

TANZANIA / JUDGMENT

dpp vs hasnain mohamed i murji others 2008 tzhc 122 14 march 2008

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14 March 2008

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IN THE HIGH COURT OF TANZANIA AT MTWARA APPELLANT JURISDICTION ECONOMIC CRIME APPEAL NO. 1/2007 (ORIGINAL ECONOMIC CRIME CASE NO. 1/2006 OF THE DISTRICT COURT OF MTWARA AT MTWARA BEFORE: A. KALLI ESQ R. MAGISTRATE) THE D.P.P. ----- APPELLANT VERSUS I. HASNAIN MOHAMED I MURJI & 3 OTHERS ----- RESPONDENTS Date of Last Order: 21/01/2008 Date of Judgement: 14/03/2003

JUDGEMENT

SHANGAL1, J. This is an appeal by the Director of Public Prosecutions against the decision of the Mtwara District Court in the Economic Crime Case No. 1 of 2006. In that case the respondents namely HASNAIN MOHAMED I MURJI, UWE SUAH MACHIPAKA, METHOD MUHAGACHIMARWA, CHAMBASA IDIBIGAMBO, SALUMBAKARINAMGUNGU and MUCHU UZIMOHAMED ILIMBANGA who shall be referred to in this judgement as the 1st to 6th respondents respectively were jointly and together charged with two counts under the Penal Code and an alternative count under the Economic and Organized Crimes Control Act, 1984. On the first count, the accusations leveled against the accused persons involved the offence of conspiracy under section 384 of the Penal Code, alleging that on or about 4th day of November 1999 at Tandahimba District Council, the respondents jointly and together conspired to erroneously effect payments of Tsh.4,910,817.20 vide cheque No. 003006480 to one Hasnain Mohamed Murji. The second count against the respondents was theft under section 258 and 265 of the Penal Code, alleging that on or about 4th day of November 1999 at Tandahimba District, the respondents jointly and together did steal Tsh.4,910,817.20 vide cheque No. 003006480 the property of Tandahimba District council, the amount which was withdrawn by Hasnain Mohamed i Murji at the National Microfinance Bank Newala Branch. The third alternative count was occasioning loss to a specified authority under paragraph 10 of the first schedule to and section 60 of the Economic and Organized Crime Control Act, 1984. The background giving rise to this appeal may briefly be stated as follows. Some time in 1999 PWI, Abdurahim Abudu Salim, the owner of the company known as ABDURAHIM ENTERPRISES decided to change the status of his enterprises to a partnership enterprises. He managed to approach and convince two prominent businessmen namely Hasnain Mohamed Murji, the

now 1st respondent and Uwesu A h m a d C hip aka, the n o w 2 nd respondent to jo in his firm. Together they agreed on terms, shares, contributions, status o f each partner and m ode o f operation. Eventually the m e m o r a n d u m o f und erstanding and other legal docum ents to establish the partnership were duly prepared hence Partnership A g r e e m e n t, cxibit PI. T he partners agreed to maintain 2 the same n a m e o f the firm but decided to divide responsibilities am ong th em selves, w here as PWI was to deal with office m a n a g e m e n t matters, while the 1st r e s p o n d e n t w a s to deal with finance matters and 2nd respondent w as to deal with daily operations. Within the s a m e year and through the efforts of both partners, especially the 1st and 2 nd respondents the firm w a s a w a r d e d a tender to fum igate c a s h e w n u t g o d o w n s at M a h u t a Division by the T a n d a h i m b a District Council at the tune o f T s h .6,547,756.28. That Fumigation contract was signed by the 2 nd r e s p o n d e n t o n b e h a l f o f the firm and the 3 rd respondent M e thod M u h a g a c h i M a r w a o n b e h a l f o f the T a n d a h i m b a District Council. At that time the 3rd respondent w as a District Executive Director o f T a n d a h i m b a District Council. In A u g u s t 1999, the operational Director o f the firm, liw esu A h m a d Chipaka, the 2 nd respondent c o m m u n i c a t e d with the T a n d a h i m b a D i s t r i c t Council Officials req u e s t i n g for an advance paym ent for the Fum igation w ork at the tune o f Tsh. 1,636, 939.08. In S e p t e m b e r 1999 the request was granted and prom ptly the firm was duly paid that a m o u n t v i d e v o u c h e r No. 3/9 and cheque No. 003006426. The ch e q u e w as collected by the 2 nd r e s p o n d e n t U w e s u A h m a d C h i p a k a o n b e h a l f o f the firm. The centre o f controversy in the w h o le matter was ignited by the mode o f p a y m e n t s o f the final sum balance o f T s h s .4 ,9 1 0 ,8 17.20 after the com pletion o f the work. In processing the paym ents o f that final instalment the T a n d a h i m b a District Council prepared a paym ent vouncer (Kxibit P8) in the n a m e o f the firm but the ch e q u e (Hxibit P9) was prepared in the nam e o f the 1st respondent w h o w as able to collect the m oney from the bank. 3 It w as con ten d e d that, that unprocedural process o f p a y m e n t was conspiraciously facilitated by the 1st and 2 nd respondents in collaboration with T a n d a h i m b a District Council Officials nam ely; M e thod M u h a g a c h i M a r w a , the 3,d respondent w h o was w orking as the District E xecutive Director; C h a m b a Saidi Bigambo, the 4 th respondent w h o w as the District Treasurer officer o f the council; Lt corner Salum Bakari N a m g u n g u , the 5th respondent w h o w as the secretary and c h a i r m a n o f T a n d a h i m b a District Council and M chuuzi M o h a m e d i L i m b a n g a , the 6th responde nt w h o w as the District p l a n n i n g officer o f the council with intent to steal from the T a n d a h i m b a District Council. A fter a full blow n trial involving five prosecution w itnesses and several defen c e w itnesses supported by a go o d n u m b e r o f exhibits from both sides, the trial Resident Magistrate in her well co m p o s e d j u d g e m e n t was satisfied that there w as no sufficient prosecution e v i d e n c e to prove the charges leveled against the respondents and con sequently acquitted all o f them. T he D i r e c t o r o f Public Prosecution w as dissatisfied with that rd decision hence this appeal. In his notice of appeal filed on 23 O ctober 2006, the Director o f Public prosecutions indicated to appeal against the acquittal o f all accused persons. H o w e v e r , in his petition o f appeal and the subse quent subm issions the Director o f Public P r o s e c u t i o n s argued against the acquittal o f the 1st to 4 th respondents only. In this appeal the appellant was represented by Ms. Shio, Learned State A ttorney while the respondents were represented by Mr. C haula Learned A dvocate o f Dar es salaam. The appellant petition o f appeal contain five

ground of appeal, namely; 1 That, the Learned trial Resident Magistrate grossly misdirected herself in failing to appreciate the prosecution evidence which had proved the case against the respondents in all counts beyond all reasonable doubt.

2. That, the Learned trial Resident Magistrate erred in law by requiring Audit Report in proving that the respondents had committed theft and occasioned loss to Tana Dahimba District Council.
3. That, the learned Trial Resident Magistrate grossly misdirected herself and erred both in law and fact by holding that this matter was a civil case rather than a criminal case. 4 That, the Learned Trial Resident Magistrate grossly misdirected herself both in fact and in law in acquitting the respondents on the ground that, the respondent's act of preparing cheque No. 003006480 in the name of the 1st respondent instead of the firm did not amount to conspiracy to steal, and
5. That, the Learned Trial Resident Magistrate erred in fact in holding that PW1 agreed with his co-partners that is 1st and 2nd respondents that the second instalment be paid in the name of the 1st respondent. Following the parties request this appeal was argued by way of written submissions which were timely filed by the parties save for a rejoinder which was waived by the appellant. Having gone through the parties submissions and due to the fact that all grounds of appeal are intertwined I would prefer to deal with all grounds of appeal concurrently. Ms. Shio's first complaint in the appeal is to the effect that the trial Resident Magistrate was wrong by holding the view that there was no stealing because the 1st respondent acted in his capacity as an agent of the firm and that he had all blessings and consent from his co-partners to collect the money. 5 In the foremost let me put some issues clear. There is no dispute that according to exhibit PI both PW1, 1st and 2nd respondents are both lawful partners with equal interests, rights and status in the operation of their firm called Abdurahim Enterprises. It is also undisputed that Abdurahim Enterprises (the firm) through the supervision of the 1st and 2nd respondents delivered fumigation services to the Tana Dahimba District Council. In turn, there is evidence on record that Tana Dahimba District Council paid Tsh. 4,910,817.20 for the fumigation work in the name of 1st respondent, a lawful and active partner of the firm. The payments were also blessed and approved by his co-partner, the 2nd respondent who was the firm's operations Director and the very person who signed the whole fumigation contract on behalf of his firm. The taxing question is who is the actual complainant and whose money were actually stolen. Were the alleged money stolen from Tana Dahimba District Council as indicated on the charge sheet or from Abdurahim Enterprises firm where the 1st and 2nd respondents are part and parcel of proprietors. Was there any scintilla of prosecution evidence to suggest that, that amount of Tsh.4,910,817.20 was actually stolen from Tana Dahimba District Council or any audit report suggesting that the council had incurred a loss of that amount during the alleged period. In his submissions, Mr. Chaula, Learned Advocate for the respondent stated that the trial courts record of proceedings is clear that there was none. Indeed that is the position. According to the evidence PW4,

PW'5, DW'3 and DW 4 the Councils accounts are audited by internal and external auditors in every financial years and yet there is no evidence from the auditors report or any other person to suggest or establish that there was theft or loss or double payments wrongly effected in the Councils accounts within the alleged period of 1999 or 2000. Mr Chaula stated that even PWI 6 who had appeared to be the appellants key witness testified to the effect that he did not know as to whether there were monies stolen from Tandrahimba District Council. His (PWI) major concern was that he was not paid a balance of his Tsh .4,910,817.20. The questions here is whether even PWI was entitled to be paid that amount of money as a person taking into consideration that the firm was already a partnership entity. It must be remembered that PWI was no longer the sole proprietor of the firm having invited the 1st and 2nd respondents as equal partners. It was therefore upon the firm to take legal action as a firm against whoever contravened the terms and conditions of the partnership agreement. Be it as it may, the crux of the matter still revolves on the fact that the alleged amount of money was paid direct to the 1st respondent instead of the firm. Mr. Chaula correctly submitted that according to the evidence on record the 1st respondent was lawful partner of the firm dealing with finance matters. Secondly the payments were effected with the blessings of the 2nd respondent, a co-partner and operational Director of the same firm. Thirdly, according to the testimony of PWI before the trial court, it was the partners of the firm who agreed from the beginning that the 1st respondent should make a follow-up of the balance from the Council. Fourthly, it was the 2nd respondent, a star player in the whole transaction who signed both Exhibits P2 and P4 authorised the cheque to be written in the name of the 1st respondent through a special request to Tandrahimba District Officials, to wit 3rd and 4th respondents and fifthly there is ample evidence that during all the period of fumigation work all supervision and contacts with Tandrahimba District Officials was done by the 1st and 2nd respondent. Such a formidable surrounding environment conclusively made the Tandrahimba District Officials particularly 3rd and 4th 7 respondent to believe that there was nothing wrong to pay the money in the name of the 1st respondent. PW 2, PW 3, PW 4 and PW5 categorically stated that such changes in payments are ordinary and possible where there is a special request from the respective payee. Therefore the argument by the Learned State Attorney that there was no piece of evidence to substantiate respondents allegations that there was a consent or special request is misconceived because it is the same prosecution witnesses PW 2, PW 3, PW4 and PW 5 who testified before the trial court that the payments were effected following the consent and special request from the respective payee. In addition, that prosecution witnesses evidence tallies with the evidence of DWI, DW 2, DW 3, DW 4 and DW 5 that a special request supported by the 2nd respondent as a co-partner and operations director of the firm was made to Tandrahimba District Council authority, to wit the District Executive Director and the District Treasurer, It was also insisted that such special request need not be in written form because even orally made request is enough provide the applicant is known. On the other hand, I agree with Mr. Chaula that even if that consent or authority was not secured, the omission connotes a minor financial irregularity which does not establish the

offence of conspiracy, theft or of conversion in loss. In other words the fact that the cheque was written in the name of one of the partners in business is not enough to establish the offences laid against the respondents. In the case with almost similar facts of *THE REPUBLIC VS. CHARLES KIEGLZO* (1984) TLR 106, a contract work was done and payment effected through one of partners and not the firm, it was held that a mere discrepancy in the accounts per se does not constitute conclusive proof of theft. Ms. Shio, Learned State Attorney went further to digest and elaborate on the issue of the 11 and called in aid the provisions of section 258(1)(2) and 263 of the Penal code. She contended that the money received by the 1st and 2nd respondents were neither deposited in the firm account nor used in any lawful activity of the firm. That the allegations by the two respondents that they used the money for another project at Newal was not supported by any evidence and therefore it is obvious that they converted the said money into their personal use. She insisted that the money were the property of the firm and the mere fact that the respondents were partners, hence having interest in the said money did not warrant them to use the same at their will and wish. She concluded that this was a clear theft and not civil dispute. This proposition sounds to be attractive but it refers me back to my earlier question, whether the sum alleged stolen belongs to the Tandahimba District Council or the firm. In her submission the Learned State Attorney is attempting to suggest that the stolen money was the property of the firm and therefore the offence was committed against the firm's money. Mr. Chaula Learned counsel for the respondents correctly said no; he stressed that the present appeal concerned with the decision of the Trial Resident Magistrate that acquitted the respondents of allegation of theft of Tandahimba District Council's money and not that of the firm. Mr. Chaula argued that even if the charge would have been related to the firm's money yet on the basis of Exhibits PI and P4 the 1st and 2nd respondents would have not been held responsible as they had by virtue of section 9 of the Penal Code, a bonafide claim of right as propounded in the case of the Director of Public Prosecution Vs. Henry s/o Rwegashamira (1973) LRT n. 15. Once again, on point of law and facts I agree with Mr. Chaula's stance that section 263 of the Penal Code is inapplicable because the respondents were charged with the theft of Tandahimba District Council's money and indeed they appeared and defended themselves before the trial court on that very charge of stealing Sh.4,910, S 17.20, the property of Tandahimba District Council. In addition even if the respondents were charged for stealing the firm's money, yet on the basis of their positions as lawful and active partners of the same firm could have been exonerated under section 9 of the Penal Code as discussed and elaborated in the case of DPP Vs. Henry s/o Rwegashamira (supra). The argument by the Learned State Attorney that the trial Resident Magistrate failed to consider the prosecution evidence in exhibits PI 1 and PI 2 which are the cautioned statements of 3rd and 4th respondents does not advance the prosecution case any further, because in those exhibits the respondents did not confess to have stolen the Tandahimba District Council's money and indeed there was no amount of money stolen from Tandahimba District Council. The evidence indicates that the 3rd and 4th respondents performed their duties in good faith believing that they were dealing with the responsible partners of the

firm. The fact which is still subsisting because the 1st and 2nd respondents are still lawful partners of the firms. In the final analysis it is apparent that the fumigation work was properly done and payments effected to the firm through the 1st respondent's name after the authorization from the firm. Indeed that amount was paid to the majority partners of the firm, meaning the 1st and 2nd respondents as the partnership was constituted with only three partners. As I have shown above there was no evidence to establish that any money was stolen from Tana District Council coffers. Likewise, there was no evidence to suggest any conspiracy to defraud the Council nor a shred of evidence to establish the offence of occasioning loss to the specified authority. Before I part with this appeal let me point out my few observations. To me this is an unusual case. It is unusual in the sense that the Director of Public Prosecutions is striving to interfere and resolve the problems of the partners arising out of their partnership agreement. There is no dispute that the 1st respondent in collaboration with his co-partner, the 2nd respondent collected the alleged amount from Tana District Council on behalf of their firm after completion of the agreed work. At the same time, in his strong defence the 1st respondent categorically expressed his dismay and disappointment as to why the matter was not left to the partners and be resolved in accordance with the terms of their partnership agreement (Exhibit PI) particularly clause 16 which provides for arbitration process. I do agree that in law every partner is an agent of the firm and partners are required to be just and faithful to each other but in my humble opinion it is not the duty of the Director of Public Prosecution to prematurely interfere and attempt to resolve problems arising out of partnership arrangements through criminal charges. Conflicts arising out of partnership agreements should be left to be resolved and dealt with by the parties in terms of their partnership agreements before resorting to criminal charges. With those remarks, this appeal must fail because the evidence on record and the circumstances of the case justified the Learned Trial Resident Magistrate to acquit all the respondents on all offences. I therefore uphold the decision of the Trial Resident Magistrate that there was no sufficient and cogent prosecution evidence to prove the charges beyond all reasonable doubt against the respondents. For the above reasons this appeal is dismissed in its entirety. >\ z M.S. Shahali JUDCJE 14/3/2008 Judgement delivered today 14th March 2008 in the presence of Mr. Hyera, Learned State Attorney for the appellant and Mr. Chaula, Learned advocate for the respondents. Right of appeal explained.

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Prepared on 14 October 2026 · Esheria