

TANZANIA / JUDGMENT

19800901 TZHC Tabora

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1 September 1980

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IN THE HIGH COURT OF TANZANIA AT TABORA. APPELLATE JURISDICTION (Tabora Registry)
CRIMINAL APPEAL NO.92 OF 1980 (Original Criminal Case No. 321 of 1979 of the District Court
of Shinyanga District at Shinyanga — Before P. P. MOYO, R.M.) J 01-tN

LUGEMBE APPELLANT versus THE REPUBLIC .00000.000. * . ..

RESPONDENT o.4*.so.e CHARGE: Destroying evidence c/s 109 of the Penal Code. J U D G
E M E N T CFIIPETA, J. On 8th August, 1980, I quashed the appellant's conviction, set aside the
sentence and ordered his immediate release from custody unless otherwise lawfully detained. I
reserved my reasons for doing so, which I now give. The appellant was charged with stealing by
public servant c/s 270 and 265 of the Penal Code and, in the alternative, destroying evidence c/s
109 of the Penal Code. He was convicted of the offence of destroying evidence and was sentenced
to four months imprisonment. The learned magistrate, quite correctly, entered no verdict or
finding on the alternative count. The prosecution's evidence was that the appellant at the ma-
terial time was a clerk of the Judiciary and was attached to Shinyanga Urban Primary Court. - It
was alleged that among other duties, the appellant was responsible for keeping exhibits. On or
about 13th September, 1979, the Shinyanga Urban Primary Court Magistrate, one Hassan Kurwa
(Pw 2), was trying a case in which 40 packets of bhang were produced as exhibits, and these were
handed to the appellant for safe custody. Later a messenger of that court, one Daudi Masaka (Pw
1) went to lock the door of the office. There, so Pw 1 alleged, he saw the appellant putting some of
the packets of bhang in a paper bag. Pw 1 then ordered the appellant to return the bhang, but the
appellant did not obey. He told Pw 1 that it was his (appellant's) responsibility to look after
exhibits. The appellant then left the office with the bhang. Pw 1 went on to tell the trial court that
he saw the appellant take the bhang to a nearby place where some artisans make charcoal
stoves. Shortly afterwards, another clerk of the court, one Mfundi (who was not called to give
evidence) arrived at the office 2 2

- As Pw 1 told, what the appellant had done. Later the appellant returned to the office
with a charcoal stove but without the bhang. According to Pw 1, he reported the matter to
Pw 2 the next day. The appellant vehemently denied Pw 1's allegations and wondered why Pw
1 would have let him take away the bhang. As the learned state attorney for the Republic
rightly pointed out, the crucial evidence for the prosecution's case was that of Pw 1. In
considering the evidence of this witness, it is pertinent to note that exhibits - including the
bhang in question - were not being kept under lock-and-key. They were kept in boxes in that

office. So every member staff in that office, including Pw 1, had access to the exhibits. That is not all. It was Pw 1 himself who used to keep the keys of the office and lock the door at the end of the day. Evidently, therefore, he had more opportunity than anyone else to take anything out of that office. That being the position, I respectfully agree with the learned State Attorney that Pw 1 was a witness who had his own interests to serve. His evidence, therefore, ought to have been treated with caution, for he had as much opportunity as, if not more opportunity than, the appellant, of committing any of the offences cited in the charge. He might, therefore, possibly have been trying to shift the blame to the appellant. The learned trial magistrate, with respect, does not appear to have appreciated this fact. He dealt with the evidence of Pw 1 as if it were that of an ordinary independent witness. With that in mind, I proceed to evaluate the evidence of Pw 1 and the rest of the evidence. To start with, while I am aware that some criminals are stupid enough to commit offences in the open, I find it rather strange that a person of the calibre of the appellant would have taken away the bhang in the circumstances suggested by Pw 1. But be that as it may, what the appellant is alleged to have done was a very serious matter which one would have thought would have prompted both Pw 1 and the clerk Marandu to make an immediate report to their superior officer - Pw 2 - just as soon as possible. It is the evidence of Pw 1 that he did just that. It is his evidence that he made the report to Pw 2 on his own initiative. But that is not what Pw 2 told the court. According to Pw 2, it was Pw 2 who asked Pw 1 after discovering that 18 of the packets of " 3 ¶ .3 rha'ng were missing from the box. This is what Pw 2 said: UT

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- I. 4J J J 1LU CLO.-D 00 I.) J. 0 .L. JJJ U £& 0 IJ %J i. .1. found 22 instead of 40 packets. That means 18 were missing in the first box. I asked the court Watchman about the missing bhang. He told me that he had seen the accused the previous day taking something like bhang in a paper bag to some artisans who make charcoal stoves." This evidence clearly contradicts Pw 1. It is evident that Pw 1 did not report the matter to Pw 2 on his own initiative. He only named the appellant after being asked by Pw 2 about the missing bhang. There is also something else in the above passage. It appears to suggest that Pw 2 had a suspicion that Pw 1 had something to do with the missing bhang. This obviously shakes the foundations of Pw 1's credibility. Pw 1's testimony might, have, carried more credence if there had been corroborative evidence. Unhappily, there was no such evidence. Pw 2's evidence weakened rather than enhanced Pw 1's credibility. None of the alleged artisans were called to give evidence. What is even more surprising, the clerk Marandu, who is said to have told Pw 2 that he too saw the appellant take away the bhang, was not called to testify. No reason was given for not calling him. As he was a clerk at the Urban Primary Court, the reasonable assumption is that he was readily procurable. It is undoubtedly true that a public prosecutor is entitled to choose which witness should be called to give evidence and who should be left out. But where a witness is essential for the unfolding of the prosecution's story and is readily procurable, the prosecution will have no justification for not calling him. If such a witness is left out and there is no reason for leaving him out, the court may draw an inference that the witness would have given evidence favourable to

the defence. It may go further aM. draw an adverse inference against the prosecution's case, especially, as in the instant case, where the other witnesses called have not made a'good showing and their evidence required some other supporting evidence. For these reasons, I am of the settled view that it was very unsafe to found a conviction on the sole testimony of Pw 1. The conviction, therefore, which, incidentally, the Republic declined to support, cannot be left to stand. It was for the foregoing reasons that I quashed the appellant's conviction, set aside the sentence and ordered his immediate release from custody unconditionally. *See* *Attorney General v. Njoroge*, 1 KLR 1 (1962). *See also* *Attorney General v. Njoroge*, 1 KLR 1 (1962).

- • • • • - Deceased open court Tabora on 1st day of September, B. D. CHIPETA, • JUDGE. Appellant: Absent, and unrepresented. State Attorney for Republic, • • • Mr. Massaba. • \ • S . 5 ..
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