

TANZANIA / JUDGMENT

19980915 TZHC Mbeya

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TZHCDECIDED
15 September 1998

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- IN THE HIGH COURT OF TANZANIA T MBIYA CRIMINAL iPL NO, 13 OF 1998
- (From Mbeya District Court Criminal Case No, 291 of 1995) EIUJ JOSHTL MISIN!
PPT1L.LNT Versus THE 0 pflTTDT -rr ..o.,o,oen,o.000..eo.o.00 J\LJI4J.).L&I JUDGNNT ELIUD
MSHU..i the appellant in this appeal is an unfortunate man for having ever come into long
contact with the complainant of these two appeals one Melkior Martin Bagule the owner and
Managing Director of M/S Bagule Motor Services and Co. Ltd., in SOJTTO Area in Mbeya
Municipality. From before 1983 while the appellant was in Iringa with the complainant who
was then working in Iringa with rfananz± Patway Corporation then with Belfaour Beaty Co.
an as an injection pump repairer the appellant naively treated the same complainant as his
friend and business associate. Even after the complainant shifted to Mbeya to continue with
his. expanded business of motor vehicle repairing. The two continued with constant
contracts that ended up with the complainant opening up criminal charges filed in court as
two separate criminal cases No, 291/1995 and Cr, C. Na, 292/1995 both of Mbeya District
Court. In the first Cr, Case No. 291/1995 the appellant ended up being charged with three
counts consisting of one count of stealing by Public Servant c/sq 271 and 26.5 of the Penal Code
and Counts of Fraudulent False accounting c/s. 317 (h) of the Penal Code, He was convicted
on 2/3/1998 as charged and sentenced to five (5) years imprisonment for the 1st count, and
three (3) years imprisonment for the other two counts.. In Criminal Case No, 292/1995 the
same appellant was charged on 29/6/1995 with single count of stealing by agent c/s. 273 (d) of
the Penal Code He was convicted as charged on 11/5/98 and sentenced to 5 years
imprisonment to run concurrently with the sentences in the other above cited Cr,..Case
No.291/1995. When sentencing, the appellant to the concurrent sentences the trial Magistrate
in both cases wondered why the public prosecutor had filed two separate criminal cases
arising out of the same transaction between the same complainant and the same appellant
It appears, that was done 09Q00-2- purposely to harass and persecute the appellant so that
he could have to suffer the order of not getting bail easily for having committed 1 two
separate offences and even if granted bail he still would have to fail coming to court
unnecessarily and in case of being convicted so that he could be punished separately. It is
somehow, fortunate that the trial magistrate turned out to be the same one who discovered
this prosecutorial and persecutorial strategy and he relieved the appellant from it
temporarily by imposing a concurrent sentence0 The Public Prosecutor was quite aware that

these two files originated from the same transactions and involved the same parties for the initial charge in Cr, Case No.291/95 was filed on 29/6/95 on a single count of simple theft C/s. 265 of the Penal Code which was later on substituted on 11/9/95 to the three faked counts upon which he was ultimately tried and convicted. Whereas in Cr, C. No. 292/1995 he, was charged on the same date of 29/6/95 for Stealing by servant C/s. 273 of the Penal Code. In both the original single count charge of simple theft in Cr, C. No. 291/95 and single count charge of Stealing by servant in Cr, C. No, 292/1995 the public prosecutor was the same as per the signature in the charge sheet and the accused was the same, the complainant was the same and the time span between the committal of the offences was only 12 days apart (20/9/91 end 21/9/91 both cases having been filed in court on the same day of 29/6/1995 with a minimal intelligence and least expertise and no experience at all the public prosecutor should have known he was dealing with a same case to be dealt with in one charge sheet one case file and one trial not with only with different courts, At the stage of these appeals, this court consolidated the two appeals by consent of both sides. This is the consolidated judgement for both consolidated judgements. The appellant in both consolidated appeals is the learned Mr. Mwakolo (advocate) and the Respondent who is the Director of Public Prosecutions representing the Republic was represented by the learned Mr. Nogela - State Attorney. I will start with Criminal appeal No. 31/1995 which originates from Cr. Case No, 292/95. The learned Mr, wakolo (advocate) had raised 2 basic grounds of appeal in the Memorandum of appeal there was no proof of any handing over certificate of Shs.5 00,0001 from the complainant to the appellant and that since the same trial magistrate had convicted and sentenced the appellant in Cr. C. No. 291/95 he was biased and occasioned miscarriage of justice. But, at the hearing of these the learned Mr. Mwakolo did not touch, upon these two grounds, possibly he wanted to adopt them as part of his arguments and I for his benefit I will take it that way rather than treat those two grounds as having been abandoned. In the hearing of this appeal the learned Mr. Mwakolo

- 3 - raised another fresh 'ground of Appeal which is the one he' basically dwelt upon that the judgement in criminal case No. 292/95 was not a 'judgment' at all for it fall short of the requirement of S. 312 (1) of the C.P.d. which was not coupled as it did. not contain the necessary content of a judgement 'i.e. it did not contain the points for determination, the decision thereon: and reasons for the decision. He further contended - that it was wrong in law to use the evidence of Cr. C. No, 291/1995 in convicting the appellant in Cr. C. No. 292/1995 without first producing the copies of the record of Cr. C. 291/95 in Cr. Case No.292/95. But, before I go into the complaints of the learned Mr. Makolo (adv) there is a technical matter I have to enforce about Cr, C. No, 292/95 about the charge itself. The statement of offence stated that: 'Offence, Section and. Law: Stealing by & servant C/s. 273 (d)' of the P.C. It remained so until conviction and sentence. This statement of offence omitted the vital section 265 which relates the offence of theft C/S. 265 of the Penal Code. In the charge of Cr, C. No, 291/95 another Public Prosecutor (due to the difference in the P.P.S signature in the charge sheet) the substituted charge of 11/9/95 stated the first count of theft as follows:— Stealing by Public Servant c/s. 271 and 265 of the Penal Code. The Stealing by in

Cr. C. No. 292/95 should also have stated the same as the Stealing by Public ..Servnt C/ss.. 273 and 265 of the Penal Code. Since the Public Prosecutor who filed the charge in Cr. Case No, 292/95 was different one the same one who had filed two different cases in the same court on the same day concerning the same complainant and the same accused for, the same transaction instead of in one case with merely different counts it means that that public prosecutor one Inspector' .Panga did not make first a clerical mistake. of not printing S. 265 of the Penal Code into the statement of offence but he negligently or purposely omitted it not knowing it was a necessary ingredient of the statement of the offence. He could not have known that an act in S.273 of the Penal Code must first steal under Sect. 265 of the Penal Code before facing the sentence provided for under S.273 of the Penal Code, Moreover, since the particulars of offence specifically stated recent time of stealing as being on 20/9/91 at day time at M/s. Motor Service Co. Ltd. at Soweto within the Municipality of Mbeya he did steal, This, 500 1 000/= the appellant would be biased in his defence for the agent himself one Mohamed Jeffrey was not in Mbeya on 20/9/91 on as to make the offence of theft if any be completed at that time of the day of 20/9/91 at the place of Soweto in Mbeya. Suppose the appellant travelled to Iringa next day in order to hide the money to Mohamed Jafferri and stole the money in Iringa; 2 days later before 24/9/91 travelled to Iringa to replace the stolen money - that stealing will have taken place in Iringa and not at Soweto Mbeya. This default was quite serious and total in the circumstances of this case to the validity of the count of theft by agent. He could not be convicted on a non-existence theft section in the charge sheet. The judgement of the learned Mr. Nandawa (S.M.)..trial magistrate contained a reasoned out judgement in compliance with S. 312 (1) of the C.P.I. I am satisfied. The reasons of the judgement were very brief and concise contained in three paragraphs starting with the last para of P. 2 up to 3 of the typed proceedings. His mention of Cr. C. 111 100 291/92 did not amount to a bias on his part for he mentioned it in respect of his defence that it was as a and irrelevant to the charge of stealing by agent in this case. It was not proper upon the trial magistrate to hint upon the defence the appellant put up in Cr. C. 291/95 because as correctly contended by the learned Mr. Mwakolo (J.DV) such a defence of the appellant in Cr. C. No. 291/95 had not been produced. as an exhibit in Cr. C. No.292/95. But, j P.1 and his supporting witnesses P4.2 Waziri Mechaie Choma PW.3 Mohamed Jafferri and PW.4 Jumanne Seleman Lusoga are co, wny and coached witnesses who were up in arms support the complainant who faced many queries from many government masters that he was victimising the appellant. He must have reached a point when the complainant had found it necessary to cook up evidence to back up his unjust from it into a kind of, truth to have available, Why did it take him so long to trace and arrest the accused from 1991 to 1995. while the complainant was around in Mbeya and Iringa. He doesn't mention in this case when he reported to the Police, No Police Officer testified at all about any complaint of P.1 to them. It could be as well in 1995 when the complainant PW.1 first reported to the Police. and the charge sheet was first filed in 29th June 1995 On the other hand the trial court failed to appreciate the defence put up by the appellant. He gave a long history of their relationship as friends to show that he could not steal from him and that they were business associates rather than as a worker of the complainant. It is unreliable that the complainant would

have given Shs.5 00 1 000/ to the appellant on 20/9/91 which the appellant stole on the same day and then dish out the Shs,500 1 000/= to PW.3 on 24/9/91 without minding at all about the stolen Shs.500 1 000/= given to the appellant. If he had that 'nancy Shs.1,000',000/= lying around likely in his office, why, would he have not given it to PW.3 beforehand rather than wait PW.3 buy the spare parts of PW.1 with his own money - for what consolation. Where PW.3 gets that Shs , 5 00 3 000/= in 1991 when S S 0

- 5- he was just an assistant at Iringa Municipal Council and...a petty businessman Why didn't P.3 get a delivery note of the spares from where he bought.. it Shs-500,000/= in Dar es Salaam This is bogus witness coached by 74.1 himself. On the other hand the appellant showed in his defence that the appellant had opened up a civil case for debt from the complainant which the complainant wanted to dodge repaying him. To avoid the civil debt he opened up these criminal charges as a defence. The defence was quite credible and comparable of raising reasonable doubt that he didn't steal anything from the complainant, The trial court erred in convicting the appellant in Cr. C. No. 292/1995. The same conviction for Stealing by Joint s/273 of the Penal Code is quashed and the sentence of 5 years is set aside. In the other appeal of Cr, C. No 291/95 the learned Mr. Mwakolo raised basically three grounds that the appellant was not an employee as a storekeeper of the complainant PW.1, that the conviction was based on a weak prosecution case and that the defence evidence was discarded altogether without good reasons. 'The evidence of PW.1 Molkior Martin Bakule was that on 28/9/91 he went to Tukuyu on a business mission. He returned back on 29/9/91 at 3.00 :.m. to be told at his office that the appellant had left a thing bereaved and had gone to bed done and taken with him various spare parts the subject of the charges for the stock taking he made. C proved that many items from the store where the appellant had been working had been stolen by the appellant. This is a blatant and naked lie. This same P.i Molkior Martin Bakule - testified in Cr. C No 292/95 the proceedings of which have been consolidated, with those of this Cr. C. 291/91 at this level that on 20/9/91 - which is 9 days earlier the said appellant had stolen Shs,500,000/= each which W.1, entrusted personally in his office to take it to 'L3 Mohamed Jaffory in Iringa. Since the appellant had stolen that money PA1 went to Iringa on 24/9/91 to pay another Shs.500,000 to P.3 and he..returned to Mbeya. So, the appellant continued to be with PW.1 and with his employees until 2/9/91 when PW.1 went to Tukuyu only to be told next day on 29/9/91 when he came back from Tukuyu that the appellant when he left behind had left for Dodoma and stole his spare parts and cheques the subject of the charges. Would the workers of PW.1 whom knew that 8 days earlier the appellant stole Shs.500,000/= entertained him, talked with him and allowed him back into the store and premises of the company for him to steal? Wouldn't they have arrested him? After all PW.1 testified in Cr. C. No. 292/95 that on 20/9/91 after the appellant stole Shs.5 00, 000/= he absconded. So he absconded on 2/9/98 with Shs.500,000/= only to surface back to the company of P.1 to steal further properties on 28/29/ 9/91 The witness cronies of P.1 testified in Cr. C. No 0 291/95 such as PW.2 Aziri Neghason Choma that on 28/9/91 he was with the appellant in the office. On 29/9/91 P.2 went to the store- to get the spare parts of the TAYA. RA Catepili. He said on 29/9/91 the appellant stealing spare parts the subject

of the charges. The Police who was given the file to investigate this case is one 854? D/Sgt. Ivo PW.3 who started dealing with this case in 21/1/1992 although the theft occurred on 29/9/91. The cheques the subject of the charges were brought to PJ.3 by the appellant himself who explained as DW.1 that they were given to him by the complainant as payments for the money which the appellant owned to the appellant but couldn't cash them for there was no money on the account of the complainant Mkwnwa N.B.C. branch. Had the defence been taken into account way long as it was and which was quite truthful the trial court could not have convicted the appellant. No wonder the learned Mr. Nagola (S1) responded to this appeal with only following grounds: I support the grounds raised by the learned Mr. Mwakolo advocate for the appellant. So I pray that the appellant be acquitted and sentence set aside, his appeal allowed. If it hadn't been for S.312 (1) of the CPA which requires my judgement too to be reasoned out and grounds for my decisions spelt out, I would have allowed this appeal in hardly 10 sentences. The appellant is a very unfortunate man who befriended an enemy who would be stabbing him from the back in years to come. The on all three counts of theft C/s. 265 and 271 of the Penal Code and Falsely accounting C/s. 317 (b) of the P.C. were gravely erroneous. They are all quashed. The sentence of 5 years and 3 years imprisonment are set aside, The appellant is released from prison henceforth and set free. (Sgd.) E.LOK. Mwipopo, J. 15/9/98 15/9/98 Coram: Hon. Mwipopo, J. appellant: Present (Joshua) Elias Mr. Mwanol dv. present holding the brief for Mr. Mbi. sc uidv. for peilat. For Republic: Mr. Ngola For Republic: Mrs. Makuru - STATE Attorney - Present, C/C Mrs. Mponzi. Court: Judgement delivered in the presence of the appellant. ee (gcic) E,L.K; Mwipopo, J. 15/9/99 this is a true copy of the original Judgement. DISTRICT RISTRAR

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Prepared on 14 October 2026 · Esheria