

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 81 OF 2021

(Arising from Criminal Case no 111 of 2020 before Serengeti District Court at
Mugumu)

JOSEPH S/O NYANCHIWA @ MANGURA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

30th August & 7th October, 2022

F. H. Mahimbali, J.

The appellant was convicted by Serengeti District Court (trial court) with the offence of stealing by agent contrary to section 273 (b) of the Penal Code, Cap 16, R.E 2019.

It was alleged by the prosecution (Respondent) that on the 20th day of August, 2016 at Miseke village within Serengeti District in Mara Region, the appellant did steal ten herds of cattle valued Tsh. 3,300,000/= entrusted to him by Ester Moyuga.

The appellant pleaded not guilty to the charge and thus compelled the prosecution to parade a total of five witnesses. Essentially, what

PW1, PW2, PW3 and PW4 testified is almost identical. That the appellant was married to PW2 who is a sibling to PW1. During the happy moment of their marriage life (PW2 and the appellant), Pw1 entrusted her 11 herds of cattle to the appellant. Pw2 corroborated the testimony of PW1, as once being the wife of the appellant. That, in between, their relationship went sour and thus parted. PW1 seeing this, she then went back to the appellant claiming return of her herds of cattle but the appellant withheld 3 on the basis that they had been for dowry refund after PW2 had parted with him (the appellant).

The appellant disputed the charges levelled against him. He claimed the said cattle are his and had never belonged to the PW1 as alleged. He had three witnesses who testified as DW2-Dw4. All testified that the appellant owned cattle at his home.

Upon hearing of the case, the trial court was satisfied that the appellant had retained the said cattle unlawfully. He was thus convicted and sentenced to five years. Not amused with the said decision, he preferred this appeal on a total of three grounds of appeal, namely;

- 1. That the prosecution failed to prove the offence with which the appellant was charged with to the required standard in criminal cases.*

2. *That, the trial court erred in law and fact to rely on fabricated evidence of the prosecution witnesses to convict the appellant on the offence charged.*
3. *That there is no evidence on record that the appellant received ten heads of cattle of the value of Tshs 3,300,000/= being entrusted to him otherwise he would have been put to civil liability.*

During the hearing of the appeal, the appellant was represented by Mr. Cosmas Tuthuru, learned advocate, whereas the Respondent was represented by Ms Monica Hokororo, learned senior state attorney.

Submitting on the first ground of appeal, Mr. Cosmas Tuthuru argued that the Republic failed to prove the case beyond reasonable doubt as per law. As per charge sheet, the appellant was charged under section 273 (b) of the Penal Code in which cannot establish the ingredients of theft unless he was charged with section 258 (1) and (2) of the Penal Code. He took this position as per decision in the case of **Meck Malegesi and Maura Ndaro vs DPP**, Criminal Appeal No 128 of 2011, CAT at Mwanza where it was held that that where one is charged with theft related offence, it must be charged with section 258 (1) and (2) of the penal code.

With the second ground of appeal, he submitted that the trial court erred to rely on prosecution's evidence to convict the appellant

and abandoning the appellant's evidence. He argued that as per testimony of PW5 (page 27 of the typed proceedings), he is an investigator of the case. He arrested the accused person together with the alleged cattle from the appellant. There is no independent witness of that transaction and that there was no certificate of seizure to substantiate the same. In the case of **Mbaraku Hamis and 40 others vs. Republic** CAT (unreported) which made reference to the case of **Selemani Abdalah and others vs Republic**, Criminal Appeal No 354 of 2008 on the importance of seizure receipt and independent witness. Further, he submitted that PW5 was not a competent witness to tender exhibit PE2 as he was not custodian of the said cows.

With PW1, he argued that she did not provide evidence of giving the said cattle to the appellant for keeping as alleged.

Mr. Tuthuru further challenged the testimony of PW3 who didn't recognize the mark of other cattle. PW4 never said anything on that. Therefore, the prosecution's case was not proved beyond reasonable doubt as per law.

As to the third ground of appeal, he submitted that it is clear that defense testimony was not considered at all (see at page 34 and 35). As the appellant testified on oath that he bought them from Chacha Mwita

(at auction). This is collaborated by DW3 – Yusuph (page 37). Had the trial court considered the defense case, Mr. Tuthuru is confident that the trial magistrate would have arrived at a different verdict. In the case of **Fred John vs Republic**, Criminal Appeal No 17 of 2018, CAT at Dar es Salaam at page 9, the court of appeal insisted on the consideration of defense testimony.

As what is the way forward, Mr. Tuthuru prayed that the appellant's appeal be allowed and that he be set free.

On her part, Ms. Monica Hokororo learned state attorney resisted the appeal. With the first ground of appeal, she submitted that the prosecution established the charge beyond reasonable doubt and the appellant was rightly convicted. As per charged section i.e. 273 (b) of the Penal Code. What was supposed to be proved were existence of the ingredients of the offence which were well established by PW1. The argument that the charging section was supposed to encompass section 258 of the penal code is a misconception.

She argued that, the testimony of PW1 is well collaborated with the testimony of PW2 and PW3. It is per page 23 of the typed proceedings (the testimony of PW3) it is very clear how the appellant was entrusted the said cattle and how PW2 paid the destruction for

PW1. Therefore, the charge was proved beyond reasonable doubt that the appellant was entrusted with the said cattle and that he retained them.

That the prosecution's evidence was fabricated is not true. As per testimony of PW1, PW2 and PW3, it is a jointed story. There is no good reason that the credence of the prosecution's evidence is questionable. Therefore, they be given credence (the case of **Goodluck Kyando vs Republic**).

On the issue of certificate seizure being filled, she countered it as not a serious contention. That as per decision in the case of **Juma Mzee vs Republic**, Criminal Appeal 19 of 2017, CAT at Mtwara, even if there is no certificate of seizure, it could not weaken the prosecution's case. That PW5 was not a competent witness to tender the said exhibit, she dismissed it. This is because as per law, the maker of it, people with knowledge of the alleged exhibits are competent witnesses to tender. As he testified on oath, it is sufficient to grant the accreditation.

With the 3rd ground of appeal, She submitted that the testimony of PW1, PW2 and PW3 have established it all. The same is collaborated with the testimony of PW4 and PW5.

With the last ground of appeal, she conceded that there was no consideration of the defense testimony. However, by virtue of section 366 of CPA she submitted that, the error is remedied. However, she prayed that this court to step into the shoes of the trial court and reach its own findings.

Regarding the appropriateness of the sentence as per section 273 of the penal code, Ms Monica was of the view that the trial court didn't give the proper sentence to the appellant. By virtue of 366 (1) b of the CPA, she called upon this court to enhance the sentence to 10 years. She then urged this Court to dismiss the appeal but with enhancement of the sentence to 10 years.

In his rejoinder submission, Mr. Tuthuru submitted that the respondent's state attorney has not stated why this court should not depart from the Court of Appeal's position on the correctness of the charge of theft. By that failure, he maintained that the appellant was charged with the defective charge.

That witnesses must be given credence; Mr. Tuthuru had not countered it. However, he argued that the said credence must be to both witnesses. However, he reasoned that a mere testifying itself is not conclusive that what they state must be relied. It is the duty of the

witnesses in their testimony to convince the court that what he speaks is truthful. In this case there is no that truth of the charge established.

Lastly, as there is no cross-appeal by the respondent, he argued that prosecution cannot raise the issue of the length of the sentence in the appellant's appeal unless they had also appealed against it.

Having heard the submissions from both sides, the first ground of appeal comes into play whether the charge before the trial court was proper to mount conviction as done. To appreciate Mr. Tuthuru's concern, I will reproduce what the relevant charging section 273 (b) of the Penal Code reads:

Where the thing stolen is any of the following things, that is to say-

(b) property which has been entrusted to the offender either alone or jointly with any other person for him to retain in safe custody or to apply, pay or deliver it or any part of it or any of its proceeds for any purpose or to any person; the offender is liable to imprisonment for ten years.

The next question now to consider is whether as per this preferred charging section by the respondent, whether it sufficed to bring the appellant into law. Mr. Cosmas Tuthuru, is of the considered view that basing on what was once held by the Court of Appeal in **Meck**

Malegesi and Maura Ndaro vs DPP, Criminal Appeal No 128 of 2011, CAT at Mwanza at page 8 and 10 where it was held that that where one is charged with theft related offence, it must be charged with section 258 (1) and (2) of the penal code. The Court of Appeal was of the considered view that an offence of stealing by agent as well as stealing by servant are integral part of theft. They must be charged together. For sure, reading the charging section above (section 273 (b) of the Penal Code by itself cannot bring sense in the absence of section 258 (1) and (2) of the Penal Code, Cap 16, R.E 2022. For better understanding of section 258 (1) and (2) I hereby reproduce it:

258.-(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing.

(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say-

(a) an intent permanently to deprive the general or special owner of the thing of it;

From the above-cited section 258 (1) and (2) (a), the first essential ingredient constituting the offence of theft is the proof beyond reasonable doubt that the taking of the cattle was without claim of any

right. Therefore, in my considered view, the appellant was not rightly charged as per law. Since stealing by agent is also part of theft offences, it is only complete when charging is encompassed with section 258 (1) and (2) a of the Penal Code. Short of it, the charge is defective.

That said, this ground alone is sufficient of disposing of this appeal. The appeal is allowed; conviction and sentence meted out against the appellant is hereby quashed and set aside. In its place, I order immediate release of the appellant unless lawfully held by other causes.

DATED at MUSOMA this 7th day of October, 2022.



F. H. Mahimbali
Judge

Court: Judgment delivered 07th day of October, 2022 in the presence of the Appellant, Ms. Monica Senior State Attorney for the respondent and Mr. Gidion Mugo, RMA.

Right of appeal is explained

F. H. Mahimbali
JUDGE