

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 23 OF 2022

(Originating from Criminal Case 27/2021 District Court of Bukoba)

BONIFACE JOHN..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

14th and 21st February, 2023

BANZI, J.:

On 15th June, 2021, the Appellant was arraigned before the District Court of Bukoba at Bukoba, charged with the offence of Stealing contrary to sections 258 (1) and 265 of the Penal Code [Cap. 16 R.E. 2019] ("the Penal Code"). It was alleged that, on diverse dates between November, 2020 and 23rd March, 2021, at Kashai-Kashenye area within the Municipality of Bukoba, in Kagera Region, the Appellant stole 400 chickens valued at Tshs.4,000,000/= the properties of Agatha Alexander Kaniki ("PW2").

After a full trial, the Appellant was convicted and sentenced to seven years imprisonment. Aggrieved with his conviction and sentence, he preferred an appeal before this Court armed with eight grounds which taking

them together fall under three complaints that; **one**, *the charge was defective for failure to disclose actual time of incident*; **two**, *the trial court failed to consider the defence evidence* and **three**, *the prosecution case was not proved beyond reasonable doubt*.

Briefly, the evidence which led to the conviction of the Appellant reveals that; on 23rd March, 2021 at around 4:00 am, the Appellant who was working for PW2 as a security guard was seen by one Shukuru Ezekiel (PW3) coming from the house of PW2 with two bags which later were discovered to contain ten chickens. PW3 arrested him and called PW2 who went to the scene with one Erick Tibaijuka (PW4). According to PW3, prior to the incident, he saw the Appellant three times with bag containing chickens. Having doubted him, he informed PW2 and three days later it was when PW3 caught him with those ten chickens. Later in the same morning of 23rd March, 2021, PW2 and PW4 took the Appellant to the street chairman of Kashai Halisi. Then, they took him to Kashai Police Post where he was interrogated by G.902 D/C Hussein (PW1) and F.5791 CPL Joseph and claimed to confess orally to steal those chickens contending to have been driven by Satan. CPL Joseph seized ten red coloured chickens, one key tied with yellow rope and two bags via the certificate of seizure (Exhibit PW1A).

In his defence, the Appellant distanced himself from the offence contending that, on 23rd March, 2021 he saw PW2 putting the chickens in two bags and later she called PW4 who after going there, she told him that he had stolen those chickens which were in the bags. He went further contending that, PW2 owed him Tshs.300,000/= and when he asked her to give him his money so that he can go home for burial ceremony, PW2 rejected. Then PW2 threatened him when he told her that he would terminate the work. Before he was taken to police station, PW4 asked PW2 what evidence she could show the police and PW2 took the keys and fasten on his waist. Thereafter, he was taken to Kashai Police Post and then to Bukoba Central Police Station where he stayed in custody until 25th May, 2021, when he was released. On 15th June, 2021, he was arraigned in court and charged accordingly. He blamed PW2 for concocting this case against him due to the debt of Tshs.300,000/=.

When the appeal was called for hearing, the Appellant appeared in person unrepresented whereas, the Respondent Republic was represented by Mr. Emmanuel Luvunga, the learned Senior State Attorney. Upon given opportunity to expound his grounds of appeal, the Appellant prayed to adopt his grounds and urged the Court to consider them. He prayed to be released from prison so that he can re-join his family.

On his part, Mr. Luvinga from the outset supported the conviction and sentence that was meted to the Appellant. Responding to the first complaint, Mr. Luvinga submitted that, the charge was not defective because according to section 132 of the Criminal Procedure Act [Cap. 20 R.E. 2022] ("the CPA"), it is not the requirement of the law to mention exact time of commission the alleged offence, but the charge is required to contain particulars which give clear information on the nature of the offence alleged to have been committed. Concerning the second complaint, Mr. Luvinga was quick to concede that, the trial Magistrate neither summarised nor considered the defence evidence which is a fatal irregularity. He urged the court to enter into the trial court's shoes and consider the Appellant's evidence. Reverting to the third complaint, it was his submission that, the Appellant was caught red-handed stealing ten chickens, thus, there was no need of calling independence witness because section 143 of the Evidence Act [Cap. 6 R.E. 2019] ("the Evidence Act") does not require number of witnesses to prove any fact. Also, every exhibit was received without objection therefore, there was no need for independent witness or identification parade as suggested by the Appellant. Besides, PW2 in her testimony proved existence of 35,000 chickens and the Appellant did not cross examine her on that aspect. Therefore, the testimony of PW2 deserves to be believed because it proves

that the Appellant stole 400 chickens. Mr. Luvunga concluded his submission by stating that, the prosecution proved the case on the required standard basing on the evidence of PW1, PW2, PW3 and PW4 and thus, the conviction was justified. When he was probed by Court on sentence, he submitted that, although the Appellant was the first offender, but it was correct to be sentenced to serve seven years imprisonment because he did not mitigate when he was given an opportunity to do so.

In his brief rejoinder, the Appellant submitted that, the prosecution failed to prove that it was him who stole 400 chickens. He insisted that, PW2 concocted this case after he mentioned to leave following her refusal to give him money so that he can go to Ngara for funeral. Had it not been for the funeral, nothing could have happened because prior to that, they were in good terms. He reiterated his prayer to be released.

Having examined the entire record of the trial court and the petition of appeal in the light of the submission from both sides, the main issue for determination is whether the case against the Appellant was proved to the required standard.

As a matter of law, in criminal matters, a fact is said to be proved when the court is satisfied by the prosecution beyond reasonable doubt that, such

fact exists. Refer to section 3 (2) (a) of the Evidence Act. That is to say, the guilt of the accused person must be established beyond reasonable doubt as it was stated in the case of **Mohamed Said Matula v. Republic** [1995] TLR 3. Generally, and always, such duty lies upon the prosecution. Thus, in the matter at hand, it was the duty of the prosecution to establish theft of 400 chickens against the Appellant beyond reasonable doubt.

Starting with the second complaint, I had opportunity of perusing the judgment of the trial court. It is evident that, the trial Magistrate has never considered the evidence of the Appellant leave alone summarising it. What is seen in the judgment is that, after summarizing the evidence of PW1, PW2 and PW3, the trial Magistrate jumped into explaining the concept of proof beyond reasonable doubt. After that, he went on and determined the case in a single paragraph and he was satisfied that the case was proved beyond reasonable doubt. For ease of reference, the said paragraph is reproduced as hereunder:

"In this case, the prosecution glued the charge to the accused after proving beyond reasonable doubt the accused committed the offence, thus that criminal principle was not ignored by the accused to make it to be a peril not worth taking. The prosecution therefor in examination in

chief lived its charge sheet content and the accused failed to destroy it."

Thereafter, he proceeded to convict and sentence the Appellant for the offence charged. It is apparent from the extract above that, the trial Magistrate arrived into that conclusion without considering the evidence of the Appellant. As rightly submitted by Mr. Luvunga, failure to consider the defence of the Appellant before convicting him is a fatal irregularity. In the case of **John Mghandi @ Ndovo v. Republic**, Criminal Appeal No. 352 of 2018 CAT (unreported) where the Appellant was convicted basing on the evidence of the prosecution side without considering the defence evidence, the Court of Appeal had this to say:

"...it seems clear to us that the 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, she seemingly rejected the defence case without analysis. In our view, the proper approach should have been for the Magistrate to deal with the prosecution and defence evidence and after analyzing the whole of the evidence, the magistrate should have then reached the conclusion,...the appellant was deprived of having his defence properly considered."

As stated hereinabove, in our case the trial Magistrate not only ignored the evidence of the Appellant, but also failed to analyse or consider it before arrived into conclusion. On the way forward, it is now established principle that, where the trial court fails to evaluate the evidence or consider the defence evidence, the first appellate court is duty bound to step into its shoes and re-evaluate the evidence and come into its own findings. In the case of **Athuman Hassani v. Republic**, Criminal Appeal No. 292 of 2017 CAT (unreported) it was stated that:

"We wish to emphasise the time bound principle that, the defence case however weak, trivial, foolish or irrelevant may seem has to be accorded the requisite consideration by the trial court and if the trial court did not do so, then the first appellate court is duty bound to reconsider it."

Therefore, being the first Appellate Court, this Court is duty bound to step into the trial court's shoes and consider the evidence that was levelled before it and come to its own conclusion. In the case at hand, it is evident from both sides that the Appellant was arrested on 23rd March, 2021. Thereafter, he was taken to Kashai Police Post before being taken to Bukoba Central Police Station. In his evidence, the Appellant stated that he was remanded at Bukoba Central Police Station from that day until 25th May, 2021 when he was released and on 15th June, 2021, he was taken to court. It is

my view that, this contention was not supposed to be left untouched. The trial court record reveals that, the Appellant was produced before the trial court on 15th June, 2021. One may ask, why the Appellant who was alleged to be caught red-handed and orally confessed to steal ten chickens was not taken to court from 23rd March 2021 up to 15th June, 2021? Unfortunately, the reasons for such delay were not revealed by the prosecution. This in itself casts strong doubt if at all the Appellant was caught red-handed stealing those ten chickens.

Apart from that, there is contradiction on prosecution evidence which casts doubts on credibility of evidence against the Appellant. According to PW1, the chickens he received and which he tendered in Court nine months later after the alleged incident were partial red in colour but around the neck the colour was pure red. However, according to PW2 the chickens were red layers, brown partly and white on the wings. On the other hand, according to certificate of seizure, Exhibit PW1A, the seized chickens were red in colour. Moreover, while Exhibit PW1A shows the key seized from the Appellant was one attached to long yellow rope, the evidence of PW1 and PW2 shows that, there were two keys. Besides, the ones tendered in court (Exhibit PW1C) were two keys and not attached on yellow rope as shown in the certificate of seizure. PW1 tendered yellow rope which according to him, it used to tie

the bags containing chickens. From these contradictions which go direct to the root of the matter, can it be said that the chickens seized from the Appellant were whole red, brown or had white wings? This unanswered question casts strong doubt of prosecution evidence. Furthermore, the prosecution evidence is not certain whether the said rope was used to tie the bags or was attached to the key(s). With this uncertainty, there is possibility that the said rope was not used to tie the bags but rather it was used to tie the Appellant as alleged by him.

Moreover, there is another controversy which casts doubt on the evidence of prosecution. PW1 was the one who tendered all exhibits. The record is silent on where the exhibits, especially ten chickens were kept after being seized. Those chickens were tendered almost nine months after the date of incident. PW1 did not state where and from whom did he get the chickens on the date he tendered in court. With this clear broken chain of custody, it cannot be said with certainty that Exhibit PW1D were the same one alleged to be seized from the Appellant.

In that regard, had the trial court analysed and carefully considered the defence evidence, it could not have arrived into conclusion that, the prosecution had managed to prove beyond reasonable doubt that, the accused person stole 400 chickens from PW2.

Thus, for all shortcomings pointed above, it is the finding of this court that, the case against the Appellant was not proved to the required standard. Therefore, I allow the appeal by quashing the conviction and setting aside the sentence imposed on the Appellant. I order his immediate release from prison unless he is otherwise lawfully held.

It is so ordered.



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**I. K. BANZI
JUDGE
21/02/2023**

Delivered this 21st February, 2023 in the presence of Ms. Evarista Kimaro, learned State attorney for the Respondent and the Appellant in person. Right of appeal duly explained.



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**I. K. BANZI
JUDGE
21/02/2023**