

TANZANIA / JUDGMENT

abdallah mussa mkambara vs republic 1981 tzca 18 16 july 1981

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM (CORAH: Nyalali, C.J., Mwakasendo, J.A. and Makame, J.A.) CRIMINAL APPEAL NO. 98 OF 1979 BETWEEN ABDALLAH MUSSA MK a MB a RA. APPELLANT AND THE REPUBLIC..... RESPONDENT (Appeal from the Judgement of the High Court of Tanzania at Mwanza) (Lugakingira, J.) dated the 14th day of December, 1978, in Criminal Appeal No. 261 of 1977 JUDGEMENT OF THE COURT MAKAME, J.A.s The appellant ABDALLAH MUSSA MKAMBARA was once employed by the Prisons Department and he had reached the rank of Senior Superintendent by the time he got convicted. The offences with which he was charged relate to the time when he was the Regional Prison Officer for Musoma Region. At that time Kiabakari Prison Farm, which grew and sold cotton among other crops, was under him and there were seven allegations against him that he stole by public servant various sums of money, part of the proceeds of the sale of that cotton. He was also alleged to have destroyed evidence, contrary to section 109 of the Penal Code but on this count he was acquitted by the District Court of Musoma which tried his case. Contrary to what the learned State Attorney on first appeal said, and which wrongly led the first appellate court to believe also, count 7, the last of the seven counts alleging theft, was never withdrawn by the Prosecution. To set the record straight, what happened was that during the final submissions at the trial the learned State Attorney more or less threw up his hands, as it were, regarding that count. The learned Resident Magistrate all the same dealt with the evidence adduced and concluded that the particular 'li . i i * | < • li . i i l n o t . b t ' i . n p r o v e d .

- 2 - He also found the appellant Not Guilty on count 8, the one alleging destruction of evidence. He convicted the appellant on all the other six counts of theft and sentenced him to a substantive prison term of five years. The appellant's efforts in the High Court were entirely unrewarded, hence this second appeal. Mr. Lakha, learned advocate who appeared for the appellant on this appeal, challenged the convictions on all the six counts and struggled valiantly to persuade us that the first appellate court erred on points of law. We have carefully considered the various ingenious arguments and, having done so, we wish to say that the convictions could conveniently be divided into three groups: Counts 1, 2 and 3; Count 4 by itself; and counts 5 and 6. We are notable to fault the first appellate court's decision on the convictions in the first group. Basically the convictions on those three counts were founded on the evidence of HAJI THOMAS, P.W.1 at the trial, supported, as it

was, by documentary and other oral evidence. Thomas was found to be clearly credible as a witness. The graph and Cooperative Society receipts were used to support the reliability on the allegation regarding the global figure of shs. 23,415/65! It is not to say the charges on the three counts would not have been proved without those documents. Group 2 consists of one count, count 4, as -wa said. Bearing in mind the character of PoW.8 HANS MWAIHOJO as convincingly portrayed by the Defence, we respectfully feel that there would be need to take the caution of looking for corroborative evidence in support of P.W.8's story before one could" rely on it with any measure of certitude. P.V/C testified to seeing P.W.4 STANSLAUS WANDA handing over the sum of shs. 438/55 to the appellant.* when the latter visited Kiabakari on a Sunday. This assertion found no support in the testimony of P.W.4, correctly described as 'evasive' by the first appellate court. With respect, we do not feel certain that the conviction was safe in the circumstances. The last group consists of counts 5 and 6 and relate to the sums of shs. 237/90 and shs. 2,390/35 respectively. KASSIM RASHID P.W.7, the person said by Mwaihojo to have given the two sums to the appellant clearly supported Mwaihojo on this. The trial court found Rashid a reliable witness and the first appellate court found no reason to disagree. We are unable to differ. For the above reasons the appeal in count 4 is allowed: the conviction is quashed and the sentence is set aside. The appeal against conviction on the remaining five counts is dismissed and the sentences shall remain undisturbed. Regarding the order for compensation, in view of our decision on count 4, the sum ordered to be paid back by the appellant is accordingly reduced by shs. 438/55. During the hearing of this appeal the question was raised as to whether or not Section 68 of the Evidence Act was applicable in criminal cases. Section 2 of the Evidence Act is clear that the Act shall apply to all judicial proceedings in the appropriate courts. We fail to see why Section 68, which relates to Rules as to Notice to produce, should be confined to civil cases only. Where the Act itself distinguishes between criminal and civil matters, as for example in Section 3(2), it says so clearly. DATED at Dar es Salaam, this 16th day of July, 1981. F. L. NYALALI CHIEF JUSTICE Y. M. M. MWAKASENDO JUSTICE OF APPEAL L. M. MAKAME JUSTICE OF APPEAL I certify that this is a true copy of the original.

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