

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MJASIRI, J.A., MMILLA, J. A. And NDIKA, J.A.)

CRIMINAL APPEAL NO. 228 OF 2014

VENANCE KABWEBWE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court
of Tanzania at Bukoba)**

(Mjemmas, J.)

Dated 11th day of June, 2014

In

Criminal Appeal No. 34 of 2014

JUDGMENT OF THE COURT

27th February, & 2nd March, 2017

MJASIRI, J.A.

In the District Court of Ngara District at Ngara, Mugisha David, Minani Ronjino, Mwesige Geoffrey, Totto Bushahu, Nathan Kalegea, Rwakatole Fredy and Aloyce Emmanuel were charged with two counts. On the first count all the accused persons were charged with unlawful grazing of livestock in a Game Reserve contrary to section 18(2) and (4) read together with section 111(1) (a) and (3) of the Wildlife Conservation Act

(Act No. 5 of 2009) (the wildlife Act). They were charged with unlawful entry into a Game Reserve contrary to section 15 (1) and (2) of the Wildlife Act on the second count. They were convicted as charged save for the 1st accused, Mugisha David, who was acquitted on the first count. They were ordered to pay a fine of Shs. 50,000/= for the first count or to serve a sentence of two years imprisonment. The same sentence was meted out in respect of the second count. Since no one claimed ownership of the head of cattle found in the Game Reserve, the trial magistrate ordered the 719 head of cattle to be forfeited to the government and for the same to be placed before the Director of Wildlife for disposal.

It was the prosecution's case that the seven accused persons unlawfully grazed the 719 heads of cattle at Kimisi Game Reserve in Ngara District, Kagera Region. In the course of the proceedings some of the accused persons testified that some of the cattle belonged to one Venance Kabwebwe, the appellant. However, it is not on record that the appellant did at any time in the course of the trial appear in Court and claimed ownership of the head of the cattle.

The appellant was not involved in Criminal Case No. 51 of 2014. He was not amongst the accused persons. Following the conviction and

sentence of the above named accused persons and the forfeiture order, the appellant Venance Kabwebwe filed an appeal to the High Court against the conviction, sentence and forfeiture order of the District Magistrate Ngara. His appeal to the High Court was unsuccessful hence this second appeal to this Court.

At the hearing of the appeal, the appellant was represented by Mr. Mathias Rweyemamu, learned advocate, while the respondent Republic had the services of Mr. Athumani Matuma, learned Senior State Attorney. Mr. Rweyemamu presented a three-point memorandum of appeal. However at the commencement of the hearing Mr. Rweyemamu sought leave to withdraw the third ground of appeal, which was readily granted by the Court. The relevant grounds of appeal are reproduced as under:-

- 1. That the Honourable Judge of the High Court grossly erred in law to deny the appellant his statutory right to appeal against decision, finding sentence and order passed by the subordinate court without being made a party to the criminal charge.*
- 2. That the Honourable Judge of the High Court grossly erred in law and fact to deny the appellant*

*his constitutional right of appeal enshrined in our
Constitution of the United Republic of Tanzania,
1977.*

In relation to grounds No. 1 and 2 Mr. Rweyemamu strongly argued that his client had a right to be heard. He relied on Article 13 (6) (a) of the Constitution of the United Republic of Tanzania which gives a party a fundamental right to a fair hearing and to pursue an appeal. He submitted that the High Court Judge was wrong in concluding that by allowing the appellant who was not a party to the proceedings of the District Court to appeal, the Court will be opening up a Pandora's box. According to him section 359 (1) of the Criminal Procedure Act [Cap 20, R.E. 2002] (the CPA), gives a right of appeal to the appellant. Mr. Rweyemamu also relied on section 313 of the CPA which allows any interested party to collect a copy of judgment from the Court. He stated that the trial magistrate knew that the head of cattle found grazing inside the National Park belonged to the appellant. The appellant was affected by the forfeiture order. He urged the Court to interpret sections 359 (1) and 313 to what Parliament had intended.

He concluded by stating that the High Court Judge was wrong in striking out the appeal, and he asked the Court to set aside the decision of the High Court.

Mr. Matuma, on his part, opposed the appeal. He argued the two grounds of appeal together. He stated that the appellant had no right of appeal in a case in which he was not a party. He submitted that the right of appeal has to be directed by a specific statute.

Article 13 (6) (a) provides a broad principle. According to Mr. Matuma, in construing a statute, a purposive approach has to be used. Therefore under section 359 (1) of the CPA any person cannot mean anybody, even a third party who was not a party to the proceedings like the appellant. Mr. Matuma submitted that the appellant had an avenue to pursue his rights under section 351 (2) of the CPA. He made reference to **Zakayo Kusaja and Richard Mtalisi v Tapa and Mtiyani Ghambi** [1993] TLR 73 (H.C). According to Mr. Matuma the learned counsel for the appellant is wrongly relying on section 313 (1) and (2) of the CPA, as this section clearly distinguishes an interested party from the actual party.

We, on our part, after a careful review of the record, are of the considered view that the main issue for consideration and decision is whether or not a third party has a right to file an appeal in a criminal matter when he was not a party to the proceedings.

Mr. Rweyemamu on his first ground of appeal makes reference to a statutory right. This means that the right of the appellant is derived from a specific statute. Our understanding of section 359 (1) of the CPA is that no such right is conferred to a third party. Section 359 (1) of the CPA provides as follows:-

*"359 (1) Save as hereinafter provided, any person aggrieved by any finding, sentence or order made or passed by a subordinate court other than a subordinate court exercising its extended powers by virtue of an order made under section 173 of this Act may appeal to the High Court and the subordinate court shall at the time when such **finding, sentence or order is made or passed, inform that person of the period of time within which, if he wishes to appeal,***

he is required to give notice of his intention to appeal and to lodge his petition of appeal."

[Emphasis provided].

Does the appellant have **locus standi** in this appeal? The law is settled, it is only the person who is aggrieved or directly affected who has the right to move the court seeking justice. Therefore only, parties named in the matter may file appeals to the Higher Courts.

We are also of the view that while section 313 (1) and (2) cited by Mr. Rweyemamu creates the right to be furnished with a copy of judgment of the trial court, it does not form any basis for a right of appeal. For it provides as follows:-

"313 (1) On the application of the accused person a copy of the judgment or, when he so desires, a translation in his own language, if practicable, shall be given to him without delay and free of cost.

(2) Any interested party or person affected by
*the judgment may be provided with a copy of the
judgment on application if he pays the prescribed
fee unless the court, if thinks fit for some reason,
gives it to him free of cost."*

[Emphasis added].

Section 313 clearly distinguishes between an interested party and the actual party. It does not give right to a third party to pursue an appeal.

Looking at the record, it is evident that the conviction and sentence of the seven accused persons are directly linked with the forfeiture of the head of cattle. The issue of forfeiture cannot be isolated. The appellant was neither charged nor convicted, and is therefore not part of the proceedings. We are in agreement with the findings of the High Court Judge, and we cannot fault his decision. The rights of the appellant cannot be addressed by filing an appeal.

In our view, the appellant should have pursued his rights under section 351 of the CPA and section 111 (a) of the Wildlife Act.

Section 351 provides as follows:-

"351 (1) Where a person is convicted of an offence and the court which passes sentence is satisfied that any property which was in his possession or under his control at the time of his apprehension:-

(a) has been used for the purpose of committing or facilitating the commission of any offence; or

(b) was intended by him to be used for that purpose, that the property shall be liable to forfeiture and confiscation and any property so forfeited under this section shall be disposed of as the court may direct.

*(2) Where the court orders the forfeiture or confiscation of any property as provided in subsection (1) of this section but does not make an order for its destruction or for its delivery to any person, the court may direct that the property shall be kept or sold and that the property or if sold, **the proceeds thereof shall***

be held as its directs until some person establishes to the court's satisfaction a right thereto; but if no person establishes such a right within six months from the date of forfeiture or confiscation, the property or the proceeds thereof shall be paid into and form part of the Consolidated Fund.

(3) *The power conferred by this section upon the court shall include the power to make an order for the forfeiture or confiscation or for the destruction or **for the delivery to any person of such property**, but shall be exercised subject to any special provisions regarding forfeiture, confiscation, destruction, detention or delivery contained in the written law under which the conviction was had or in any other written law applicable to the case."*

[Emphasis ours].

The Wildlife Act also provides an avenue for the appellant.

Like the High Court Judge, we are persuaded by the High Court decision in **Umbwa Mbegu and Another v Republic** [1969] HCD No. 312. We are in agreement with the conclusion reached by Hamlyn, J. (as he then was), in **Umbwa Mbegu** case (supra) that a right of appeal in a Criminal matters is governed by statute. The wording under section 312 (1) of the repealed Criminal Procedure Code Cap 20 is identical to the wording in section 359 (1) of the CPA. The appellant has no right whatsoever to come to this Court as an aggrieved party simply because he claims to own the 719 head of cattle.

The essence of the right of appeal in a criminal case is the provision of the opportunity to have one's conviction and sentence adequately re-appraised in order to minimize the risk of wrong convictions and the consequent failure of justice. It is an opportunity right to be exercised by a convicted person.

As pointed out by Mr. Matuma, this process if allowed, would open up a floodgate of litigation from all and sundry in the name of the aggrieved parties.

It is, therefore, our firm view that section 359 (1) does not give the right of appeal to a third party. Only the parties who are directly involved in the proceedings have a right to file an appeal under section 359 (1) of the CPA. If such right so existed it would have been categorically stated.

In the result we hereby dismiss the appeal.

Order accordingly.

DATED at **BUKOB**A this 28th day of February, 2017.

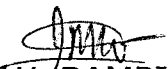
S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL



I certify that this is a true copy of the original.


P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL