prove the distinctive marks different from others. Before arrest, nothing was said about the bull and its marks. The evidence did not prove the appellant was there. The certificate was not filled as per the law. I pray the appeal be allowed. The law. The law that establishes the offence the appellant was charged with is section 268 of the penal code. It states as hereunder; (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. Page.3 Hon. AUGUSTINE RWIZILE

- (3) This section applies to a horse, mare, gelding, ass mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig

Determination.

Mr. Sadiki argued that the charge the appellant was convicted of is defective because it was stated in the particulars of the offence that the appellant got to steal a cow(bull). In his view a cow and a bull are two different animals and therefore the appellant was convicted based on the charge which conflicts the law. The animal, in his view, called a cow(bull) is not known into the eyes of the law. It may be pointed out that a charge must be concise and clear. It must be specific with the offence alleged committed. The rationale for charging an accused person with a specific charge lies in the principle of fair hearing. The accused person must know the specific charge he is facing so that he can prepare his defence. This cannot be accomplished where the accused person faces an omnibus charge or charge that is not concise and clear. Mr. Sadiki was therefore right in asserting that there is no crime without the law. The yard stick on whether the charge is defective is, if an accused knew or understood in certain terms the charge facing him for the purposes of preparing his defence. In normal terms, the cow is well known. The bull and the cow although different but belong to same species. It seems throughout the hearing; the trial court addressed the stolen property as the cow. The appellant I have to say, it is with certainty that he knew the offence he was charged with, and he therefore properly manage to put up his defence. It was further argued that since Pw4 a livestock officer who examined the meat did not specify his credentials, his evidence purportedly given as an expert lacked in material terms. I have to note here that there is no dispute that Pw4 was a livestock officer who examined the meat and stated it was not for human consumption. I do not think, proving that meat was not fit for human consumption needs an expert. Since Pw4 was so called. I find it unmerited to discredit his evidence merely because he did not state his credentials in court. The first ground therefore has no merit it fails. The second and fourth grounds will be determined together. They are about exhibits P7. Exhibit P7 is an inventory. It was made on 22nd August. It is in the record that it contains a disposal order given by a resident magistrate, Pw5. According to the exhibit, it was two thighs of the cow with Mark B and the intestines. Upon examining the same an order for burying the same was made. He said, his evidence that the disposal order was made in the presence of the appellant. Although the appellant denied any involvement in the commission of the offence and did not say anything about the order by having made a total denial which I am it is a lie. But still it was not his duty to prove himself innocent. As submitted by Mr. Sadiki, the manner in which the inventory of perishable goods has to be dealt with is elaborate in the case of *Buluka Leken Ole and another v R*, (supra) where the Court of appeal on page 11. It was stated that the accused persons should not only be present but also should be asked to comment before the order is issued; It stated as hereunder; Similarly, in *Mosi Chacha @ Jranga v. R*, Criminal Appeal No. 508 of 2019 (unreported), faced with the same problem of absence of the suspect at the session at which a disposal order was sought, this Court observed that the mandatory requirement is not only the presence of the suspect but also affording him a right to be heard before the disposal order is to be given. Page.4 Hon. AUGUSTINE RWIZILE It was the decision of

the Court that based on the requirement of the PGO 229 para 25, five things must be observed;

1. The prayer to issue the order to dispose of perishable exhibits may be made by the investigator or the prosecution informally before a magistrate in chambers;
2. If the order is likely to be relied upon in any future court proceedings against any suspect, that suspect must be present at the time of making the prayer and;
3. The suspect must be asked as to his comments, remarks or objections as regards the perishable exhibits sought to be destroyed.
4. If that suspect does not make any comments, remarks or objections, the magistrate shall record the fact that, the suspect was invited to make any comments, remarks or objections, but he opted to make none.
5. If the suspect makes any comments, remarks or objections, they shall be recorded as appropriate either on the reverse side of the Inventory Form or on any separate piece of paper or papers and shall be signed by the magistrate. The above are cumulative conditions that must be met if the inventory was to be used in the evidence before the trial court. Cattle theft is a serious offence and carries with it severe sentence. There is no evidence that any of the above was complied with. Although Pw5 said the appellant was present, he said, it was at night and was called at the police station. I think this was the worst of all practice offered by Pw5. The same threw himself in the deception because it is not even clear if the person, he met was the appellant or not. Still, it is not clear if the meat in question was that subject of the case at hand. If that was indeed done, when then did he stamp on the inventory or was invited to the police station and went with the stamp of the court. The appellant was not asked to comment on the same and Pw5 is good to that. It is therefore true of Mr. Aliko that the inventory was in contravention of the law. It should be expunged. Having expunged exhibit P7, the remaining exhibits which are key include the motorcycle which was not proved belonged to the appellant. But still there are a knife, a panga, a basket and a bucket exhibits P6, P2, P3, P4 and P5 respectively, which I have no doubt they were tendered and admitted as the law demands. It should be noted that since the appellant was charged of cattle theft, it was the duty of the prosecution to prove that the meat subject of the case was of the bull/cow. To prove this, the Pw4 was tendered. He said, he was called at the police station to determine if the said was meat from the domestic animal or not. He said, he was called to determine two thighs of the cow with a mark B. He made a report which however was not admitted on evidence. The court ruled on page 25 of the proceedings that, "the report has been tempered" and for that reason its authenticity could not be relied upon. The ruling of the trial court on it was not challenged and therefore remains intact. It is therefore clear that there is no evidence proving that they were thighs of the cow, or a bull as said. In his evidence he did not say how did he conclude that it was cow meat distinct from other animals. From the above evidence, having excluded exhibit P7, and having showed that the rest of the exhibits were not key to the case. I hereby find merit in the 2nd and 4th grounds of appeal. From the above, I find it irrelevant to determine the

remaining grounds since there is no sufficient evidence to prove the charge. Therefore, it is held that there is merit in this appeal, and it is allowed. The judgement of trial court is quashed, and sentence set aside. The appellant be released from prison unless held for some other lawful Page. 5 Hon. AUGUSTINE RWIZILE ::- cause. Dated at KIGOMA ZONE this 8th of October 2024. A. K. RWIZILE, J JUDGE OF THE HIGH COURT Page.6 Hon. AUGUSTINE RWIZILE

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Prepared on 13 October 2026 · Esheria