

TANZANIA / JUDGMENT

abel juma vs kelvin mathayo

2018 tzhc 2047 28 december 2018

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TZHCDECIDED
28 December 2018

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF SHINYANGA AT SHINYANGA PC. CRIMINAL CASE APPEAL NO 11 OF 2018 (Arising from Criminal Case Appeal No. 4of2018 of District Court of Kahama and Originating from Criminal Case No. 924 of 2017 of Kahama Urban Primary Court a p p e l l a n t ABEL JUMA..... VERSUS KELVIN MATHAYO..... RESPONDENT

JUDGEMENT

Date of last order: 03.12.2018 Date of Judgement: 28.12.2018 EBRAHIM, J.: This is a second appeal. The respondent herein was firstly arraigned at Kahama Urban Primary Court charged with the offence of theft c/s 265 of the Penal Code, Cap 16 RE 2002. The respondent pleaded not guilty to the charge. The facts of the case as it could be gathered from the record is that the appellant hired the respondent to work at his Lodge known as Mabao Executive Lodge on 16.04.2017. According to the testimony of SMI (the appellant), on that particular day he handled over to the respondent 16 crates of beer, 10 crates of soda and Tshs. 280/- M-PESA balance. At the hearing of the case, the appellant told the court that when he came back he noticed M-Pesa balance of Tshs 190,000/- is missing together with 6 crates of beer valued at Tshs. 242,000/- making a total of Tshs. 436,000/-. When he asked the appellant, he admitted to have used the said amount. SM2, evidenced to have also started working at SMI's lodge on 16.04.2017 the same day with the appellant. She said that she saw 47 crates of beer and 26 crates of soda. SU1 on the other hand admitted to have taken Tshs. 150,000/- only after asking for money from the appellant in vain. He said that he sent the money to his sick mother and that the appellant owed him four months salaries. As for the lost amount of Tshs. 436,000/-, the appellant said that they never put it in writing or done any account reconciliations since he started working with him. Infact, the appellant owes him the remaining balance of Tshs. 320,000/-. 2 The trial court found out that the appellant failed to prove his case beyond reasonable doubt on account that his testimony together with that of his witness do not tally. The court also found out that the appellant failed to prove that the respondent stole Tshs 436,000/-, hence acquitted the respondent. Aggrieved the appellant appealed at the District Court of Kahama, Criminal Appeal No. 04/2018. The first appellate court upheld the decision of the trial court on the basis that the respondent rightfully

took the money on the pretext of bonafide claim of right. Aggrieved again, the appellant lodged this appeal raising two grounds of appeal that appellant's case was proved beyond reasonable doubt; and that the District Court mixed a labour issue with a criminal issue. This appeal proceeded *ex parte* after the respondent failed to enter appearance as he is nowhere to be seen. Submitting for the appellant Mr. Samwel Ndanga, learned Advocate made reference to the testimonies of SMI and SM2 and stated that they both evidenced the respondent to have stolen the money. He stated further that the respondent agreed to have taken the money and send it to his mother. Evidence of SM 1 and SM 2 was consistent with what respondent did. Respondent agreed that he took money and sent to his mother. Thus in terms of Section 258(1) of the Penal Code, Cap 16, RE 2002 element of theft was proved by SMI and SM2, argued Mr. Ndanga. Arguing on the 2nd ground of appeal, Mr, Ndanga said that since the respondent claimed that the appellant did not pay him salary, he should have taken the matter to the labour court which is different with the present criminal issue of stealing. He prayed for the appeal to be allowed. As it can be observed this is a second appeal. The general rule is that an appellate court should not disturb the concurrent findings of facts of the lower courts unless there has been misapprehension of the evidence, a miscarriage of justice or violation of some principles of law or practice. The principle has been illustrated in the cases of Issa Mgara @ Shuka V Republic, Criminal Appeal No.37 of 2005 (Unreported); and Dickson Joseph Luyana and Another V Republic, Criminal Appeal No.1 of 2005 (Unreported), to name but a few. The crucial question in this case is whether the appellant managed to prove beyond reasonable doubt that the respondent stole Tshs. 436,000/-. Theft has been defined under Section 258(1) of the Penal Code, Cap 16, RE 2002 to mean: "A person who fraudulently and without claim of right takes any thing 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." From the above definition therefore, for the offence of stealing to stand a person must take such thing fraudulently and without claim of right. The literal meaning of the word fraud is deception or untruth. SMI stated in his testimony at page 3 that when he asked SU1 about the money, he told him that he has sent the money to his mother. SU1 said the same in his testimony that he took the money and sent it to his mother after asking the appellant to give him his salary in vain. I would therefore not term the act by the appellant as theft as he did not deceive the appellant. More so as correctly observed by the first appellate court, the respondent entered the defence of bonafide claim of right as provided under Section 9 of Cap 16. The act by the respondent was done in honest claim of right and without intention to defraud that is why he told the appellant the truth. Being a criminal case, the appellant ought to have proved that indeed he has paid the respondent his salary. Such proof is missing in this case and making the defence by the respondent to raise doubt to the case of the appellant. Mr. Ndanga has insisted that if the respondent has issues of salary, he should have channelled the claim through a labour court. Unfortunately for the appellant what was before the court was not the case by the respondent but rather appellant's case which he had an onus to prove and he miserably failed. Defence by the respondent is also recognised in criminal law, route taken by the appellant himself. Again as correctly observed by the appellate court as well as trial court, the appellant said that he left 6 crates of beer. However his witness said that she saw 46 crates of beer. This proves the assertion by the respondent that

nothing was put into writing and they had never done any calculation for the court. Hence there is contradiction as to whether there were 6 crates, 46 crates or nothing at all which also brings another doubt. That is not all. I have gone through the charge sheet; it clearly does not tally with the testimony of the appellant that he stated in court. The law, i.e. Section 132 of the Criminal Procedure Act, Cap 20, R.E. 2002 requires the charge to contain specific offence and particulars necessary to give reasonable information to the nature of the offence. The charge sheet read that the respondent stole Tshs. 436,000/- cash. It did not say anything about the crates of beer and its value. At court the appellant stated that the appellant stole cash Tshs. 190,000/- and 6 crates of beer valued Tshs. 242,000/-. That being said, the charge does not reflect exactly what was evidenced by the appellant as required by law. Thus the appellant did not prove the allegations contained in the charge sheet. Mr. Ndanga said that SM2 proved that the respondent stole the said amount. With respect that is not true because the testimony of SM2 is clear to the extent that they were employed with the respondent on the same day; she saw 46 crates and on a certain date SU1 did not come to work. Nowhere did she even suggest that SU1 stole the claimed amount. That being said, I also find that prosecution case was not proved without reasonable doubts. Thus, I find no misapprehension of evidence, facts or misapplication of law that would entitle this court to interfere with the concurrent findings of the lower courts. I therefore find this appeal to be unmeritorious and dismiss it in its entirety. Accordingly ordered)UX_ Shinyanga 28.12.2018 8 Date: 28 / 12/2018 Coram: Hon. C. S. Uiso, Ag DR Appellant: Absent Respondent: Absent B/C: Grace, RMA Court: Matter coming for judgment both parties are absent. Judgment delivered in the absence of both parties. Court: Right of Appeal explained.

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