IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

GEITA SUB REGISTRY

AT GEITA

PC. CRIMINAL APPEAL NO. 2532/2024

(From Criminal Appeal No.05 of 2023 of the District Court of Bukombe Originating from Criminal Case No.39/2023 of the Primary Court of Bukombe at Ushirombo)

BUJUKANO LUSHESHA ..... APPELLANT

VERSUS

HAKISIMBILA KURWA..... RESPONDENT

JUDGMENT

Date of last order: 12/03/2024

Date of Judgment 18/04/2024

MWAKAPEJE, J.:

This is a second appeal lodged subsequent to the Appellant's dissatisfaction with the decision rendered by the first appellate District Court of Bukombe.

The basis of this appeal stems from the allegation that the Respondent was accused of and charged with the offences of stealing and subsequently being found in possession of the stolen property, namely, one cow bearing the mark 'CC,' valued at TZS 2,000,000.00, purportedly belonging to the Appellant, in the Primary Court of Ushirombo.

The Primary Court, however, acquitted the Respondent due to a lack of evidence, alluding to discrepancies in identifying the purported stolen property: specifically, the cow possessed by the Respondent bore the mark "CC100" and not "CC", as contended by the Appellant. Dissatisfied with this verdict, the Appellant pursued an appeal at the District Court of Bukombe, where the decision of the Primary Court was upheld. Persisting in his discontent, the Appellant now brings forward a second appeal before this Court, delineating the following grounds of appeal.

1. *That the first appellate court erred in law and fact by relying on the interpreter's testimony, which deviated from what PW1 stated on Earth in Sukuma prose.*
2. *That the first appellate court erred in law and, in fact, by upholding the decision that denied the Appellant's natural justice during the selection of an interpreter.*
3. *That the first appellate court erred in law and in fact for upholding the decision of the trial court which lacked sufficient defence as to the Respondent was caught with stolen property.*
4. *That the first appellate court erred in law and, in fact, by summoning an incompetent expert witness contrary to the standards of law, ending up abusing the court process.*

5. *That the first appellate court erred in law and in fact for upholding the decision on the trial court which improperly analysed the exhibit of stolen cow, which was in possession of the Respondent.*

This appeal was argued by written submissions. Mr Beatus Emmanuel, a learned advocate, represented the Appellant, while the Respondent had the services of Mr Laurent Bugoti, a learned advocate.

On his first ground of appeal, Mr Beatus contended that a significant disparity existed between the Appellant's statements and the interpretation provided by the unrecorded interpreter. The Appellant, proficient only in his native language, relied on an interpreter to translate his testimony into Kiswahili. However, he argued that the translation deviated substantially from the original statements made by the Appellant, thus undermining the integrity of the proceedings. He further stated that such irregularities, including the failure to ensure the interpreter's compliance with legal requirements, violated his right to a fair trial as provided under sections 30(1) & (2) of the Third Schedule to the Magistrates Court Act, Cap 11 R.E. 2019, as stated in the case of **Joseph Maweta v. Lekitety Karasi** (1992 TLR 70).

Moving to the second ground of appeal, attention was drawn to ensuring that interpreters appointed by the court meet certain qualifications as

outlined by legal provisions. However, Mr Beatus asserted that the first appellate court failed to ascertain whether the interpreter appointed by the trial court adhered to these requirements, thus depriving the Appellant of his right to a fair hearing. To support his contention, he cited the case of **Shimbi Daudi v. Kulwa and Others,** Criminal Appeal No. 660/2020 CAT 17900. He further argued that procedural irregularities in the selection and qualification assessment of interpreters undermined the administration of justice.

Concerning the third ground of appeal, Mr Beatus contended that the evidence presented by the Appellant sufficiently established the Respondent's culpability beyond a reasonable doubt. The stolen cattle, identified by distinctive marks despite attempted alterations, was found in the Respondent's possession, who provided an inadequate explanation for its presence. He cited the case of **Nurdin Akasha @ Habab v. Republic** (1995 T.L. R. 227) to bolster his argument on the assertion that knowledge of the stolen property's presence is critical to establishing guilt.

Turning to the fourth ground of appeal, Mr Beatus argued that the first appellate court failed to assess the competence of an expert witness summoned during the trial. The expert's qualifications and experience

needed to be adequately verified, rendering his testimony inadmissible. To cement his argument, he cited the case of **Hassani Fadhili v. The Republic** (1994 TLR 89).

Finally, on the fifth ground of appeal, Mr Beatus argued that the first appellate court neglected its duty to comprehensively review the trial proceedings, including the evidence and exhibits tendered. His contention was supported by the case of **John Kafeero Sentongo v. Peterson Sozi** (Civil Appeal No. 173 of 2012 Court of Appeal of Uganda) regarding procedural irregularities undermining the administration of justice. He, therefore, urged this honourable court to allow the appeal concerning the stolen cattle, as far as procedural irregularities and violations of the Appellant's rights, which compromised the fairness of the trial.

In response to the Appellant's grounds of appeal, Mr Bugoti, counsel for the Respondent, asserted that the Appellant's contentions lack substance and are founded on unsupported evidence. He further contended that the Appellant's arguments centred around alleged discrepancies in the trial court's interpreter's conduct are deemed baseless and lacking evidentiary support. The counsel for the Respondent stated that the Appellant's assertions regarding the

interpreter's performance lack credible backing and fail to align with the trial proceedings' records. He bolstered his argument with the case of **Halfani Sudi vs Abieza Chichili** [1998] TLR 527. Addressing the first and second grounds of appeal, which pertain to the interpreter's conduct, Mr Bugoti argued that the Appellant's claims are unsubstantiated and lack specificity. The Respondent's counsel emphasised that the trial court and the interpreter discharged their duties diligently and per established standards and procedures in the case of **Shimbi Daudi@ Kulwa and four others vs R**, Criminal appeal No. 660 of 2020. Additionally, Mr Bugoti highlighted that procedural complaints raised by the Appellant in their submissions were not reflected in the original grounds of appeal, contravening the principle that parties are bound by their pleadings. In this aspect, he referred to the case of **James Gwagilo versus Attorney Genera**l [2004] TLR.

Regarding the fourth ground of appeal concerning the expert witness, the counsel for the Respondent contended that the trial court's reliance on the expert's testimony was appropriate and within its discretionary powers. Mr Bugoti argued that the Appellant's criticism of the expert's qualifications and the court's handling of the expert witness misunderstood the legal framework governing expert testimony as

provided for under section 35(5) of the Primary Courts Criminal Procedure Code.

On the third and fifth grounds of appeal, which challenged the dismissal of the Appellant's case in the first appellate court, Mr Bugoti maintained that the Appellant failed to meet the burden of proof required in criminal cases. The Respondent argues that the Appellant's inability to provide clear and consistent evidence, particularly regarding identifying the stolen cattle, undermined his case. The Appellant described both his stolen cows to have been engraved with a mark "CC", but to a bizarre turning of affairs when the purported cows were presented before the trial court as an exhibit by the Respondent, the engraved marks turned out to be "CC110" leaving the Appellant hopelessly seeking a lame refuge of presuming the marks to have been doctored by the Respondent. The Respondent asserted further that the Appellant's attempt to shift blame onto the Respondent for alleged alterations to identifying marks lacks credibility.

It was further contended by Mr Bugoti that whether the Respondent knew of stolen cows and that the same was found in his kraal is not necessarily enough to connect him to the above-mentioned offences. The claim needs to be revised since the crucial component of positive

identification of stolen properties has been watered down by the Appellant's own shaky testimony. Unfortunately, the principal of the recent position would not be able to feature under the prevailing circumstances at hand. To cement his argument, he referred to the case of **Joseph Mukumba and Samson Mwakagenda vs the Republic,** Criminal Appeal No. 94 of 2007.

In rejoinder, Mr Beatus contended that there were procedural irregularities concerning the interpreter's presence and administration of the oath, emphasising the importance of maintaining standards in court proceedings. Further, Mr Beatus challenged the Respondent's interpretation of legal principles in **Joseph Maweta vs Lekitetyi Karasi** [1992] TLR 70 and asserted that the issues raised are pertinent to a fair trial. He argued that the Respondent's rebuttal lacked merit and was intended to deflect attention from their failure to substantiate his case, which is distinguishable from the case of **Halfani Sudi vs Chichili** (*supra*). In conclusion, Mr Beatus urged the court to allow his appeal, emphasising the procedural irregularities in admitting expert witness statements. He emphasised his point while referring to the case of **Hassani Fadhili vs Republic** (*supra*).

After carefully reviewing the grounds of appeal and the submissions made by the respective parties, this court will now proceed to determine the presented grounds of appeal. Central to this appeal is the crucial question: whether the prosecution effectively proved its case beyond a reasonable doubt.

It is firmly established that for a person to be convicted for an offence in the primary court, the court has to be satisfied that an offence was committed beyond reasonable doubt. Paragraph 5(1) of the Magistrates' Courts (Rules of Evidence in Primary Court) Regulations, G.N. 22 of 1964 provides that:

> *"5(1) in criminal cases, the court must be satisfied beyond reasonable doubt that the accused committed the offence."*

Therefore, it is upon the one prosecuting the case to prove his case beyond reasonable doubt. This principle was solidified in the case of **Selemani Makumba v. Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96. The Court of Appeal expounded that:

> *"It is, of course,* ***for the prosecution to prove the guilt of an accused person beyond a reasonable doubt*** *and an accused person does not assume any burden to prove his innocence." [Emphasis supplied]*

This burden remains constant throughout proceedings, and any doubt should be resolved in favour of the accused. This trite law has been expounded in the case of **Mohamed Said Matula V Republic** [1995] TLR 3 (CA), where it was stated that:

> *"......, the onus is **always on the prosecution to prove** not only the death but also the link between the said death and the accused; **the onus never shifts away from the prosecution and no duty is cast on the Appellant to establish his innocence.**" [Emphasis supplied]*

In another case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha** (Civil Appeal 45 of 2017) [2019] TZCA 453, it was articulated that:

> *"It is again trite that the **burden of proof never shifts to the adverse party** until the party on whom **onus lies discharges his** and that the burden of proof is **not diluted on account of the weakness of the opposite party's case.**" [Emphasis supplied]*

With the aforementioned principles in consideration, I shall now proceed to address the grounds of appeal, beginning with the third. The Appellant contends that the first appellate District Court erred in affirming the decision of the Primary Court, despite the purported

inadequacy of the defence presented, juxtaposed with the apprehension of the Respondent with stolen property. I must express my disagreement with the counsel for the Appellant on this matter, as it is improper for a decision to rely on the weakness of the defence rather than the strength of the prosecution's case, as delineated in the case of **Paulina Samson Ndawavya v. Theresia Thomasi Madaha** (*supra*).

It is evident in the present appeal that the Appellant's claim regarding the distinctive markings on the cattle in question contradicts the evidence provided. Furthermore, there exists no substantiation that the Appellant correctly identified his purported stolen cow nor that the Respondent was found in possession of the stolen property. When one contends to have lost his property, he ought to identify the same in the required standards of law as was stated in the case of **Bulungu Nzungu vs Republic** (Criminal Appeal 39 of 2018) [2022] TZCA 454. In the said case, it was stated that:

> *"Identification of* ***the recovered items ought to have specifically, be proved by referring to specific and peculiar marks on the items in question.*** *PW1 had a duty to prove that the items recovered and presented in court were distinctly and specifically his and no one else's." [Emphasis supplied]*

In the present appeal, the Appellant stated that his cow was bearing a mark of "CC," while the one found with the Respondent bore a mark of "CC100," which is two different marks altogether. What is contended by the Appellant that the said mark was doctored was not proved; hence, it is an afterthought.

Moreover, the doctrine of possession of stolen goods necessitates proof of five elements, which were stipulated in the case of **Joseph Mkumbwa & Another vs Republic** (Criminal Appeal 94 of 2007) [2011] TZCA 118, that:

> *"For the doctrine of recent possession to apply as a basis of a conviction, it must be proved, first, that* ***the property was found with the suspect****; second,* ***the property is positively proved to be the property of the complainant****; third, that the property was recently* ***stolen from the complainant*** *and lastly, that the* ***stolen thing constitutes the subject of the charge against the accused...****" [Emphasis supplied]*

All the above conditions were not met in the present appeal. In short, the conditions remained unsubstantiated in this instance. The Respondent maintained that the said cattle were procured from DW3, who obtained it from DW2, a fact uncontested by the Appellant. There

was nowhere in evidence that it was proved that the said cow found in the Respondent's possession belonged to the Appellant.

Moving to the fifth ground, wherein the Appellant contends that the District Court failed to adequately analyse the evidence. The records affirm that the District Court indeed scrutinised the pertinent exhibit, reaching conclusions differing from those posited by the Appellant. Given that the Appellant bore the onus of proof in prosecuting his case, it was incumbent upon him to furnish evidence substantiating his claim that the markings on the exhibit tendered by the Respondent had been tampered with. However, no such evidence was proffered. It is, therefore, untenable for the Appellant to allege inadequate analysis when the responsibility to establish such evidence was laid squarely upon him during the proceedings in the Primary Court.

With regard to the first, second, and fourth grounds of appeal; these were not addressed in the first appellate court. It is a fundamental principle that issues not raised before the first appellate court cannot be raised anew on subsequent appeals. The principle was reiterated in the case of **Galus Kitaya vs Republic,** Criminal Appeal 196 of 2015 [2016] TZCA 301 when guided by the position in the case of **Nurdin Musa**

Wailu V Republic, Criminal Appeal No. 164 of 2004 (unreported), where it was stated that:

> *"...usually the Court will **look into matters which came up in the lower courts and were decided**. It will not look into matters which **were neither raised nor decided** either by the trial court or the High Court on appeal." [Emphasis Supplied]*

However, it has also been established that the court may consider the same when the grounds raised involve a point of law. In particular, in the case of **Jafari s/o Musa vs DPP** (Criminal Appeal 234 of 2019) [2022] TZCA, the Court of Appeal, while affirming the positions in the cases of **John Madata v. Republic,** Criminal Appeal No. 453 of 2017**;** and **Julius Josephat vs Republic,** Criminal Appeal No. 3 of 2017 (both unreported), stated that:

> *"Of course, we are aware that the above position has been relaxed to accommodate **new grounds of appeal, which are on points of law**". [Emphasis supplied]"*

In the footing of the above, indeed, the first, second and fourth grounds of appeal are novel. However, the second ground deals with a point of law that the Appellant's right to be heard was curtailed by the trial court. The first and the fourth are not; hence, this court will not consider them.

Now, concerning the second ground of appeal, the Appellant contends that he was curtailed his natural justice during the proceedings of selection of an interpreter. In short, he contends that he was not heard to that effect.

It is firmly established that court records are inviolable. This principle underpins the essence of a fair trial, ensuring the opportunity for appeal or review of decisions made by lower courts. It is crucial to recognise that any appeal or review essentially constitutes a trial of the existing record. Hence, the integrity of these records is paramount; they are presumed to reflect the proceedings of a case and are not readily susceptible to challenge. See the cases of **Halfani Sudi v. Abieza Chichili** [1998] TLR 527 and **Shabir F. A. Jessa v. Rajkumar Deogra,** Civil Reference No. 12 of 1994 (unreported) as referred in the case of **Alex Ndendya vs Republic** (Criminal Appeal 207 of 2018) [2020] TZCA 202 (6 May 2020). In the case of **Alex Ndendya vs Republic**, it was explicitly provided that:

> *"It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record."*

In light of the appellant's arguments, I conducted a thorough review of the trial court's records to ascertain the sequence of events. Firstly, it is

notable that the Appellant himself acted as the prosecutor in the Primary Court proceedings. Upon scrutinising the entirety of the records from the first day of the reading of the charge on 15th March 2023 to the delivery of the judgment on 04th August 2023, I found no indication that the appellant, in his capacity as one who prosecuted the same, required the assistance of an interpreter, nor was such assistance denied. Secondly, despite it being mandatory to afford the accused person an interpreter as far as section 30 of the Primary Courts Criminal Procedure Code in the Third Schedule to the Magistrates Court Act, Cap. 11 R.E. 2019 is concerned, there is no record within the trial court's proceedings indicating his prayer for or appointment of an interpreter. Thus, the appellant's claim appears to be an *ex post facto* assertion lacking substantiation within the official court records.

This court is confident in the integrity of the trial court's proceedings conducted in the trial court, finding them to have been conducted fairly. Additionally, it is noted that the Appellant was proficient in the language used in the Primary Court and was duly afforded the opportunity to present his case, as evidenced by the trial court's records. Being official and authoritative, these records carry significant weight and cannot be undermined by mere allegations. Consequently, I affirm that there was no infringement upon the principles of natural justice, as the Appellant

was unequivocally granted the fundamental right to be heard during the trial. Hence, the second ground of appeal is dismissed accordingly.

In conclusion, after meticulous consideration of the grounds of appeal and the submissions thereto, this court finds no merit in the Appellant's contentions. I, therefore, proceed to dismiss it in its entirety.

DELIVERED at **GEITA** on this 18th day of April 2024.

G.V. MWAKAPEJE
JUDGE
18/04/2024

Right to Appeal explained.

This judgment is delivered on the 18th day of April 2024 in the presence of Mr Beatus Emmanuel, Advocate for the Appellant, and Mr Liberatus John, Advocate for the Respondent and the Appellant and Respondent in person.

G.V. MWAKAPEJE
JUDGE
18/04/2024