

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA
(CORAM: MBAROUK, J.A., MKUYE, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 61 OF 2017

KANDOLA PAULO @ KADALA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Mohamed, J.)

dated the 22nd February, 2017
in
Criminal Appeal No. 120 of 2016

JUDGMENT OF THE COURT

28th February, & 8th March, 2018

MKUYE, J.A.:

In the District Court of Singida, the appellant Kondola Paulo @ Kadala was charged with two counts of stealing by agent contrary to sections 265 and 273 (b) of the Penal Code [Cap. 16 RE 2002]. The particulars of the offence in the first count ran as follows:

"PARTICULARS OF OFFENCE:

*KANDOLA S/O PAULO @ KADALA between January,
2013 to May, 2013 at BioSustain Tanzania Ltd Office*

at Singida, within the District and Region of Singida did unlawfully steal pesticides, worth Tshs 12,000,000/= (Twelve million shillings) the property of BIOSUSTAIN TANZANIA LIMITED which were entrusted to him as an agent by the said Company for the purpose of selling to the farmers instead he used the same for his own use.”

As to the second count, the particulars of offence were as follows:

PARTICULARS OF OFFENCE:

KANDOLA S/O PAULO @ KADALA between July 2013 to November, 2014 at BioSustain Tanzania Limited office at Singida, within the District and Region of Singida did unlawfully steal cash money valued at Eighty seven million (87,000,000/=Tshs) the property of BIOSUSTAIN TANZANIA LIMITED which were entrusted to him as an agent by the said Company for the purpose of buying cotton instead he used the same for his own use.”

After a full trial the appellant was found guilty, convicted in both counts and was sentenced to four years imprisonment for each count which were ordered to run concurrently.

Aggrieved, he unsuccessfully appealed to the High Court where the appeal was dismissed in its entirety.

Still protesting his innocence, he has preferred this second appeal to the Court while fronting six grounds of appeal which, we think, can be condensed into one ground of appeal covered under ground No. 3 to the effect that the prosecution failed to prove the case beyond reasonable doubt.

At the hearing of the appeal on 28/2/2018, the appellant appeared in person and unrepresented; whereas the respondent Republic was represented by Mr. Harry Mbogoro, learned State Attorney.

The appellant adopted his grounds of appeal and opted to hear the submission of the State Attorney first and respond later, if need arose.

Mr. Mbogoro initially opposed the appeal but on being probed by the Court as to whether the evidence available proved the charged offences, he conceded and supported the appeal for the reason that the case was not

proved beyond reasonable doubt. He contended that, though in the first count the appellant was charged with stealing Tshs. 12,000,000/=, Exhibit PI titled "Uthibitisho wa Madeni" (at page 58 of the record) showed the amount claimed from him was Tshs. 12,400,000/= and in the same document the total amount claimed by the Company was Tshs. 13,680,000/=. In that case he said the charged offence was at variance with the evidence in Exhibit PI.

As to the 2nd count, Mr. Mbogoro argued that though the charge shows the appellant stole Tshs. 87,000,000/=, PW1 testified that he stole Tshs. 99,629,881,000/= which he thought was a typing error. PW2 said Tshs. 99,629,000/= was stolen by the appellant. In that regard he submitted that the prosecution failed to prove the offence beyond reasonable doubt and urged the Court to quash the lower courts' conviction, set aside the sentences and release the appellant from custody unless held for other lawful reasons.

When the appellant was asked to respond, he did not have anything to add, and understandably so he being a lay person, and left the matter in the hands of the Court to decide.

We are aware that this is a second appeal. It is now settled that where there are concurrent findings of facts of the two courts below, the Court would not under normal circumstances interfere with such concurrent findings of facts. However, if the courts below misapprehended the substance, nature and quality of such evidence which result into unfair conviction in the interest of justice, the Courts would interfere. (See **Abdallahman Athuman Versus Republic**, Criminal Appeal No. 149 of 2014 (unreported) and **DPP Versus Jaffari Mfaume Kawawa** [1981] TLR 149). In this case, since both the trial court and the 1st appellate court found as a fact that the appellant committed the offence, we think, we are entitled to interfere. We shall explain.

There is no gainsaying that the appellant was charged with and convicted of the offences on the evidence that he stole some amounts of money entrusted to him. After having scrutinized the charge sheet and the evidence available, we have observed that they are at variance. Whereas the charge sheet in the 1st count alleges that the appellant stole a round figure of Tshs. 12,000,000/= and in the 2nd count Tshs. 87,000,000/=, the evidence on record shows different figures.

With regard to the first count PW1, Henry Njau testified that they gave the appellant who was their employee and agent Tshs. 13,068,000/= for farm inputs. After paying some money he remained with a debt of Tshs. 12,668,000/= which he claimed was for farm inputs for Meatu District. When they sent a person to Meatu the appellant told him that the said farm inputs of Tshs. 12,668,000/= were bought by a certain person but still he was unable to deposit the said amount of money to the Company. Besides that, there was an exhibit which was tendered in the trial court and admitted as Exhibit P1 to prove that the appellant stole Tshs. 12,000,000/=. However, the said Exhibit P1 showed different amounts of money which the appellant was indebted indicated as "Deni lililobaki", that is Tshs. 12,400,000/= as one item of the total amount and total amount indicated as "Jumla ya Deni lote" of Tshs. 13,680,000/= which Company said the appellant was indebted. As it is, one cannot tell as to which amount the Exhibit P1 was intended to prove that the appellant was indebted or had stolen between the amounts shown in Exhibit P1 and the one shown in the charge sheet.

Likewise, with regard to the 2nd count involving Tshs. 87,000,000/=: PW1 testified at page 19 of the record that the appellant owed a total amount of Tshs. 99,629,881,000/=. Though Mr. Mbogoro thought it was a

typographical error he did not give us anything to substantiate his claim. PW2, Dr. Rayez Haider at page 26 of the record told the trial court that the appellant was indebted to the Company Tshs. 99,629,000/=. These amounts were different from the amount claimed in the charge sheet of the total of Tshs. 99,000,000/=.

We think this is not a minor discrepancy since the appellant could not be in a position to understand exactly which amount of money he has been alleged to have stolen to enable him prepare his defence and, more so, when taking into account that even PW1 and PW2 themselves differed on the amount of money allegedly stolen by the appellant. On top of that, such evidence cannot sufficiently prove the case beyond reasonable doubt.

In the case of **Justine Kakuru Kasusura @ John Laizer Versus Republic**, Criminal Appeal No. 175 of 2010 (unreported), where the evidence on record did not tally with the charge sheet, the Court agreed with the appellant that the prosecution failed to prove their case beyond reasonable doubt because of the variance between what was stated in the charge sheet and the evidence adduced by the prosecution witnesses. The Court found that though the charge sheet stated that what was stolen was

2,000,000 US Dollars the prosecution witness testified on a parcel or cargo as the item which was received by the appellant without mentioning the amount and the type of the currency stolen. At the end of the day the Court found such anomaly created a reasonable doubt which was resolved in favour of the appellant.

Apart from the amount of money alleged by PW1 and PW2 to have been stolen in the second count, there was no documentary evidence produced by the prosecution to prove that the appellant stole it as was testified by PW1 and PW2. The appellant in his defence denied to be indebted to the Company.

The importance of producing documentary evidence in cases of this nature was emphasized in the case of **Justine Kasusura** (supra) when the Court stated:

"As shown herein above, the particulars of the offence clearly state that what was stolen was 2,000,000/= US Dollars, but that allegation was neither supported by evidence from either the

*prosecution witnesses or documentary evidence
tendered as Exhibits at the trial court.”*

It was expected that the BioSustain Company would have produced documents to show that they gave the appellant that amount of money which is claimed to have been stolen by the appellant. In this case, that they did not do.

We have also observed that, PW2 had testified on yet another amount of Tshs. 91,961,000/=. This amount, he said, was reached through an agreement dated 3/12/2014 (Exhibit P4) between the complainant and the appellant's relatives whereby a reduction of a certain amount of money was made from Tshs. 99,629,000/= to Tshs. 91,961,000/=. This also adds a confusion as to the amount the appellant stole from the complainant.

There are a number of occasions where this Court has ruled out on situations where particulars of the offence differ from the evidence of the prosecution witnesses, particularly the complainants. In the case of **Sanke Donald @ Shapanga Versus Republic**, Criminal Appeal No. 408 of 2013, for example, where the date when the offence was committed in the charge sheet was at variance with the date explained by the complainant in

evidence, the Court quoted with approval the case of **Ryoba Mariba @ Mungare Versus Republic**, Criminal Appeal No. 74 of 2003 (Unreported) in which it was stated:

*"... If there is a variation in the dates, then the charge must be amended forthwith and the accused explained his right to require the witnesses who have already testified recalled. **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 occure.**"* [Emphasis added]

Likewise, the Court in the case of **Noel Gurth aka Bainth & Another Versus Republic**, Criminal Appeal No. 339 of 2013 (unreported) the similar principle was extended to a situation where there was a variance of the place where the offence was committed in the charge sheet and the evidence adduced in the trial court. The Court stated as follows:

"We can, for purposes of our present appeal extend the same principle and hold that where there is a

variation in the places where the alleged armed robbery took place, then the charge must be amended forthwith. If no amendment is effected the 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.”

In this case, as we have endeavoured to discuss hereinabove, we are of the view that the variance in the amounts of money stolen in the charge sheet and the evidence adduced is similar serious. Therefore, a similar principle can be extended even to the differences of the amounts of money shown in the particulars of offence in the two counts in the charge sheet and the contradicting evidence on the amounts stolen from the complainant's prosecution witnesses that is, PW1 and PW2 and Exh. P1. Under such a situation, an amendment of the charge was unavoidable to enable the appellant understand the nature of offences charged and prepare his defence. Otherwise, the variance between the charge sheet and the contradicting evidence from the prosecution witnesses sufficiently creates a doubt on the appellant's conviction. In that regard, we agree with Mr. Mbogoro's stance.

In fine, we accordingly allow the appeal, quash the conviction against the appellant, set aside the sentences imposed on him and order for his immediate release from prison unless held for some other lawful reasons.

DATED at **DODOMA** this 7th day of March, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL