THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

DC CRIMINAL APPEAL CASE NO. 16/2004.

(Originating from Sumbawanga D/Court Criminal Case No. 146/2002)

LETES CHAKUPEWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Dated 19.5.2006
And
Dated 19.7.2006)

JUDGMENT

BEFORE: HON. B. M. MMILLA, J.

The appellant was one of the three persons who were charged in the District Court of Sumbawanga with the offence of cattle theft c/s 268(1) and (3) of the Penal Code as amended by Act No. 12 of 1987. At the end of trial, he was convicted and sentenced to serve a term of seven (7) years' imprisonment. The appeal is against conviction and sentence. His colleague one Christopher s/o Makozi Njinji has not appealed. The appellant argued his appeal in person while the Republic was represented by learned state attorney Mr. Malata.

The facts of the case were not complicated. On 20.7.2002 the complainant one Ntemi received information that one of her herds of cattle was stolen from her kraal during the night. According to her, the stolen herd of cattle was red in colour with a white spot on the forehead. Upon that information, she laid the report at Mpui Police Post. She also laid that information to the divisional secretary. Investigation was commenced.

After reporting the incident to the police, she happened to pass at a certain butcher owned by the appellant. As she was there, she was informed by Christopher Njinji (second accused before the trial court) that he suspected the thieves to have sent the stolen herd of cattle to Kaengesa. On peeping into the butcher, the complainant noticed that the said Christopher was selling meat, but there was neither skin hanged therein nor any hooves. She suspected a foul play. She hurriedly reported the findings at Mpui Police Post. As a result, Christopher and his colleague were apprehended. PW1 told the court that upon interrogation, Christopher told them that the cow they slaughtered belonged to the appellant, and that the skin was sold to some one who hails from Lusaka village. According to the complainant, the skin, head and hooves were later on recovered by the police, as well as the foetus in that her stolen herd of cattle was expectant. The skin was recovered from the appellant's field and was found buried in the ground.

The case was investigated by PC Julius. He told the trial court that upon receiving the complainant's complaint, investigation was commenced. In the course of investigation, they recovered a head of the herd of cattle which was allegedly stolen from one person known as Anasiata Kalunga who told them that she bought that head from the butcher of the appellant which was being run by Christopher Njinji and his colleague. They also recovered the hooves from one person known as Yusto Chalo who told them that he bought them form the appellant at the slaughter house. The head was red in colour with a white spot on

the forehead. They also recovered a skin which they found buried in the appellant's field. The said skin was of a red cow. According to PW5, all these items were taken to Police Station at Sumbawanga as exhibits.

The appellant and his employees were arrested and brought to police station at Sumbawanga. On 22.7.2002, he was taken before PW6 No. B6690 D/Sgt. Barnabas for interrogation. He admitted involvement. Upon that, D/Sgt Barnabas recorded appellants' caution statement. The appellant said in his statement that he bought the said herd of cattle from Sodezya s/o Ngao who told him that he was given the same by Michael s/o Ntemi, the son of the complainant.

The appellant's memorandum of appeal has raised five grounds, most crucial being the first and second grounds. While the first ground alleges that the trial court erred in law and fact in accepting and using as evidence the skin which was tendered in court as an exhibit without having been identified by the complainant, the second ground alleges that the trial court erred in accepting and using as evidence the caution statement which was basically repudiated without even conducting a trial within trial before accepting it. The rest of the grounds dwell on sufficiency of evidence generally.

The Republic declined to support conviction and the sentence which was imposed by the trial court on the ground that it concedes to what the appellant has said. On the basis of that, the Republic has suggested to this court to allow the appeal, quash conviction and set aside the sentence which was imposed by the trial court and release the appellant.

It is certain that at the time PW1 Eugenia d/o Ntemi and PW2 Noel s/o John gave their evidence, the skin which was later on tendered as exhibit 'B' was not in court. Though they described how that head of cattle looked like, they were not

shown the skin which was purportedly recovered to enable them identify it. Similarly, they were not shown the head and hooves of that herd of cattle. In my view, these were the witnesses who were conversant with how the stolen herd of cattle looked like because PW1 was the owner of the said cow while PW2 was her herdsman. In view of this, I agree with both the appellant and the learned state attorney that the trial court slipped into an error in thinking that these two witnesses satisfactorily identified the stolen herd of cattle.

Reliance was also made on the appellant's caution statement. Going by what the appellant said during trial, the said caution statement was indeed repudiated. Most important however, is the fact that it was admitted even without giving him chance to contradict it.

The learned state attorney was of the view that the trial court ought not to have admitted as evidence the said caution statement without first having conducted a trial within trial in view of the fact that he had retracted his confession. He cited the case of **Masanja Mazambi v. Republic (1991) T.L.R. 200** in which the court of appeal said that:-

> "A trial within trial has to be conducted whenever an accused person objects to the tendering of any statement he has recorded".

With great respect, this is the practice in those cases before the High Court in which trial is with the aid of assessors. It does not involve those cases before subordinate courts in which trial does not involve assessors. The case of **William s/o Shumba v. Republic, Criminal Appeal No. 10 of 1998, Court of Appeal of Tanzania, Mwanza Registry (unreported)** is relevant.

In that case, the Republic did not support the conviction of the appellant on the ground that, among others, the admission of a cautioned statement which contained a repudiated confession was improper. The learned judge of the first appellate court agreed with the learned state attorney for the Republic that the cautioned statement ought not to have been admitted as evidence against the appellant because a trial within trial was not conducted to enable the trial court to decide its admissibility. He said:-

> "There is no discretion in this matter, either a trial within trial is conducted and the admissibility of the statement is first established by the prosecution or it is rejected outright".

On its part the Court of Appeal said that:-

> ".....the learned judge of the first appellate court appears to have overlooked the occasion and purpose for a trial within trial. As we understand it, a trial within trial is conducted in a trial with the aid of assessors (in our jurisdiction) or with a jury (in jurisdictions in which juries are used) in order to protect them (the assessors or members of the jury, as the case may be) from hearing evidence which may possibly be inadmissible. It is assumed (sometimes perhaps wrongly) that since they are not legally trained, they would not be in a position to distinguish legally admissible evidence from evidence which is legally inadmissible. If they would hear in admissible evidence, it might influence their opinion when they are asked to give them regarding the verdict in the case. Thus, in a trial within trial evidence is given in the absence of the assessors by prosecution witnesses as well as the defence witnesses, if need be, to enable the judge to decide whether a piece of evidence is or is not admissible. Once the judge

> decides in a ruling that the piece of evidence in question is admissible, the assessors are then called in and that evidence, and the circumstances in which it was obtained, is given all over again so that the assessors can hear it. If, on the other hand, the judge rules the evidence inadmissible, then the assessors will not hear it, and that is the end of the matter as far as that piece of evidence is concerned. See Spry, V.P. in the Court of Appeal for East Africa judgment in **EZEKIA s/o SIMBAMKALI AND ANOTHER v. R. (1972) H.C.D. n. 192.**
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> In a trial in which assessors are not sitting, where the magistrate or judge alone decides both on facts and on the law, a trial within a trial is not usually conducted because it would be highly artificial. See Georges, CJ's remarks in **NWIPOMA ALI HUSSEIN NYAMAKABA v. R. (1969) H.C.D. n. 181".**

In view of the above authority, I hold that a trial within trial was not necessary in the circumstances of this case. What much is, the trial court was required to consider the grounds pointing to repudiation, a fact which could have enabled it to decide whether or not to discard the statement as evidence. Admittedly, that was not done. As such, that statement was improperly admitted and relied upon as evidence.

In view of what I have said above regarding these two grounds, it is obvious that the trial court strayed into those irregularities which I consider to have been fatal because they go to the root of justice. In other words, the trial was defective. In a proper case, I would have, for those reasons, allowed the appeal and released the appellant from jail. In the circumstances of this case however, especially

considering its nature, I feel that it is one of those cases in which the interests of justice would have demanded a retrial.

The principles upon which retrial should be ordered were clearly restated by the Court of Appeal for East Africa in the case of **Manji v. Republic (1966) E.A. 343.** It was stated in that case that:-

> "...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person".

The catch phrase here is that such an order should be made where the interest of justice so demand. As stated above however, each case must depend on its own particular set of facts.

In this case, the judgment of the court of which the appellant was convicted was delivered on 7.02.04. That means that he has served two and a half years as at this date. The question becomes; is it in the interests of justice to start the case afresh two and a half years after delivery of the judgment being contested? In my opinion it is not, because it is possible that if it will start afresh, it may take two

or more years to finalise, making it undesirable, should he be convicted, to go to jail once again for the second term. In the premises, I allow the appeal, quash conviction and set aside the sentence. Appellant is released from jail unless he is otherwise being lawfully held for some other offences.

B.M. Mmilla,
Judge
19/7/2006.