IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA, J.A, KITUSI, J.A And KEREFU, J.A.)

CRIMINAL APPEAL NO. 187 OF 2016

KAENGE CHRISTOPHER ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam.)

(Massati, J.)

dated the 18th day of October, 2004.
In
Criminal Appeal. No. 69 of 2004.

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JUDGMENT OF THE COURT

9th & 25th July, 2019

MUSSA, J.A.:

In the District court of Kibaha, the appellant and another were arraigned for armed robbery, contrary to sections 285 and 286 of the Penal Code, Chapter 16 of the Laws (the Code). At the trial, the appellant stood as first accused, whereas his co-accused was, namely, Riganya Chamliro, a juvenile aged 15 years.

The particulars on the charge sheet were that on the 18th day of July 2003, at Tondoroni Village, within Kibaha District, the appellant and the co-accused stole 58 goats, two radios and one torch, properties of Siza Mrisho and Wilson Miraji. It was further alleged that the appellant and the co-accused stabbed the said Siza Mrisho and Wilson Miraji so as to obtain and retain the stolen properties.

The appellant and the co-accused refuted the accusation, following which the prosecution featured five witnesses, two medical examination Police Forms No.3 (Exhibits P1 and P2), twenty six goat skins (exhibit P4) and a radio (exhibit P5) to support the accusation. On their part, the appellant and the co-accused gave sworn statements to refute the prosecution accusation. It is, perhaps, also pertinent to observe at this stage that, at the commencement of the trial, a preliminary hearing was conducted, whereupon the trial court posted the following undisputed detail:-

> *"That both accused wrote cautioned statements in which accused No.1 admitted the offence while accused No. 2 denied."*

Rather paradoxically, the referred cautioned statements were, actually, not adduced into the record of the evidence and, little wonder, the same are no show in the record of the appeal.

The case for the prosecution, as told by its witnesses, was to the effect that the fateful occurrence took place at a farm house belonging to Shadrack Sabuli Mbwilo (PW2) which is situate at Tondoroni Village, kibaha District. At the farm, PW2 had fifty eight (58) goats which were ordinarily kept under lock and key in a separate structure made of cement bricks. As it were, at the material time, PW2 was a resident of Dar es Salaam and had entrusted Wilson Miraji (PW3) to housewarm the farm house and keep watch of the goats. The evidence was to the effect that PW3 resided at the farm house with his wife, namely, Siza Mrisho (PW1).

On the alleged fateful day, around 11.00 p.m. or so, PW1 and PW3 were asleep at the farm house when, suddenly, the entrance door was broken and several bandits stormed therein. Having gained entrance, the intruders immediately confronted PW3 whom they hacked with a bush knife on his head, shoulders and hands. His wife, PW1, tried to wail about but she was momentarily silenced by the

bandits upon being hacked on her arm. The unwelcomed visitors then demanded to be given the key that opens the structure in which the goats were kept. The bandits took the key after being shown by PW1 and had both PW1 and PW3 visually bound and gagged with pieces of clothes. Next, they drove all the goats out of the kraal and forced PW1 and PW3 to walk in their company. Soon after, the bandits abandoned PW1 and PW3 at a bush and disappeared with the herd of goats.

On the morrow of the ordeal, PW1 and PW3 were rescued from where they were abandoned and taken to the Village Executive Officer, namely, Lista Bunzu (PW4). PW4 recollected that both PW1 and PW3 had injuries and, hence both were taken and admitted at an undisclosed hospital. Aparently, ahead of their treatment, both PW1 and PW3 had been issued with Police Forms No.3 (PF 3) which, as we have hinted upon, were respectively, adduced into evidence by PW1 and PW3 as exhibits P1 and P2. In their respective testimonies, both PW1 and PW3 conceded that they could neither recognize nor identify the perpetrators of the robbery much as the incident took place in darkness and there was no identification aid such as a lamp.

A little later, PW4 and others including Abdallah Omari (PW5), followed the trail left by the goats' hoofs which led them to Pugu railway station, Dar es Salaam Region. Reaching there, they reported the robbery occurrence to Pugu police post where two undisclosed police officers were availed to assist the trail trackers. As they proceeded further, the trail trackers saw two persons: The first person, however, clicked his heels upon seeing them and disappeared but the second person did not move a bit as, according to PW4, that man was lying asleep on the ground. As it turned out the man was none other than the appellant. Evidence was further to the effect that close to the spot where the appellant was lying asleep there was a blood stained bush knife and a radio. It seems, if we may interject a remark here, the appellant was fast asleep much as PW5 recollected that he was awaken after the trail trackers struck him with a stick.

Upon being asked as to what he was there for, initially, the appellant claimed that he was feeling tired after a drinking spree but, moments later, he confessed complicity in the robbery incident and led the trail trackers to a spot where they found twenty six (26) carcasses of slaughtered goats. The appellant allegedly informed

them further that his colleagues in the banditry had gone to fetch a vehicle so as to carry the slaughtered goats. Moments later, a Kombi motor vehicle emerged at the scene. The Kombi was being driven by a certain Majaliwa Masudi who was not featured as a witness. Immediately thereafter, the occupants of the Kombi including Riganya, the appellant's co-accused, disembarked and ran clear of the scene. In the final event at the bush, PW5 and others took the slaughtered goats to Vingunguti, Dar es Salaam where they were photographed. Speaking of the slaughtered goats, PW2 told the trial court thus:-

> *" I identified the goats as my properties. There is a big bull goat. I took the goats to a health officer who allowed us to eat their meat. I gave money for the goats to be snapped. I have the skins at home. I can see a pitcture of the notorious he goat"*

Ironically though, the alleged photographs of the slaughtered goats, or any of them, were not adduced into evidence. As regards the skins of the slaughtered goats, in response to cross-examination by the appellant, PW2 informed the court thus:-

"We gave the skins to the police station after I have dried them at home. The skins have been destroyed because that (sic) there is heat and that they had been dried (sic). The skins were undressed after the stolen goats were found with you ... I took a week to doing the skins. The police ordered me to bring up the skins from home."

The witness (PW2), was then allowed by the trial court to adduce into evidence the twenty six (26) skins against objections from the appellant and the co-accused which were overruled.

It should also be recalled that near the sport where the appellant was seen sleeping, a blood stained bush knife and a radio were seen. Speaking of the radio, PW4 had this to tell the trial court.

"... the radio was mine which I sent to the son of PW3 for making repair. It contains a name of the owner from whom I bought the radio one Simon A. Katigo. It was a 12 band Akai radio. I pray to produce as exhibit."

As it were, the radio was adduced into evidence and marked exhibit P5. With this detail, so much for the prosecution version of the occurrence which was unveiled by its witnesses. Thus, against the

foregoing backdrop, the appellant and the co-accused were apprehended and arraigned as we have already intimated.

In his sworn testimony, the appellant told the trial court that, at the material times, he operated for gain as an assistant in a Fusso lorry Registration No. TZB53 which was owned by a certain Karia John. He further testified that on the 18th July, 2003 he travelled from Vingunguti locality in Dar es Salaam, where he used to reside, to Pugu auction centre where he desired to join his colleagues and the lorry he was working with. The lorry was, however, not there but, soon after, around 3:00 p.m or so, he met a friend of his, namely, John Petro, who took him to a pub which was within the locality. At the pub, the two of them settled for a drink and the appellant recalled to have taken a mixture of safari lager beer and konyagi for quite a while until 10:00 p.m. when he could take no more. He walked out of the pub but, no sooner, he could not make it any further and retired at a spot where he fell asleep. From there, he was later confronted by several persons who apprehended and took him to Sitakishari Police Station in Dar es Salaam. The appellant did not make specific

reference to the robbery occurrence, but he tacitly refuted involvement by saying:-

"I completely deny to be a bandit"

On his part, the co-accused claimed that on the 19 July, 2003 around 5.30 a.m. he boarded a kombi, which was being driven by Majaliwa Masudi, destined for Pugu where he desired to purchase eggs for sale. They arrived at Pugu around 5:45 a.m. but, just as they were disembarking, some policemen emerged at the scene and besieged the kombi. Some of the occupants of the motor vehicle managed to escape but he (co-accused) remained at the scene and he was, eventually, arrested and transferred to Stakishari Police Station and later to Tumbi Police Station. His captors insinuated that he was involved in a robbery occurrence which took place at Tondoroni Village. In his testimony the co-accused refuted the accusation, just as he faulted the prosecution witnesses for telling lies.

On the whole of the evidence, the learned trial Magistrate was impressed by the version told by prosecution witnesses from which he inferred that the appellant was found in possession of a portion of the

stolen goats to which he failed to satisfactorily account for. The learned trial Magistrate further deduced from the evidence that the co-accused was an accomplice who went to hire the kombi to collect the carcasses of the slaughtered goats. With respect to the appellant's and the co-accused person's defence, all what the learned trial magistrate did was to recite their telling at the trial as follows:-

> *"On the other side of the defence both accused persons denied the charge. Accused No.1 told this court on oath to the effect that, when he was arrested he had been coming from a drinking spree, whereas accused No.2 said that he just got a lift in the vehicle which was hired by others who went to collect the slaughtered goats at Pugu auction."*

As it were, the Magistrate did not go so far as to weigh the defence case against the case for prosecution and thereby determine whether or not the former case was capable of raising doubts on the latter case. We shall revert to this shortcoming, later in our judgment, to determine the consequences of the non-compliance.

For the moment, it will suffice if we cull from the judgment of the trial court to the effect that both the appellant and the co-accused

person were found quilty and convicted as charged. Upon conviction, the appellant was sentenced to a term of twenty (20) years imprisonment with twelve (12) strokes of the cane. On his part, the co-accused who, as we have intimated, was a juvenile, was sentenced to a corporal punishment of ten (10) strokes of the cane.

On appeal to the High Court, the first appellate Judge (Massati, J., as he then was), agreed with the finding of the trial court to the effect that the appellant was found with stolen articles, that is, the twenty six (26) goat carcasses and the radio the very next morning after the robbery. In the premises, the learned first appellate Judge remarked:-

> *"There, the doctrice of recent possession could not have been more applicable."*

As regards the cautioned statement which was posted at the preliminary hearing as an undisputable detail, the Judge further remarked thus:-

> *"It is true that a retracted confession requires corroboration. Now, here, there was corroboration because the appellant was found in possession of the stolen articles. Secondly,*

even without the corroboration, there was sufficient evidence, independent of the recanted cautioned statement, to prove the offence."

In the upshot, the first appellate court upheld the decision of the trial court and the appeal was dismissed in its entirety. It is, however, noteworthy that that the learned Judge clearly strayed into error in his remark about the cautioned statement which, as we have already intimated, the same was not adduced into evidence and, obviously, the remark was upon an extraneous matter. In addition, it is further noteworthy that the learned Judge misread the sentence of imprisonment imposed by the trial court on the appellant and, in his judgement, he wrongly posted a detail to the effect that, upon conviction, the appellant was sentenced to thirty (30) years imprisonment, instead of the term of twenty (20) years imprisonment which was, actually, meted out by the trial court. Quite unfortunately, the prison officers, seemingly, reckoned the appellant's punishment to be a prison term of thirty (30) years which was wrongly posted by the first appellate court. As it turns up, presently, it is the appellant alone who is aggrieved by the whole decision of the High Court of which he

seeks to impugn it upon a memorandum of appeal which comprises seven (7) points of grievance, namely:-

"1. *THAT, your Lordship the learned first appellate Judge grossly erred in holding to the appellant's conviction based on a defective charge (sic).*

2. *THAT, the learned first appellate judge grossly erred in enhancing the appellant's sentence un-procedural (sic).*
3. *THAT, the learned first appellate judge erred in holding to Exh.P.4 collectively tendered and admitted un-procedural (sic).*
4. *THAT, the learned first appellate judge erred in holding to Exh.P.5 tendered by PW.4 un-procedural (sic).*
5. *THAT, the learned first appellate judge erred in convicting the appellant where no evidence was led as to how he was re-arrested in connection with the offence.*
6. *THAT, the learned first appellate judge erred in holding to the appellant's conviction based on un-justified corroborated prosecution evidence.*

7. *THAT, the learned first appellate judge grossly erred in holding that the prosecution proved its case beyond reasonable doubt as allegedly charged."*

At the hearing before us, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Ms. Mwanamina Kombakano and Ms. Haika Temu, both learned State Attorneys. In the course of hearing, the appellant fully adopted the memorandum of appeal which he, however, did not elaborate and, instead, requested us to let the respondent submit first and he retained the right to rejoin, that is, if need be. On her part, Ms. Kombakono, who took the floor to argue the appeal, supported the appeal, albeit, as she put it, for different reasons from those raised by the appellant in the memorandum of appeal.

The learned State Attorney commenced her submissions with a reference to the charge sheet which she faulted for containing an incorrect detail to the effect that the stolen items were properties of Siza Mrisho and Wilson Miraji. In reality, she further submitted, the evidence was to the effect that the herd of fifty eight (58) goats and the radio, which were the subject of the charge, respectively,

belonged to PW2 and PW4. There was another defect on the particulars of the charge sheet which was pointed out by the learned State Attorney and this related to the weapon used by the bandits which, she said, was not disclosed. Ms. Kombakono initially sought to impress on us that the defects were fatal and went to the roof of the case. Incidentally, we so found that in the first ground of his memorandum of appeal, the appellant also raised concern on the defectiveness of the charge sheet.

The learned State Attorney then criticized the first appellate Judge, as she put it, for inappropriately enhancing the sentence imposed on the appellant from a term twenty of (20) years to a term of thirty (30) years imprisonment. Again, Ms. Kombakono took the position that the enhancement was fatal and operated adversely to the appellant who, as of now, should have finished the term of twenty (20) years imprisonment which was meted out by the trial court. We should, additionally, note that this complaint is just as well contained in ground No. 2 of the memorandum of appeal.

The learned State Attorney was further concerned with the two medical examination documents which were adduced into evidence as

exhibits P1 and P2. In this regard, Ms. Kombakono faulted the trial court for not reading the contents of the documents upon their admission so as to afford the appellant the opportunity of being seized with the details of the same. Quite apart, she said, the court did not inform the appellant of his right to require the medical officer who posted the details on the documents to be summoned for cross-examination pursuant to the provisions of section 240(3) of the Criminal Procedure Act, Chapter 20 of the Laws (CPA).

As regards exhibit P4 and P5 which, respectively, related to the goat skins and the radio, the learned State Attorney submitted that upon the sizure of the items, section 38(3) of the CPA was not adhered to and, accordingly, a foolproof chain of custody was not set in motion. It was, for instance, not demonstrated upon evidence how exhibit P4 changed hands from whoever seized it to PW2 who, eventually, adduced the skins into evidence. Likewise, she futher submitted, it was not shown how PW4 became possessed of the radio which he eventually adduced into evidence. In sum, Ms. Kombakono urged us to discount exhibits P4 and P5 for the reason that the chain of custody on the items was either not set in motion or was, at a

certain stage, broken. We, again, reflect that the appellant voiced the same concern in grounds Nos. 3 and 4 of the memorandum of appeal.

Thus, for all the foregoing submitted reasons, the learned State Attorney advised us to allow the appeal by quashing the appellant's conviction as well as the sentence imposed on him. Having heard the submissions of Ms. Kombakono which, incidentally, supported his appeal, the appellant fully supported her without more.

On our part, we thought it was fitting to put to either party the question as to whether or not the two courts below took into consideration the defence of the appellant to which they were imperatively enjoined. Both the appellant and the learned State Attorney took the position that both courts below did not, appropriately, consider the appellant defence. However, either party was at a loss with respect to the consequential remedy which is tied to the shortcoming.

Addressing now the issues of contention raised in the appeal, we should first remark that although Ms. Kombakono initially informed us that her reasons for supporting the appeal are different from those pleaded by the appellant; but, in reality, the learned State Attorney

echoed the appellants' grievances as pleaded in the memorandum of appeal, save for her criticism about the handling of the PF 3.

We propose, for a start, to reflect on the first grievance raised by the learned State Attorney and the appellant to the effect that the charge sheet is faulty for incorrectly alleging that PW1 and PW2 were the owners of the allegedly stolen items and further for not disclosing the type of weapon which was used to attack PW1 and PW3. We should note, in this regard, that the evidence which was adduced clearly established that the owners of the stolen herd of goats and the radio were, respectively, PW2 and PW4. On the other hand, from the testimonies of PW1 and PW3, it also clearly came to light that the weapon used to attack the couple was a bush knife. We are obliged to observe that it is not always the case that every defect on the charge sheet leads to fatality. On the contrary, whether or not a defect on the charge sheet is incurably fatal differs from case to case depending, in the main, on whether or not the person accused was prejudiced by the defect. We asked Ms. Kombakono whether or not the appellant at hand was prejudiced by the defects on the charge sheet and her reply was in the negative and, in elaboration, she

conceded that both defects are curable under section 388(1) of the CPA. We entirely subscribe and we need not venture on this issue any further.

With respect to the alleged shortcoming in the course of adducing the two PF3, true, upon being adduced into evidence, the contents of the two document were not read in court. As rightly formulated by Ms. Kombakono, the non-compliance fatally operated against the appellant who was thereby denied an opportunity of being seized with the substance of the evidence which was comprised in the documents. What is more, as, again, rightly observed by the learned State Attorney, the provisions of section 240 (3) of the CPA were not heeded to at the time of adducing the document. It is now trite that non-compliance which section 240(3) of the CPA imperatively leads to the discounting of a PF3 and we, accordingly, expunge exhibits P1 and P2 from the record of the evidence. Having expunged the two documents, it is needless for us to have gloss over their details or shortcomings.

Next in our consideration, is the grievance about the alleged enhancement of the sentence imposed on the appellant from twenty

(20) to thirty (30) years imprisonment. In reality, the learned first appellate Judge did not quite enhance the sentence. What he did, as we have already intimated, was to misread the sentence of twenty (20) years imprisonment imposed by the trial court and posted a detail to the effect that the appellant was sentenced to thirty (30) years imprisonment. It is unfortunate that the incorrect detail operated adversely to the appellant but, we need not be detained by this shortcoming, the more so as in our resolve on the other issues of contention in this appeal the incorrect sentence will be effectively defused.

Addressing now exhibits P4 and P5, we note that there are two related issues which tend to undermine the weight to be attached on the two exhibits. The first issue pertains to the sufficiency of the evidence of the identification of the items, whereas the second relates to whether or not a foolproof chain of custody was set in motion under which the items changed hands.

Dealing with the first issue, as we have already intimated, the evidence was to the effect that PW2 bluntly claimed in court to have identified his goats ahead of adducing into court the 26 pieces of goat

skins. As it turned out, the witness did not give a prior description of the skins and did not point out, if there were any special marks on the skins or any of them. In the High court case of **Nassoro Mohamed v. The Republic** (1967) H.C.D 446 Georges C.J. made the following observation:-

> *"The proper procedure for identification of property in court is that the claimant should describe the item before it is shown to him, so that it can be clear to the court, when the item is eventually tendered, whether or not he was able to identify it."*

We fully adopt the foregoing prescribed procedure and we so find that, in the case at hand, the identification of the skins was flawed and fell short. On his part, PW4 gave a prior description and a special mark of the radio before the same was adduced into evidence and marked exhibit "P5" But, as it will soon become apparent, the issue is as to how and when he became possessed of the radio which was retrieved close to the spot where the appellant was seen sleeping. That brings us to the second issue pertaining to the chain of custody. We should, in this respect, observe at once that, upon the seizure of

the goats' carcasses, skins and the radio, the two police officers who were in the company of the trail trackers fatally failed to comply with the mandatory provisions of section 38 (3) of the CPA which goes thus:-

> *"Where anything is seized in pursuance of the powers conferred by subsection (1), the officer seizing the thing shall issue a receipt acknowledging the seizure of the thing, being the signature of the occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of the witnesses to the search, if any."*

If the foregoing provision had been complied in the case at hand, thereafter a foolproof chain of custody would have been set in motion. The leading case on this subject is the unreported Criminal Appeal No. 110 of 2007 - **Paulo Maduka and Others V. The Republic** where it was observed:

> *"By chain of custody, we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence,*

be it physical or electronic. The idea behind recording the chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime rather than for instance, having been planted fraudulently to make someone appeal guilty. Indeed, that was the contention of the appellants in this appeal. The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it."

Unfortunately, it is beyond question that, in the case at hand, the foregoing guiding principle in criminal investigation was not observed right from the very outset. As a result, it cannot be ascertained as to when and how exhibits P4 and P5 changed hands from the trail trackers, who retrieved the items, to PW2 and PW4 who, respectively, eventually adduced into evidence the items. We cannot overrule the possibility of the items being tempered with and, consequently, the reliability of exhibit P4 and P5 to support the inference of the doctrine of recent possession is thrown into doubt.

Lastly, there is yet another disquieting factor of the case which we raised and put to the parties. It seems clear to us that the learned trial Magistrate dealt with the prosecution evidence on its own and arrived at the conclusion that the same comprised proof of the case and as a result, he did not, at all, put the defence case to a consideration. In our view, the proper approach should have been for the Magistrate to deal with the prosecution and defence evidence and after analyzing such evidence, the Magistrate should have then reached the conclusion. In the case of **Hussein Idd and Another v. The Republic** [1986] TLR 166, this Court held:-

> *"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

As regards the consequences of such a misdirection, in the unreported Criminal Appeal No. 56 of 2009 – **Moses Mayanja @ Msoke v. The Republic,** this court made the following observation:-

"... it is now trite law that failure to consider the defence case is fatal and usually vitiates the conviction. See, for instance:-

(a) ***Lockhart – Smith V.R*** *[1965] EA 211 (TZ),*

(b) ***Okoth Okale v. Uganda*** *[1965] EA 555,*

(c) ***Hussein Iddi Another v. R*** *[1986] TLR 166,*

(d) ***Malonda Badi & Others v. R*** *Criminal Appeal No. 69 of 1993 (unreported), among others."*

In the referred **Lockhart – Smith** case, the appellant, an advocate, was convicted in the District Court of Dar es Salaam on three counts of contempt of court. The offence arose from certain remarks made by the appellant when representing his client in the District Court. The trial Magistrate found the words spoken by, and the conduct of the appellant were discourteous and disrespectful to the court and amounted to contempt of court. As he was convicting the appellant, the trial Magistrate remarked:-

"In the instant case, I believe the evidence of the prosecution witnesses. I find

corroboration in their testimonies. I also find that the accused uttered the words alleged and perpetrated the conduct alleged. I therefore reject the accused's statement. In the result, I find the accused guilty as charged. I hereby convict the accused on each of the three counts of the charge."

On appeal, the High Court (Weston, J.) faulted the trial Magistrate for rejecting the appellant's evidence solely because he believed that of the witnesses for the prosecution. In the upshot, the court held:-

"The trial magistrate did not, as he should have done take into consideration the evidence in defence, his reasoning underlying the rejection of the appellants statement was incurably wrong and no conviction based on it could be sustained."

Likewise, in the appeal under our consideration, the appellant was deprived of having his defence properly considered. In the circumstances, the conviction and sentence imposed upon the appellant cannot be allowed to stand.

In sum, taking into account the cumulative effect of all the shortcomings which undermined the case at hand, we, accordingly, allow the appeal with an order quashing the conviction and setting aside the sentence. As a consequence, the appellant should be released from prison custody forthwith unless if he is held there for some other lawful cause.

DATED at **DAR ES SALAAM** this 18th day of July, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

R. KEREFU
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL