

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 563 OF 2015

MABULA LIMBE APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the judgment of the High Court of Tanzania
at Mwanza Registry)**

(Matupa, J.)

Dated the 16th day of November, 2015

in

Criminal Appeal No. 60 of 2015

.....

JUDGMENT OF THE COURT

6th & 11th July, 2018

MWANGESI, J.A.:

At the district court of Magu, Mabula Limbe, who happens to be the appellant herein, stood arraigned for the offence of cattle theft contrary to the provisions of section 268 of the Penal Code, Cap 16 R.E 2002. It was the case for the prosecution that, on the 15th day of February, 2014, at or about 02: 00 hours along Mwabasabi Street within Magu district in the Region of Mwanza, the accused did steal one herd of cattle namely pig valued at TZs 300,000/=, the property of one Meryciana d/o Paschal.

When the charge was put to the appellant, he protested his innocence. As a result, the prosecution summoned five witnesses to establish the commission of the offence by the appellant. In the judgment which was delivered by the learned trial resident magistrate on the 3rd day of October, 2014, the appellant was convicted to the charged offence and sentenced to go to jail for fifteen years. The attempt by the appellant to appeal to the High Court of Tanzania, Mwanza Registry to challenge the decision and sentence imposed to him by the trial court, was not successful and hence this second appeal to the Court.

In his memorandum of appeal, the appellant has raised about nine grounds of appeal. Nevertheless, for the reasons which we are going to demonstrate soon, we will neither state the brief facts of the case giving rise to the impugned decision, nor reproduce the grounds of appeal by the appellant. This is from the glaring variation which we noted between the particulars of the offence in the charge and the evidence of the principal witness of the prosecution (the complainant) as contained in the proceedings.

On the date when the appeal was called on for hearing, the appellant entered appearance in person unrepresented and hence fended for

himself, whereas the respondent/Republic was advocated for by Mr. Lameck Merumba, learned State Attorney, who was assisted by Ms Gati William Mathayo, also learned State Attorney. The appellant on being informed of the order of address to the Court that, he was the one with the right to start addressing the Court, he opted to let the State Attorney respond to his grounds of appeal first, before he could make a rejoinder if need be. He however requested the Court to have regard to his grounds of appeal as contained in his memorandum of appeal.

Nonetheless, before the learned State Attorney could commence his response to the grounds of appeal by the appellant, we *suo motu* required him to address us on the glaring anomaly of the variation between the particulars of the offence in the charge and the evidence of the prosecution witnesses. The response from the learned State Attorney was to the effect that, he has indeed noted that there is variation between the two. While in the particulars of the charge it has been indicated that the complainant whose pig got stolen on the fateful night was one Maryciana d/o Pascal, the evidence in the proceedings through Magdalena Paschal, discloses that, the stolen pig belonged to Magdalena Paschal, who was the actual complainant.

Ordinarily Mr. Merumba went on to submit, the anomaly ought to have been remedied during the hearing of the case in terms of the provisions of section 234 (1) of the Criminal Procedure Act, Cap 20 R. E 2002 **(the CPA)**, by making amendment to the charge. And the fact that such an opportunity was not utilized at the most opportune moment, things being as they are, rendered the evidence by the prosecution witnesses not to be in support of the charge. He therefore, supported the appeal and asked us to allow it and set the appellant at liberty.

The appellant on his part had nothing useful in rejoinder understandingly for the reason that, the argument involved some matters of law of which he was not conversant with. He just reiterated his stance as contained in his memorandum of appeal that, the case against him was not established by the prosecution witnesses and as such, he be set free.

The issue which stands for our determination in the light of the above situation, is whether the appeal by the appellant is founded. The offence facing the appellant was couched in these words:

"Statement of offence: Cattle theft contrary to section 268 of the Penal Code Cap 16 R.E 2002.

Particulars of the offence: That Mabula s/o Limbe charged on the 15th day of February, 2014 at or about 02: 00 Hours, at Mwabasabi Street within Magu district in Mwanza Region, did steal one head of pig valued at TZs 300,000/=, the property of one Meryciana d/o Pascal."

On the other hand, part of the testimony of one Magdalena Paschal who claimed to be the owner of the pig which got stolen as reflected at page 5 of the record of appeal reads that:

"... I am a peasant and I also keep animals. I live at Mwasabasi and among the animals I keep are pigs. I had three pigs. One of them was stolen on the 15th February, 2014 ..."

The variation in regard to the owner of the pig which got stolen on the 15th February, 2014 between the particulars in the charge and the evidence in the proceedings suggests that, there were two incidents of theft which occurred on the said date. Had both the prosecution and the court been vigilant enough, undoubtedly would have noted the anomaly and moved for amendment of the charge in terms of section 234 (1) of **the CPA** which stipulates that:-

"Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and all amendments made under the provisions of this subsection shall be made upon such terms as the court shall deem just."

Since the avenue provided by section 234 (1) of **the CPA** was not utilized to remedy the anomaly within the most appropriate time, there is no gainsaying in holding that, the appellant was tried and convicted under a defective charge.

The subsequent question is as to what should be the way forward. In **Noel Gurth a.k.a Bainth and Another Vs. Republic**, Criminal Appeal No. 339 of 2013 (unreported), the Court was confronted with a similar problem whereby, there was variation in the places where the alleged offence of armed robbery took place. The Court adopting the earlier

reasoning in **Ryoba Mariba @ Mingare Vs. Republic**, Criminal Appeal No. 74 of 2003 (unreported), stated that:

*"...If there is variation in the places where the alleged armed robbery took place, then the charge must be amended forthwith and the accused must be explained his right to require the witnesses who have already testified if any, be recalled to testify. **If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right. Short of that a failure of justice will occur.**"*

[Emphasis supplied]

See also: **Bakari Omari @ Lupande Vs. Republic**, Criminal Appeal No. 130 of 2006, **Masasi Mathias Vs. Republic**, Criminal Appeal No. 274 of 2009 and **Emanuel Lazaro and Others Vs. Republic**, Criminal Appeal No. 395 of 2015 (all unreported)

In the same breath, the reasoning made in **Noel Gurth a.k.a Bainth and Another Vs. Republic** (supra) can be adopted to the present appeal that, where there is variation as to the names of the victim/s of an incident, then the charge must be amended forthwith. And if this is not

done the preferred charge against the accused will remain unproved and the accused shall be entitled to an acquittal as a matter of right. Short of that will occasion injustice.

We allow the appeal by the appellant by quashing the conviction of the appellant by the two lower courts and set aside the sentence which was imposed on him. In lieu thereof, we direct for the immediate release of the appellant from prison unless he is legally incarcerated for some other grounds.

Order accordingly.

DATED at MWANZA this 9th day of July, 2018

B. M. MMILLA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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


B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL