IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 132 OF 2023

HASHIMU MOHAMED KINANDA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

30th August & 25th October 2023

MWANGA, J.

The appellant, **HASHIMU MOHAMED KINANDA,** appeared before the District Court of Kibaha at Kibaha on 15th March 2021 to answer a charge of theft contrary to Section 265 and 268(1) of the Penal Code, Cap. 16 R.E 2019. It was alleged that on the 10th day of May 2021, at Muheza Tangini area within Kibaha District in the Coastal Region, the appellant stole twenty-five cows valued at fifty million Tshs. (50,000,000/=) and seven goats valued at three hundred thousand Tshs (300,000/=) the property of Rajabu Maulid.

He denied the charge. After the trial, he was found guilty as charged and convicted accordingly. He was, therefore, sentenced to five (5) years imprisonment. Being aggrieved, the appellant appealed against the conviction and sentence to this court.

Believing innocent, he lodged this appeal against that District Court decision on the following grounds:

1. That the trial magistrates erred in law and facts to convict and sentence the appellant without considering the ownership and the value of the animals purported to be stolen and owned by Rajabu Maulid. They were not established and proved to the required standard thereby creating doubts in the prosecution case.
2. The trial magistrates erred in law and facts to convict and sentence the appellant without considering that the chain of custody of all prosecution exhibits was broken down and improperly admitted in evidence; therefore, the same was to be expunged from the record.
3. That the trial magistrate erred in law and fact to convict and sentence the appellant while the prosecution failed to call a material witness in which the Court could have drawn the adverse inference

for such failure by the prosecution and, the appellant deserved an acquittal by the trial court.

4. That the honorable trial magistrate erred both in law and facts to convict and sentence the Appellant while there are variances between the Charge sheet and evidence; hence, the Appellant could have been acquitted by the trial court.
5. That the honorable trial magistrates erred both in law and facts to convict and sentence the appellant without considering the Prosecution Evidence meted with material doubts that could have been resolved in favor of the appellant; hence he deserved an acquittal by the trial court.
6. That the honorable trial magistrate erred both in law and facts to convict and sentence the appellant while the appellant was not supplied with a complainant statement to understand the complaints which resulted from the charges against him to enable him to get well prepared and marshal his defense.
7. That, the honorable trial magistrate erred in both law and facts by failing to comply with the mandatory requirements set out under section 210 (3) of the Criminal Procedure Act, Cap 20 [R.E 2022]

which couched in mandatory terms, hence making the whole prosecution's testimonies with no evidential value.

8. That, the honorable trial magistrate erred in both law and facts to convict and sentence the appellant without considering that the appellant was not found in possession of any animals or skin of the purported stolen animals and that no evidence was established beyond reasonable doubts that the appellant was the one who stole the purported stolen Animals.
9. That, the honorable trial magistrate erred both in law and facts by improperly applying the circumstantial evidence in convicting and sentencing the appellant herein as he was not arrested with any animals or skin of the purported stolen animals, hence erroneous decision which prejudices the appellant.
10. That the honorable trial magistrate erred both in law and facts to convict and sentence the appellant without considering the mitigation factors, which are couched in mandatory terms.
11. That the honorable erred both in law and facts to convict and sentence the appellant in this appeal without considering his defense adduced during the trial.

12. That the honorable trial magistrate erred both in law and facts to convict and sentence the appellant without considering the minimum sentence provided under the Minimum Sentence Act, hence prejudicing the appellant.
13. That the trial honorable Magistrate erred both in law and facts by treating the Appellant herein with legal discrimination to convict and sentence him while acquitting the 2nd Accused **(Shabani Ramadhani Luhi),** hence violating the constitutional principle of equality before the law.
14. That the honorable trial magistrate erred both in law and facts by failing to evaluate the evidence properly adduced by all parties' trial at the trial court, hence reaching the erroneous decision which prejudices the appellant.
15. That the honorable trial magistrate erred in both law and facts to convict the appellant while the prosecution failed to prove the case against the appellant beyond a reasonable doubt.

The appeal was argued by way of written submission. Mr. Maleko, Senior State Attorney represented the respondent, while the appellant enjoyed the legal service of Selemani Matau, learned counsel.

The appellant contends that he was illegally convicted and sentenced while the prosecution failed to establish and prove ownership and value of animals alleged to have been stolen and owned by complainant one Rajabu Maulid. The appellant argued that it is mandatory on the offense of stealing or theft for the complainant to establish and prove ownership and value of the property claimed to be stolen. In support of his contention, the learned counsel cited two authorities; **Hassani Said Twalib Vs Republic,** Criminal Appeal No.95 of 2019, the Court of Appeal at Mtwara on page 10, and **Faraji Ally Likenge vs. the Republic,** Criminal Appeal No.381 of 2016, CAT-Mtwara) on page 12. He argued that no piece of evidence was adduced to prove that the complainant was the owner of the alleged stolen animals. Also, the value of the said animals was not proved since there was no valuation report or any other legal means as required by law. Therefore, he failed to adhere to the principle that he who alleges must prove.

Per contra, the learned stated attorney has vehemently argued that the proof of value is not one of the key elements to be proved in the

offence of stealing under section 258(1) of the Code [Cap 16 RE 2022]. He added that the ownership issue was established by prosecution PW1 (Rajab Maulid), who, on page 15 of the trial court proceedings, identified the stolen cows with mark TKB.

I have gone through this ground of appeal and considered the respective submissions. Undoubtedly, the court records show that the prosecution has established the ownership of the stolen property by its witness PW1, who identified the stolen property by the mark TKB M 7 and TKB. On the value of the stolen property, the complainant, PW1 just mentioned that the cow stolen was valued at Tshs. 53,000,000/=.

In my view, the appellant's argument above is in disarray because what needs to be proved in the offense of stealing is whether the said properties have been stolen or not, which to my view is an undisputed fact. Furthermore, such an argument would make sense if the appellant had asked the question regarding ownership or value during the trial. Raising such allegations at the appellate stage is regarded as an afterthought. It is the settled position of the law that failure to cross-examine the adverse party's witness is deemed to have taken as true the substance of the evidence that was not cross-examined. See the case of **Shomari**

Mohamed Mkwama vs Republic, Criminal Appeal No.606 of 2021[2022] TZCA. But the variances of places as named did not prejudice the accused as was given the right to cross-examine and the right to defend himself. This position is provided in the case of **Loy Lesila@ Mbaapa vs The DPP,** Criminal Appeal No.64 of 2022. Following the above, I find that the ground lacks merit.

Regarding, the second ground of appeal, the learned counsel for the appellant stressed that there was a broken chain of custody and the exhibits were improperly admitted at the trial court. He argued that, it is a matter of law that any exhibits tendered and admitted in court must pass the unbroken chain of custody as held in the case of **Petro Kilo Kinangai Vs. The Republic**, Criminal Appeal No.565 of 2017(CAT-Unreported) on pages 8,9 and 10. He narrated that, throughout the trial court proceedings, all exhibits were not following the chain of custody. The counsel referred to Exhibit P1 (certificate of seizure) stating that it does not indicate how it was obtained, and its handling up to be tendered in court. Again, stated that there was no receipt of the certificate of seizure issued as per section 38 (3) of the Criminal Procedure Act [Cap 20 R.E 2022]. Also cited are the cases of **Pascal Mwinuka Vs. The Republic**, Criminal Appeal No.258 of

2019 page 20, and **Ramadhan Idd Mchafu Vs. The Republic,** Criminal Appeal No.328 of 2019 on pages 14& 15. Apart from that, he challenged the admission of exhibit P5 it does not show its chain of custody. In that regard, he prayed that the same be expunged from the record for contravening the mandatory requirement of law. He added that he is aware that the is an exception; however, said that the exception is not applicable in exhibits in this case, and the same were to be rejected for contravention of the law.

To the contrary, the learned State Attorney protested the complaints of the appellant simply because the developments of the court of appeal about the chain of custody do not require the republic to establish that chain in every exhibit brought up before the court. For ease of reference the counsel quoted the case of **Deus Josia Kilala vs. Republic** [Criminal Appeal No.191 of 2018] where it was held that;

> ***"…. Chain of custody is meant for those exhibits which easily change hands. It's not every time. When the chain of custody is broken, that exhibit is not taken by the court…."***

Therefore, he argued that the law was meant to suggest that not every exhibit brought up in court should be handled in such a way as to

establish the chain of custody. According to him, the principle of chain of custody was established to protect only those exhibits that easily change hands, like drugs. Hence, the animal skin, which is the subject of the appeal, is not in the category of those exhibits as the same cannot change hands easily, yet has never been tampered with.

My analysis of the above ground is that the appellant was the one who brought the stolen property to the slaughter area. After being asked for the permit, he purported to have forgotten it. When he was given the chance to follow the permit, he did not return and thereafter he was not responding to his calls. However, it was discovered that the complainant went to the scene of the crime and identified some of his cows through the mark TKB-M7, found some of the cows alive, and others were already slaughtered and the skin was not removed. Then, the exhibits were sent to the police station, and for the meat, the police officer who was already sent to the butcher of the 2nd accused, they were told that the seller was the appellant. He prepared inventory in exhibit P5, which was tendered without any objection. Since the prosecutions tendered exhibit P5 in the presence of the appellant the appellant did not object to its admission in court. In my view, the allegations that the chain of custody was not

maintained are regarded as an afterthought. See the case of **Shomari Mohamed Mkwama vs Republic**(supra). That being said, this ground also lacks merit.

On the third ground of appeal, the counsel Mr. Seleman submitted that it is trite law that all material witnesses must be called to testify. Failure to do so is fatal, and the court is duty-bound to draw adverse inferences on the prosecution case. According to him, in this case, the prosecution failed to call one George, whom PW1 and PW2 introduced. In support of his argument, the counsel cited the case of **Sundura Athuman vs Republic,** Criminal Appeal No.291 of 2016, pages 8 and 9, and **Kassimu Arimu @ Mbawala vs. Republic**, Criminal Appeal No.607 of 2021 on pages 9 and 10. Following the above-cited authorities, the counsel pray this court to draw an adverse inference against the prosecution's failure to call George, who is alleged to be a material witness.

Responding to the third ground of appeal, the learned State attorney stated that the appellant's allegations that the prosecutions failed to call up material witnesses to prove their case is baseless because it is a trite law that no particular number of witnesses is needed for the prosecutions to prove their case. He referred to section 143 of the Evidence Act [Cap 6 R.

E 2022] and the case of **Yuda John vs R,** Criminal. Appeal No. 238 of 2017, in which the court held that;

> ***"...There is no legal requirement that the prosecutions should call a specific number of witnesses..."***

From the above quote, it is quite clear that the prosecutions were not bound by the defense to call up any more witnesses to prove the case at hand.

My take on this ground of appeal is that I profoundly believe that the prosecution failed to call one George, who is said to have handled the stolen properties, to the appellant. The records speak clearly that George was among the keepers of the cow and goats of the complainant. However, on the fateful date, the said George disappeared with the said animals until it was discovered that the same were slaughtered. Nevertheless, the appellant was identified to be the one who sent the stolen property to the slaughter area. Under the circumstances, I am confident that failure to call the said George was of no consequence. In other words, he was not a material witness as such to be called to prove the prosecution's case. Rather, I consider him as a co-accused who could

not fit for a prosecution witness. Having said so, I find that the ground of appeal is irreverent and, hence, lacks merit

The fourth and fifth ground of appeal was the submission that there is material doubt in the prosecution case and variances between the charge sheet and the evidence. It was alleged that the charge sheet shows the complainant and the owner of the alleged stolen animals to be Rajabu Maulid, 60 years old, while the one who was called to testify was Rajabu Muhamed, and when PW1 was recalled, the name and age changed to Rajabu Mauridi, 63 years old. Also, there was a change of age from 60 to 63 years as well as dates 12/10/2021 to 14/09/2022, which is almost 11 months; several cows and goats alleged to be stolen were 29 cows and 31 goats as is seen on page 15 of the proceedings. PW3 the veterinary officer said the stolen cows were 38 and 24 goats. PW4 indicated that the stolen cows were 38 and 0 goats; PW5 indicated that the stolen cows were 25 and 31 goats and PW11 said that there were 25 cows and 25 goats. However, the prosecution failed to justify the same.

Apart from that, it was submitted that there is a material doubt on the kilograms of meat, i.e., pages 69 -71 of the trial court proceedings which show that PW1 (Rajabu Maulid) testified that there was 235 kilogram

of meat without analysis of which kilograms were for the cow meat and which was for goat meat, while on his part PW 11 (G 9676 DE CPL Makiadi testified that there were 231 kilograms of meat also without specifying as which kilograms were for cows and which kilograms of meat was for goats. In addition to that, PW 2 said that there were 8 skins, while PW4 stated that there were 38 skins, as can be seen on pages 21,23 and 29 of the trial court proceedings. Also, PW1 said that there was a label mark TKB 7 on page 15 of the proceedings, while PW4 stated that there was no label mark on the said animals. Further, the appellant raised doubt that the prosecutions failed to tender the cautioned statement of the appellant recorded at Kibaha Central police.

On top of that, the appellant claimed that the pointed-out variances and doubts go to the root of the prosecution case. Therefore, the court could have resolved the same in favor of the appellant and acquitted him. Added that the variances are fatal illegality. In support of his arguments cited the following authorities **Damas Mgova vs. The Republic,** Criminal Appeal No.13 of 2022, CAT at page 10, **Hussein Kausar Rajan vs The Republic**, Criminal Appeal No.670 of 2020, CAT at page 11 also the cases of **Friday Mbwiga @ Kameta vs. The Republic**, Criminal Appeal No.514

of 2017, the court of Appeal of Tanzania at Mbeya (Unreported) at page 8 paragraph 3 and **Kassim Aram @ Mbawala vs The Republic** (supra) at page 11.

In reply, to the fourth and fifth grounds of appeals is the argument that there were variances between the charge sheet and the evidence adduced at the court. The name of the victim written in the charge sheet is Rajab Maulid, whereas the evidence on records of appeal as per PW1, the name of the victim is Rajab Mohamed. On their part, the prosecutions protested that the variance is trivial and does not go to the root and so grave to flop it or even exonerate the appellant from liability.

The learned state attorney added that the variance was caused by the slip of the pen on the part of the court since the charge sheet bears the name of Rajabu Maulid. To support the argument, the court of appeal developed the principle of the Slip of Pen Rule in the case of **William Getare Kerege vs Equity Bank & Another**, Civil Application No.24/8 of 2019, in which the court stated that, the court can correct clerical mistakes such as the word, for instead of; or an arithmetical mistake such as 108 instead of 180…'

According to the state attorney, the court went further that the litigant should not suffer for the mistakes of an officer of the court. Therefore, he invited this court as the first appellate court to invoke the slip of pen rule and correct the variances of names. Also stated that other contractions of numbers of cow goats are minor and should not be considered.

Tackling the fourth and fifth grounds of appeal, I am firm in the finding that it is an undisputed fact that there are variances in the names of the complainant and dates when the offense occurred. However, these variance does not prejudice the appellant in anyhow. Also, the appellant never cross-examined witnesses on the said matters. The principle has always been that failure to cross-examine an important point implies that one is admitting the truthfulness of the testimony on that point. This position was demonstrated in the case of **Fabian Chumila vs Republic**, Criminal Appeal No 136 of 2014.

Apart from that, it appears that there are inconsistencies and contradictions, as pointed out above by the appellant. However, the court must decide whether the inconsistencies and contradictions go to the root of the matter and flop the prosecution's evidence. The Court stipulated this

position in the case **Mohamed Said Matula Vs. R** [195] TLR 3 where it was stated that: -

> ***"Where the testimony by witnesses contain inconsistencies and contradictions, the court must address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."***

In the present case, this court discovered that the pointed-out inconsistencies and contradictions are minor to dismantle the prosecution's evidence. For instance, on the issues of names of the complainants; it is not disputed by the appellant that the person who appeared in court was a different person from the one in those particular moments. That being the case, then the contradictions and inconsistencies become teeth less and inconsequential.

Regarding the sixth ground of appeal, the appellant complained that the prosecution failed to supply him with the copy complainant's statement because the law under section 9 (3) of the Criminal Procedure Act, [Cap .20 R.E 2022] requires as such. Through the complainant's statement, the charges against the appellant are found the same could have enabled the

appellant to marshal his defense early before the hearing commenced. Also referred to the case of **Rashid Mohamed Selungwi vs The Republic**, Cr. Appeal No.456 of 2021, CAT-Unreported).

Additionally, the appellant's counsel submitted that they are aware that some of the errors can be cured by section 388 of the CPA, though as the justice demands and circumstances of the matter at hand, the court should allow this ground of appeal since it is meritorious.

The learned State Attorney argues that failure to supply the complainant's statement is not fatal. This is because the accused heard his case during plea taking where his charge was read over and pleaded not guilty, preliminary hearing (facts narrated), also, he managed to cross-examine the witness and ultimately, he defended his case. That reason is sufficient to tell that the trial was fair. Therefore, the ground of appeal has no merit.

In answering this ground of appeal, I wish to ask myself if failure to supply the complainant's statement was fatal. The learned counsel for the appellant, while submitting on this ground of appeal, submitted that the rationale of the appellant to be supplied with the complainant's statement

is for him to understand the nature of the offense and defend it properly during the trial. I certainly agree with the counsel that it is important that the statement of the complainant be supplied to the accused for the purpose explained above if the ends of justice demand. However, if not supplied, and no prejudice caused, cannot vitiate the proceedings. Having passed through the matter at hand, it appears that the appellant defended the case properly, hence not showing how he was prejudiced by the failure to be supplied with such a statement. There is nowhere the appellant had indicated that he requested to be supplied with the complainant's statement and was refused. Given that, I join hand the submission by the respondent that it is with no doubt the appellant understood the nature of his case and entered his defense properly. Therefore, I find this ground of appeal with no merit.

On the seventh ground of appeal, it was argued that the trial court failed to comply with the provision of section 210(3) of the Criminal Procedure Act, Cap 20.20 R. E 2022. The above-mentioned failure renders the whole prosecution's evidence of missing evidential values. It is the contention that throughout the proceedings, e.g., on page 16 of the trial court proceedings, there is a word that reads as follows **"COURT: Section**

210 (3) of the CPA complied with". Hence, it is the appellant opinion that the provision was not complied with since there are no appellant comments as to whether his evidence was read over to him. Therefore, he asserted that the prosecution case has no evidential value by violating this fair trial principle.

Responding to the seventh ground of appeal, the learned state attorney argued that the complaints that the prosecution failed to comply with section 210(3) of the CPA are not fatal since it is cured under section 388 of the CPA. He referred to the holding in the case of **Yuda John vs Republic**, Criminal Appeal No 238 of 2017, and **Flano Alphonce Masalu@ Singu and four others vs Republic**, Criminal Appeal No 366 of 2018, on page 15, reflecting to section 210 which states that:-

> *"**210(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments that the a witness may make concerning his evidence."***

It is my take that, the application of this section assures quality in evidence recording. However, noncompliance with this section is not fatal unless

there are facts that the accused was prejudiced of his right at that stage of hearing the case. Borrowing leaf from the case of **Erick Maswi & Another vs Republic**, Criminal Appeal No.179 of 2020[2022] TZCA 339, it was stated that:-

> ***"...we agree with the learned state attorney that failure by the appellant to establish how they were prejudiced for noncompliance of section 210(3) of the CPA renders the infraction curable under section 388 (1) of the CPA..."***

Given the above, I am confident in holding that since in the matter at hand, the appellant's advocate never showed how the appellant was prejudiced on noncompliance. Therefore, the ground of appeal lacks merit.

As to the nineth ground of appeal, the appellant's counsel submitted that the appellant has not found in possession of any animal(s) or skin (s) of the alleged stolen animals. Added that in any criminal case, for the accused to be convicted with charges, the prosecution must lead evidence connected to the accused in connection to the offense charged. It is his view that suspicion however strong cannot be ground to convict. Referring to the present case, the counsel contended that, the appellant was not found in possession of any animal(s) or skin(s). Additionally, that the Judgement of

the trial court on page 11 was based on suspicion of not having a permit. Thus, it is not enough to sustain a conviction in criminal cases to the required standard. The counsel cited the case of **Anord Mtuvula vs. The Republic**, Criminal Appeal No.511 of 2022 CAT page 13, and **Ardinardi Iddy Salimu vs Joseph Evarist @ Msoma**, Criminal Appeal No.298 of 2018, CAT (Unreported) at page 24 para 2.

The appellant's counsel on the tenth ground of appeal reiterated what had been submitted in the nineth ground and added that the court applied improperly the circumstantial evidence. Thus, the decision of the trial court was erroneous and prejudiced the appellant for the reason that the same was based on circumstantial evidence and did not comply with the mandatory requirement of the law in the determination of the trial in which the appeal originated. In support of his argument, he cited the case of **Jimmy Runangaza vs The Republic**, Criminal Appeal No.159 'B' OF 2017 CAT (unreported).

In response to the nineth and tenth grounds of appeal, the learned state attorney submitted that the allegations that the appellant was convicted for stealing without being found in possession of the skin of the stolen cows and about the improper application of circumstantial evidence, is a

misconception of the law regarding the offense of stealing. According to the counsel, the appellant is confusing the offense of stealing and being found in possession of the stolen property. To him, since the appellant is charged with the offense of stealing, then possession of the stolen property is not a key element. Apart from that stated that there was evidence relied on by the trial court. Hence proved the case. The allegations of suspicion are just coming from the bar. The circumstantial evidence is all about connecting the dots between the allegations and evidence and inferring the accused is guilty and that is the one who committed the offense and not any other person.

However, it is the submission that the trial court did not depend only on circumstantial evidence there were events of unbroken chains that inferred the guilt of the appellant. There was evidence to be relied on which the trial court based on to convict and sentence.

Attending these grounds of appeal, I concur with the submission of the learned state Attorney. Among the key elements of theft as defined under section 258(1) of The Penal Code [Cap 16 R.E 2019], possession is not one. Therefore, it is clear that the appellant's allegations that he was found in possession of the stolen property have no leg to stand. Hence misleading himself and the court. On the part of circumstantial evidence,

this court, after passing through the records, is satisfied that the trial court properly applied the rule circumstantial. Since the accused was the one who sent the stolen property to the slaughter area and disappeared after being asked for the permit, that being the case, there is no gap found in the prosecution in this part.

Considering the eleventh ground of appeal, the appellant's learned counsel stated that the trial court failed to consider mitigating factors. Referred to the trial court record on page 13 of the typed judgment and 79 of the trial court proceedings, the trial magistrate did not to the mandatory requirement of the law in respect of the appellant for not considering mitigation factors which is fatal irregularity. Therefore, invited this court as the first appellate court to enter into the shoes of the trial court and do what was supposed to be done by the trial court. To cement the argument, cite the case of **Bahati John vs The Republic**, Criminal Appeal No.114 of 2019 CAT(Unreported), on pages 8 and 9.

Responding to the eleventh ground of appeal, the learned state attorney reproduced what had transpired at the trial court as shown on page 79 of the trial court proceeding where the accused /appellant, during mitigation, stated: **"I pray to be apologized by this court."** At this

juncture, it is argued that the appellant put nothing for his mitigation. Even if he could do that, his failure to mitigate his sentence should not favor him.

Considering the argument by both parties, I am of the observed that the appellant never mitigated and instead prayed for the court to forgive him. The court is not there to forgive parties but instead to deliver justice. Also, in his submission, the appellant's counsel did not indicate which mitigation was not considered by the court. At this juncture, I concur with the argument by the learned state attorney that there was no mitigation to be considered by the trial court. And there is no injustice seen to be done to the appellant. However, the Court of Appeal in the case of **Issa Mustapha Gora & Another vs Republic**, Criminal Appeal No.330 of 2019[2022] TZCA 638 stated inter alia that

> ***"...Failure to consider mitigating factors caused no injustice to the appellant..."***

Therefore, without much ado, I find that this ground of appeal is unmeritorious as well.

On the twelfth ground of appeal, it is the submission of the counsel for the appellant that the trial court failed to consider the defense of the

appellant as it is required by law, the court to evaluate the testimonies adduced by all parties during the trial, including considering the defense of the appellant. The learned counsel contended that it was fatal irregularity not to consider the defense of the accused and invited the court to see the case of **Sungura Athuman vs The Republic**(supra) on the page in that respect. It also stated that the trial court did not consider the appellant's defense as it has submitted in ground nine above.

The counsel added that the Judgment of the trial court, on page 13, the trial court said that it considered only the evidence of the appellant. However, looking at pages 74 to 76 of the proceeding creates doubts about the prosecution's case. Hence, if the court could have evaluated and considered the defense evidence, the appellant would have been acquitted of the charges against him. Hence this ground of appeal be allowed.

On her part, the learned state attorney argued that this ground of appeal is trivial and invited this court to rehear and consider the defense case of the appellant and enter its findings. To support the argument cited the case of **Wambura Kiginga vs Republic**, Criminal Appeal No.287 of 2022.

Considering the argument of parties and the trial court record, this court is of the observed view that the appellant pointed out on page 13 of the trial court Judgment that his defense was not considered. Passing through the said page, it is discovered that the trial court considered the evidence of the appellant and stated that it found nothing substantial to raise doubt about the prosecution. Therefore, it is clear that the trial court considered the defense evidence. Having said so, I find that the ground of appeal has no legs to stand. Therefore, the ground lacks merits.

Regarding the 13th ground of appeal, Mr. Mtauka asserted that the trial magistrate failed to consider the sentence provided under the Minimum Sentences Act, Cap 90, where the offense of theft or stealing of animals is provided under section 4 (2) and part II subpart I to the schedule. The minimum punishment for this offense is 3 years imprisonment, while the trial court ordered five years imprisonment for the appellant. It is the submission that since the appellant is the first offender deserved the minimum sentence. **Yeremia Jonas Tehani vs. The Republic,** Criminal Appeal No. 100 of 2017

To the contrary, the learned state attorney protested that stealing does not fall under the category of the Minimum Sentence Act, Therefore,

the sentence passed was lawful. This is by the provisions of section 170 of the Criminal Procedure Act. (supra).

Responding to this ground of appeal, this court observes that the sentence imposed by the trial court is proper. This is the reason that the sentence for stealing cattle, as stipulated in **The Minimum Sentence Act Cap 90 R.E 2002** under section 5(b), is five years imprisonment. Therefore, I profoundly believe the sentence was proper and just.

On the fourteenth ground of appeal, the appellant complained that the trial court treated him with legal discrimination, considering the trial court convicted and sentenced him leaving behind the second accused, **Shabani Ramadhan Luhi**. Therefore, the trial court contravened the principles of natural justice equality before the law. It is the assertion that the appellant deserved acquittal as the 2nd accused, considering what has been submitted in grounds 2,4,5,9 and 10 above. In that respect, he prays the court to allow this ground of appeal.

Responding to this ground of appeal, the learned State Attorney submitted that the allegations are unfounded and have no legs to stand since there is no discrimination in acquitting the 2nd accused and convicting

the appellant because the evidence adduced during trial suffice to convict the appellant on the offence charged with.

Looking at the fifteenth ground of appeal, I profoundly believe that the appellant misconceived the principle of natural justice as provided in the constitution of the United Republic of Tanzania. This is the reason that in criminal cases, it is not mandatory when the charge sheet constitutes two accused, both of them to be acquitted or convicted together. What is being considered is whether the evidence of the prosecution touches the accused or not. If the evidence misses a link with the accused, it is obvious the court is obliged to acquit the accused for not having a case to answer as it is provided for under section 230 of the Criminal Procedure Act. Therefore, the concept of discrimination as advanced by the counsel for the appellant is misconstrued. For instance, it would have been a case of discrimination if both accused persons were convicted of the same offense but the trial court imposed a different sentence.

Regarding the fifteenth ground of appeal, it is the contention that the trial court failed to evaluate properly the evidence adduced by all parties during the trial and hence reached an erroneous decision. It is the assertion that the proper evaluation of evidence in the trial is a paramount

duty of the trial court which the trial court did not accord to as is evidenced by what they have submitted on grounds 1, 4, 5, 9, and 11.

On the other hand, the learned state Attorney argued that the evidence was properly evaluated and in case it was not evaluated this court may sit as a trial court and re-evaluate the evidence and enter its findings.

If that could have been done, the appellant could have been acquitted. It is therefore the humble prayer that this court serving as the first appellate court has the power to re-hear and re-evaluate the evidence on record and allow the appeal.

Throughout this ground of appeal, I am of the observed view that the appellant did not explain specifically which part of the evidence was not evaluated by the court. The learned counsel for the appellant pointed out that what was submitted in grounds 1,4,5, 9, and 11 is what constitutes the part that was not evaluated properly. To me, this ground of appeal is uncertain as it was demonstrated in the case of **Daudi K. Mwakaleja vs Aliko Mwangungulu** (Misc. Land Appeal 9 of 2020) [2021] on page 12 (Unreported).

On the last ground of appeal, the learned counsel submitted that the charges against the appellant were not proved to the required standards i.e. beyond reasonable doubt. The appellant's counsel argued that all doubts must be resolved by the prosecution in favor of the accused. As they have submitted in all grounds of appeal above. The appellant has pointed out the doubts left behind by the prosecution's evidence which would have not sustained the conviction of the appellant. Having said so the learned state stated that failure to prove the charges against the appellant in the required standard is fatal irregularity he referred to the cases of **Kassim Arim @ Mbawala vs Republic (Supra)** and **Hussein Kusar Rajan vs The Republic** (Supra).

Conclusively the learned counsel stated that based petition of appeal and on what has been advanced in the submission in chief. It is their considered submission that the appeal has merit and prayed the same to be allowed. And subsequently prayed the following orders (i) The whole proceeding and judgment of the trial Court be quashed and set aside and the conviction and sentence of five years imprisonment imposed by the trial court to the Appellant be quashed and set aside. (ii) The Appellant immediately be set free and released from prison. (iii) Any other reliefs this

Honorable Court may deem fit and just to grant for the attainment of justice.

On the contrary, the learned state attorney disputed that the prosecution side proved the case beyond reasonable doubt. Again, argued that the basis of this argument is elements to prove the offense of stealing were established, which are ownership, aspiration and the thing stolen was capable of being stolen. It is the submission further that the circumstances of the incident point finger at the appellant. Thus urged this court to uphold the conviction and sentences of the trial court.

From the deliberations above I am persuaded that the prosecution discharged their noble duty to prove the case beyond reasonable doubt. As it was stated in the case of **Pascal Yoya@Maganga vs Republic**, Criminal Appeal No. 248 of 2017(Unreported), where it was held that: -

> ***"It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence".***

For the foregoing, I find that the case against the appellant was proved beyond reasonable doubt. I, therefore, dismiss the appeal in its entirety.

Order accordingly.

H. R. MWANGA

JUDGE

25/10/2023