**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO 113 OF 2016**

**(Appeal from the judgment of the District Court of Morogoro at Morogoro in Criminal Case No.183 of 2011 dated 24 September, 2013)**

**MSAFIRI CHAWA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

***19 Febr. & 13 March, 2018***

**DYANSOBERA, J:**

This is an appeal by Msafiri Chawa against the decision of the District Court of Morogoro which convicted him of a charge of cattle theft and imposed on him a sentence of fifteen (15) years imprisonment.

The appellant absconded the bail and so he was convicted *in absentia* by the trial Court. He now appeals to this Court challenging both conviction and sentence. The particulars of the charge against him were that at around 0300 hours on the day of 9th day of April 2011, at SUA Kididimo in Morogoro District and Region, together with his colleague who are not part of this appeal, did steal one cow valued at Tshs.2,000,000/= the property of one Ally Khalfani.

The petition of appeal lodged by the appellant contains eight grounds of complaints. However, having passed through the petition of appeal, it appears that the appellant's major complaint against the trial court's verdict is that the **prosecution did not prove its case beyond reasonable doubt**.

When the appeal came up for hearing the appellant appeared in person, unrepresented. The respondent Republic was represented by Ms.Neema Mbwana, learned State Attorney, who prayed for an adjournment on the grounds that she had no case file.

Following frequent requests for adjournment of this appeal by the Republic the Court declined further adjournment as prayed by learned State Attorney; thus the appeal was ordered to proceed for the reason that the Republic /respondent was not serious with this appeal as it has taken long time in court.

The appellant had nothing useful to add to what he had stated in his grounds of appeal. he, therefore, prayed the Court to adopt his grounds of appeal as reflected in his petition of appeal.

I have considered the trial court's record, the grounds of appeal and the overall circumstances surrounding this case. The law is clear and it has been repeated in numerous cases by the Court that it is upon the prosecution to prove the charge against the accused beyond reasonable doubt. See for instance, the Court of Appeal decisions in Bakari **Omari@Rupande v. Republic,**

Criminal Appeal No 130 of 2006 (Unreported) and **Ahmad Omari v. Republic,** Criminal Appeal No 154 0f 2005 (Unreported).

The appellant in this appeal faults the decision of the trial Court that his conviction was based on improper hearing procedural irregularities. The gist of his complaint is that since the case at the trial Court was against three accused persons charged with different counts, the trial Court was under obligation to prepare a memorandum of the agreed facts for each accused for the purpose of fair and expeditious trial, instead the trial Court opted to prepare a joint memorandum of agreed and disputed facts for all accused which is against the law.

It is the requirement of the law that at the conclusion of preliminary hearing the Court is obliged to prepare a memorandum of agreed matters for each accused. This is clearly spelt out under section 192 (3) of the Criminal Procedure Act [Cap 20 R.E.2002] and was expounded in the case **of Rashid Nassor v. Republic,** Criminal Appeal No 59 of 2003 (unreported).

From my dispassionate scrutiny of the record in this appeal, it is true as rightly observed by the appellant, the preliminary hearing conducted by the trial Court did not comply with the provision of section **192(3) of the Criminal Procedure Act**, as the memorandum of agreed and disputed mater was jointly prepared for both accused.

The legal effect of non-compliance with section 192 (3) of Criminal Procedure Act depends on the circumstances of a particular case. For instance, in the case of **Christopher Ryoba v. Republic,** Criminal Appeal No 26 of 2002,(unreported) there was non compliance by the trial Court with the provision of **section 192(3) of CPA** in that no memorandum of agreed matter was drawn up along the requirement spelt out in the subsection.

The appellant came to Court seeking the nullification of his trial on this ground only. The Court held that only the proceedings dealing with the preliminary hearing were vitiated. The appeal was, thus, dismissed. The appellant in this appeal did not tell the Court how he was prejudiced by the trial Court's omission to prepare a memorandum of agreed matter for each accused. According to the records, in this appeal I have gleaned nothing there from indicating that the appellant was prejudiced in any way by this non compliance.

In the view of the Court of Appeal decision in the case of **Rashid Nassor V Republic Criminal Appeal No 59 of 2003 and Joseph Munene and Another V Republic Criminal Appeal No 109** of **2002** both (unreported),I reject this ground of appeal.

Another ground of complaint which is purely a point of law is that the trial District Court erred in law for admitting exh.P1 tendered by the prosecution against the appellant. In response to this ground of complaint, I agree with the appellant the procedure for the

admissibility of both exhibits at the lower Court was tainted with illegalities, inconsistencies and defects.

As the trial court record reflects, the Exhbits P1 (inventory), P2 (Caution statement by 2nd accused) and P3 (Caution Statement by the appellant) were tendered by the prosecution as indicated at page 15,34and page 44 of the proceedings.

In my view, it was incorrect for the trial Court to admit both exhibits tendered by the prosecutor. That was wrong. The exhibits were supposed to be tendered by the witnesses since the prosecutor was neither a witness nor a competent person to tender both exhibits in Court. See section 127(1) of the Evidence Act and the case of **DPP V Sharif Mohamed @Athuman and 6 others Criminal Appeal No 74 of 2016.**

It is also worthy to note that, the caution statements of the appellant (Exhb.P3) and the 2ndaccused (Exhb.P2) were both recorded contrary to section 50(1) (a)(b) of Criminal Procedure Act, therefore even if they would have been tendered by a competent witness their admissibility would have been defective.

Since the caution statement by the appellant was recorded contrary to the law, it should not have been admitted in evidence. guided by the principles adumbrated in the case of **Richard Lubilo and another v. Republic,** Criminal Appeal No 10 1995, I expunge the evidence in exhibitsP1, P2 and P3. That being the position, I am left with the evidence given by PW1, PW2, PW3, PW5, PW6, PW7

and PW 8. The question that arises for determination is whether the evidence of these witnesses alone is capable of establishing a conviction against the appellant.

It is not in dispute the appellant's conviction at the trial Court was based on circumstantial evidence and his act of absconding the bail. There is no witness who testified to have caught the appellant *in flagrante delicto* stealing the cow. For instance, PW1 Ally Alfan failed to tell the Court how he identified the head of the cow which he said belonged to him; he merely stated that his cow had a mark on its ear.

Taking into account the settled position of the law on identification, as succinctly stated in the case of Raymond **v. Francis** (1994) TLR 100, it cannot be said with certainty that the identification given by PWI met the legal requirement by any standard.

The 1st accused and the 2nd accused in the trial Court were recorded to have incriminated themselves and it is upon their confessions that the conviction appellant was founded. Their evidence required collaboration before it was acted upon. This requirement was underscored in the case of **Mkubwa Said Omar v. SMZ** (1992) TLR 365.

In the instant appeal, it appears there was no corroboration of evidence in the trial Court. Since the evidence of the prosecution in the trial Court was weak for the reasons I have demonstrated and

since the caution statement of the appellant and the inventory were of no evidential value there was no evidence to found the conviction of the appellant.

Although the appellant absconded the bail but that in my view that was not a sufficient ground to page the conviction of the appellant. The accused may abscond the bail for several reasons but not necessarily that he may have committed the offence.

In consideration of discrepancies found in prosecution evidence at the trial Court.I have apparently arrived into the conclusion that the prosecution did not prove the charge against the appellant beyond reasonable doubt.

In the event, and for the reason stated above, I allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released forthwith unless lawfully held.


W.P. Dyansobera

JUDGE

13.3.2018