

TANZANIA / JUDGMENT

1978017 TZHC Mbeya

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1 January 1978

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2 IN THE HIGH COURT OF TANZANIA AT YOEYA APPELLATE JURISDICTION HIGH COURT
CRIMINAL APPEAL NO. 148 OF 1978 C/P NO.144/789 146/78 & 147/78 (ORIGINAL CRIMINAL CASE
NO. 48 OF 1978 OF THE DISTRICT COURT OF I'OEYA DISTRICT AT NBEYA) BEFORE: E.P. NTUI
ESQ., DISTRICT EAGISTRILTE JACOB S/O Jf"TU . o . a a a • a a • • a • • a a , • ••••••
APPELLANT (Original Accused) V e r s u s
TUEREPUBLICRESPOLSENT (Original Prosecutor)
CHARGE: Robbery with violence c/s 285 and 206 of the Penal Code. JIJGDMUET SAMLTA, J., -
Ernest Kapinde is aged about 70. He was born before the First World War. He is, however, still
strong enough to earn his own living. He is a businessman. He owns a shop at Tunciuma. On
February 7, 1970, he was at I'iboya. He came to buy merchandise for his shop. He bought goods
worth shs.3,700/=. He must have looked forward to earning a fairly substantial profit after selling
the goods. Any man placed in his (Ernest Kapinde's) shoes would have entertained the sane idea •
It is a normal human behaviour. But thieves would not let Ernest Kapinde alone. They needed his
goods to 'earn' their bread and butter. After he had finished the shopping Ernest Kapinde took the
go to the Mabatini Bus Stand. He was to board a bus there which was to convey him and his goods
to Thriduna. He could not make the journey. Why? Let Ernest Kapinde himself answer the
question: "A bus came and I asked the driver where the bus was going. I met the second accused.
He told me that the bus was going to Songie. I got down. I waited for the right bus. I sat near my
goods. Some of the goods were in a suitcase. I sat on two cartons of soap. The first accused was
there, He opened the suitcase and ran away with it. He was running. I chased him. The second
accused, this tall man, picked a stone and tried to hit me with it - b. People who were at the bus
stand advised me not to follow the accused to grab at the suitcase lest I be killed .," Within a week
or so the four appellants were charged before the district court of Mbeya district with stealing
Ernest Kapinde's At the end of the trial all the appellants were convicted and charged. Each was
sentenced to a term of five years imprisonment -- 'I -2- The present consolidated appeals are
against that decision. Among the people who were at the bus stand on the material day, that is,
February 7, were one .Andembwisye Mwangunguru and Leonard. Nwakrije. Both men knew each
appellant well. Prior to February 7 Andembwisye used to sue the four men moving in one
company. While he was at the bus stand, on February 7, Andembwisye saw the first appellant,
Jacob Jim, running away; he was carrying a suitcase. The other three appellants were also
running, following the first appellant closely. At the same time Andembwisye heard Ernest Kapinde,
who was a stranger to him, shout for help. Andembwisye also saw the second appellant,

Asangaiwise s/o Mwakabna, threatening to hit Ernest Kapindle with a stone when the old man attempted to chase the group. Both Anderibwisye and Leonard had seen the four appellants in one company on the material day before the theft had occurred. Leonard saw them conversing near a hotel known as RAHi HOTeL, while he was at the stand, Leonard suddenly saw the first appellant holding a suitcase and running fast. The second appellant was following him (the first appellant) behind. Soon thereafter he heard an old man appealing for help, shouting, in Swahili: "Nimeibiwa sanduku lanu". Yusufu Maleua is a taxivan. He is based at Mbeya. In February 1978 he used to drive Taxi No.61. On the afternoon of February 7, at about 2.45 p.m., he was driving from Nzovwe going to the town centre. At the Baptist Hospital the first appellant stopped him and hired his taxi. The first appellant told the taximan that he (the appellant) and his companions - three in number - wished to go to the town. The appellant and his companions got into the taxi. The first appellant's companions were the other appellants. The group had a luggage wrapped up in a gunny bag Yusufu Maleua dropped the four men at the town market. Let us now go back to the old man, Ernest Kapindle. The old man had confidence in the hounds of justice. After informing the Ward Secretary of the locality about the theft he went to the police station where he made a report. In the evening he accompanied a policeman and went to the Nabatini area. The team went there to search for the men who had stolen the suitcase. They reached a bar, and there the old man saw the first appellant. He pointed at him and told the policeman that he (the first appellant) was the man who had snatched his suitcase. In a few seconds the first appellant lost his personal liberty. He was apprehended. The appellant promised the policeman to lead him to the place where the stolen property was hidden. On the following morning he led the policeman, Ernest Kapindle and other people to a room in Mabatini area which during that week was being occupied by the second appellant. The second appellant was not there. The policeman searched the room and recovered a few things—including an old torch - which the old man identified as some of his stolen property which was in the suitcase. The old torch had a special mark. On February 13 the policeman who had searched the second appellant's room saw the third appellant, Henry s/c Daniel, near the R.T.C. shop in Mbeya town. As soon as he saw the policeman the appellant took to his heels. The policeman refused to be outwitted. He chased the appellant and caught him. The appellant said that the second appellant was the thief. The second appellant was then standing nearby. Another policeman who happened to be on the scene arrested the second appellant. The fourth appellant surrendered himself at the police station on the following day after he had heard that the police wished to see him. In summary that is the evidence which the prosecution laid before the lower court. All the appellants gave evidence on oath. None of them called a witness. The first appellant's story was as follows. On the material day, that is, February 7, he went to N'olizi to buy vegetables. He bought a bag of vegetables and left N'olizi for the town at 1.00 p.m. He went to the town bus stand where he met the other appellants. He told them that he was going to the market. A taxicab came, and he hired it. The other appellants asked for a lift, and got into the car. They were all dropped at the town market. At the market he parted ways with the other appellants. The appellant was silent as to what he did between the time he had disembarked from the taxi-cab and 9.00 p.m. when, according to him, his father had sent him to a shop to buy cigarettes. As all the shops were by 9.00 p.m. closed, he went to a bar to buy the cigarettes. There his personal freedom was brought to an end. He was

arrested by a policeman, on the ground that he had stolen somebody's money. The second appellant's story. The appellant asserted that at about 1.00 p.m. on February 7 he was at a bus stand near the Baptist Hospital. There he saw the third and fourth appellants coming from the direction of the hospital. The first appellant hired a taxi, and asked him to give a hand in loading his luggage into it. He responded positively to the request. Then all the four appellants boarded the taxi and headed for the town centre. At "Ujiindini" he (the second appellant) disembarked, and went on foot to the police station. He could not say what business he had at the police station, or what else he did on the day. On February 13 he was arrested by the police. The appellant also said: "The things the police seized from my room are the exhibits tendered here in court". Let us now turn to the third appellant's story. This is what the appellant told the lower court. On February 7 he went to a hotel where he met the fourth appellant. He accompanied the fourth appellant to a hospital. As there were many patients waiting for treatment at the hospital, the pair decided to go to the bus stand. There they met the first appellant, who had with him "a full bag", and the second appellant. The first appellant hired a taxi, and all four of them got into it. At a bus stand near the market they hired the taxi—cab. They walked to SOCOFCL and the fourth appellants/for the Government Hospital. From the hospital the appellant went to the R.T.C. Office, to collect his money. A few days later he was apprehended by the police. The fourth appellant's yarn was substantially the same as the third appellant's story. Unlike the other appellants, however, the fourth appellant admitted that Yusufu Malema was the driver of the taxi in which we travelled to town. The learned trial magistrate reviewed the evidence at some length. The upshot of the exercise was that he found all the / four appellants to have taken part in the theft of the suitcase. In the course of his judgment he said: "There is ample evidence from the complainant PJ.2 that it was the first accused who grabbed his suitcase at the bus stand and ran away with it. While PW.2 tried to chase the first accused the second accused tried to stop him by casting stones at him. This evidence is corroborated by the evidence of 111.5 and W.6 who were at the bus stand at the time the theft took place. Prior to the stealing and on other occasions these four accused were seen at bus stand together and on the material date in particular they were together. After the theft the 3rd and 4th accused ran towards the direction where first accused was seen running with the stolen box. Second accused actively took part by trying to frustrate PT.2's efforts to apprehend the first accused and recover his property. The theft was committed at about 2.00 p.m. and just about 45 minutes later the four were assembled near the Baptist hospital bus stop awaiting for transport. The sack which they carried must have contained their loot. On the totality of the evidence I find it proved that the first accused was seen snatch a suitcase from the complainant. When arrested he told the police to the second accused's room where part of the stolen property was recovered. I find it further proved that the 3rd and 4th accused were accomplices in the crime just as 2nd and first accused". The appeal of the first appellant is, plainly a hopeless one. The case against him was cast-iron. If, after being made aware of the evidence which was given in this case, there is anyone in the world who could believe that the first appellant's guilt was not demonstrated beyond reasonable doubt, they must be possessed of a credulity far surpassing any man's. The appellant was seen at least by two men who knew him very well running away from the bus stand with a suitcase in his hand. The incident took place in broad daylight. The old man * Ernest Kapinde - was quite emphatic in his testimony that the first

appellant was the man who snatched his suitcase.. As if to confirm the three witnesses' -5-. evidence, the first appellant led a policeman and the old man to a room where part of the stolen property was hidden. The appellants' story about vegetables was, in my judgment, a desperate attempt on the part of the appellant to avoid being compelled to carry the cross of guilt. The story was very thin indeed. Like the learned trial magistrate, I have no hesitation in rejecting it as a pack of lies. In my view the first appellant was rightly convicted. I would dismiss his appeal against conviction. In approaching the appeals of the other appellants, I have in mind that theft is not a continuing offence. In the instant case the offence of theft was complete immediately after the suitcase was removed from where it was lying, the law being that asportation is complete once every atom in the article being moved has left the place in which that particular atom was before. The evidence in this case showed that the three appellants did not physically take part in the removal of the suitcase from where it had been lying before. With his accustomed fairness, Mr. Mwanyika, counsel for the respondent, submitted that the evidence in this case did not establish the guilt of the third and fourth appellants conclusively. He argued that, as they had joined the first appellant after the latter had snatched the suitcase; the two appellants could not rightly have been held to be parties to the theft. As regards the second appellant, the learned Senior State Attorney contended that the conclusion that the appellant had conspired with the first appellant to steal the suitcase was ineluctable. With all respect to the learned Senior State Attorney, I am not able to agree with his submission that the guilt of the third and fourth appellants was not proved beyond a reasonable doubt. In my view the possibility that those two appellants had not conspired with the first and second appellants to steal the suitcase is a remote one. Why do I say so? That I will tell. The evidence on record clearly shows that the four appellants were friends. Quite often they were seen in one company. Indeed, on February 7, before the theft took place, they were seen in one company. Leonard Nwaje saw the four conversing at a hotel. This was before Ernest Kapinde was deprived of his suitcase. Later the four arrived at the bus stand. It is not clear from the evidence as to how long they stayed at the bus stand but it is as plain as a pikestaff that immediately after the first appellant had grabbed the suitcase and started running away with it the other appellants ran closely behind him. Some minutes later they dropped the suitcase with a bag and headed for the town market. All these circumstances lead, in my judgment, to an irresistible conclusion that the four appellants had conspired to steal the old man's property. I offer no other reasonable explanation. p -6- If that view is sound, as I believe it is, it follows that, by their conduct, the three appellants had encouraged the first appellant to steal the suitcase. In law, therefore, the three appellants aided and abetted the first appellant in committing the theft. By virtue of s. 22(c) of the Penal Code they are as guilty of the theft as the first appellant. Like the learned trial magistrate, I am of the settled view that the three appellants' stories were basically false. Mr. Mwanyika thought that the guilt of the third and fourth appellants was not established beyond reasonable doubt. What do lawyers mean or ought to mean when they talk of proof beyond reasonable doubt? I find the answer to that question in a passage from the judgment of DING, J., in *Miller v Minister of Pensions* /1947/ 2 All E.R. 372 at P. 373: "... That does is well settled. It need not reach certain degree but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the

evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice." In my considered opinion it is possible but not in the least probable that the third and fourth appellants (not to mention the second appellant) had not come to an agreement with the first appellant to steal the old man's property. Their continued presence at the bus stand after that agreement had been reached must have encouraged and was intended to encourage the first appellant to defy many people who were present at the bus stand and steal the old man's property. I would, for the reasons I have given, albeit briefly, dismiss the appeal of the three appellants. I turn now to the appeals against sentences. As was pointed out earlier, each appellant received a sentence of four years' imprisonment. The appellants are first offenders, but they entered the world of crime with frightening courage. They may be amateurs of crime, but the gravity of the offence they were convicted of cannot be over-emphasized. Within the letter and spirit of the law of the land the courts must do everything possible to demonstrate the society's firm disapproval of anti-social ventures such as that which the appellants had successfully embarked upon. The appellants are at liberty to disbelieve it, but what they got in the lower court is what they amply deserved. I would dismiss the appeals against sentences, too. B • A. SAM/LTTA

- - - - - f I - 7 OLUERg Each of the four appeals is hereby dismissed in its entirety. (1 B. A. Si\ILT TA JUDGE January 17, 1978 None of the appellants present or represented. Mr. Mtaki for the respondent.

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Prepared on 13 October 2026 · Esheria