IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

DC CRIMINAL APPEALS NO. 71 & 72 OF 2012 & No. 2 OF 2013

(From Original Criminal Case No. 314 of 2010 in the District Court of Mpanda)

MADALE LUSANGIJA
SULE MAJURA } ..... **APPELLANTS**
MACHEMBE KWILASA

Versus

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

22nd & 29th January, 2014

JUDGMENT

MWAMBEGELE, J.:

The appellants Madale Lusangija, Sule Majura and Machembe Kwilasa were arraigned before the District Court of Mpanda on a charge of cattle theft c/s 268 (1) of the Penal Code, Cap. 16 of the Revised Edition, 2002. They were convicted and each sentenced to a five year jail term. They were aggrieved by the convictions and sentences and in consequence whereof each one of them, at different times, lodged an appeal in this court. Their appeals were christened Criminal Appeal No. 71 of 2012, Criminal Appeal

No. 72 of 2012 and Criminal Appeal No. 6 of 2013 for the first, second and third appellant respectively.

The three appeals were argued together on 22.01.2013 during which the appellants appeared in person under surveillance of the prison officers and were not represented. The respondent Republic was represented by Ms. Lugongo, learned State Attorney. Except for the third, all the appellants had nothing to add to the grounds of appeal earlier filed on which they prayed to adopt and rely. The third appellant, with some superciliousness, added that no Preliminary Hearing (PH) was conducted in his respect nor was his plea taken. That he complained before the trial court but the trial magistrate turned a deaf ear at him. The third appellant seemed to suggest that his trial was a nullity for not conducting a PH and for not taking his plea.

On the other hand, Ms. Lugongo, learned State Attorney was of the considered view that the evidence at the trial was more than abundant to sustain the convictions and sentences meted out to the three appellants. She submitted that at the centre of complaint between the appellants is the complaint that the prosecution did not prove the case against the appellants to the required standard; that is proof beyond reasonable doubt. There was ample evidence, circumstantially, she submitted, that the three appellants sought for a permit from Jastin Ntojage PW4 to transport head of cattle to Kigoma in the name of Busiga Kilaga which was the name profiled to PW4 as the name of the third appellant. They hired transport from Said Salum PW1 who testified the trio transported the head

of cattle from Mpanda to Kigoma to which they sold the animals to Hassan Mohammed PW8. Both PW1 and PW8 were shown a permit sought and obtained from PW4 to verify that the head of cattle they were to transport to Kigoma were the property third appellant who, as already alluded to above, identified himself as Busiga Kilaga. The learned State Attorney submitted that circumstantial evidence showed unbroken chain of events implicating the appellants that they were the culprits. To augment this argument, the learned State Attorney cited to me ***Hamidu Mussa Thimotheo And Majidi Mussa Thimotheo Vs R*** [1993] TLR 125; the decision of the Court of Appeal of Tanzania.

As for the third appellant's contention that a PH was not conducted in his respect and that his plea was not taken, the learned State Attorney submitted that the record shows that his plea was taken on 02.06.2011 and he pleaded not guilty to the charge. As for the PH not being conducted, the learned State Attorney seemed to concede that it was indeed not conducted but was quick to state that noncompliance of the procedure was not fatal. To augment this argument, the learned State Attorney cited ***Exaud Nyali & Another Vs R***, DC Criminal Appeal No. 33 of 2013; an unreported decision of this court in which it was held that failure to conduct a PH was not necessarily fatal; it all depended on the circumstances of each case.

In rejoinder, the appellants denied to have stolen the head of cattle and transported them to Kigoma. They all challenged why did PW4 issue permits to persons he did not know. They, in unison, submitted that the

complainants knew their culprit [illegible] PW8 who was found in possession of stolen head of cattle. The third appellant, superciliously, rejoined that PW1 was not a witness to rely on because on 19.05.2011 he testified that he left with four people aboard his vehicle – meaning himself, the spanner boy and two accused who owned the head of cattle. But on 17.08.2011, the third appellant charged, when called to re-testify, he stated that he left with five; that is himself, the spanner boy and three people who claimed to own the head of cattle. On this premise, the third appellant submitted, the witness changed the goal posts because he; the third appellant, was added to the charge. Therefore, the third appellant insisted, PW1 would have kept changing the goal posts as long as the accused persons were added to the charge. This demonstrated his unreliability, he stated. On the permit the third appellant submitted that the same was not free form contradictions: while PW4 testified to have issued a permit in respect of twenty head of cattle; PW1 and PW8 testified that it was a permit in respect of twenty two head of cattle. On this premise, the third appellant was of the considered view that the permits referred to by the witnesses were two diametrically different permits.

On the witnesses not being called to testify, the third appellant seemed to draw the attention of the court to the fact that it should be taken that if they were to be called to testify, they would have adversely testified against the prosecution. These witnesses are mama Dick; in whose residence PW4 testified to have met the appellants, and one Rama who PW8 claimed he was the one who called to tell him over the buying head of cattle from Mpanda.

I have treaded through the evidence on record in the light of the rival arguments of both parties. Let me, firstly, start with the third appellant's contention that neither a PH was conducted after he was joined nor his plea taken. On the PH, the record of this case is clear that the same was not conducted after the third appellant was joined as third accused. However, as rightly pointed out by the learned State Attorney, failure to conduct the same is not necessarily fatal. In ***Exaud Nyali***, this court had an opportunity to discuss the present issue and had taken the view that failure to conduct a PH is not necessarily a fatal irregularity. It depends on the nature of each particular case. The test has always been whether such omission has occasioned any faillure of justice. Like in ***Exaud Nyali***, I find fortification in the unreported decisions of the Court of Appeal of ***Benard Masumbuko Shio Vs R*** Criminal Appeal No. 213 of 2007 ***Mkombozi Rashid Nassor Vs R*** Criminal Appeal No. 59 of 2003, ***Joseph Munene and Another Vs R*** Criminal Appeal No. 109 of 2002, and ***Christopher Ryoba Vs R*** Criminal Appeal No. 26 of 2002. In ***Benard Masumbuko Shio*** (supra) referring to its earlier decision in ***Christopher Ryoba***, the court made the following observation:

> "... conducting a preliminary hearing is a necessary prerequisite in a criminal trial. It is not discretionary. **The procedures stipulated under s. 192 are mandatory**. And needless to say, s. 192 was enacted in order to minimize delays and costs in the trial of criminal cases.