

TANZANIA / JUDGMENT

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9 June 1980

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IN THE HIGH COURT OF TANZANIA AT4BORA. V ' V • APPELLATE JURISDICTION V (Tabora Registry) V V V HIGH COURT CRIIYIINAL APPEAL NO. 21/80 OF THE DISTRICT COURT OP IIASWA DISTRICT TMASWA V VIRUR OSMAN VS: THE REPUBLIC V V CkLRGE: 1st count: Sales of goods above the maximum price, V C/S 20 and 26 of the Price ActJo.19 of 1973. V :.2nd. count: Destroying evidèn'ce, c/s 109 ofe th Penal V 'COde, Car. 16 Vol.1 ofthe. Laws. V 3rd coVunt:Falling to ithsue cash ale receipt, a/s V :41(1) 72(I).'(f) (g) of the VSmp Duty"Act.. No'. 20 of I -97 JUDGI5ENT V V

- MtSHI 9 J: V V V The appellant, one KHEETRON D/O OSMAN, was charged and V convicted On three Counts. On the first count, she was charged
- with"Vthe offence of Selling goods above the maximum price c/s 20 and .?6 of Act No. 19 of 1973 • She was sentenced to a fine V Shs. 750/— or fOu± thonths imprisonment in default. On the second countrihe *s charged with destroying evidence c/s 109 of the peiat Code to which she was sentenced to a fine of Shs. 300/7 or two months imprisonment in default. And the third count she Was charged with failing to issue a cash sale V receipt c/s 41(i)(I)(f) 'and (g) of ,Act',No. 20' Of 1972, and V wab sentenced to ,fle of Shs. 300/— or two months imprisonment in default. She is appealing against both conviction and sentence. •" The' Voircumstces ie.ding to this prosecution apparently, are Very simple and short. The Police are said to have heard that the-appellant was selling certain types of shirts above the. ' prescribed maximum price. A trap was set and someone 'was allegedly given three Police Notes of shillings one hundred each. This' person went to the appellant's shop and bought a shirt for shs. 270/—. The Policenotes were 'handed to the appellant who refunded Shs. 30/— to the buyer as a changc. The'PolI'ce'énte'red immediately and quarie'd the buyo ästo how muóh he had' paid for the shirt and he was told that it was Shs. 270/—. The appellant denied to have sold the shirt. Her dy, .sho-p and premises 'werethbroughly searched but the Police money was not found. On the word of the decoy, the appellant was" charged with the offencas as I have already 'stated above. The appellant denied the charges hence this appeal.
- ,. .13. -2- The judgment of the learned trial magistrate has been attacked. on .s•èveral' grounds which I shall presently deal with. The learned State attorney who appeared for the Republic did not seek to suppor4thoconvj6tion and seemed to support the defence Counsel's arguments. As the result Bhowëd, the learned State Ltorney was right. The first

ground of appeal, state that the learned trial magistrate erred in rejecting the prosecution application for withdrawal of the charges- without considering the merits of the same or without lawful grounds. I feel, I, however, torn this ground of appeal although Counsels did not argue this ground.. On 23/10/79 the court made the following "Pros I have been instructed by J.P.C. to withdraw the charges, but no grounds have been submitted. Order application refused because no grounds have been given why the charge should be withdrawn." There are only two provisions in the Criminal Procedure Code on which such withdrawal could have been done. These are section 86 which reads. . . . and section 200 which reads. Section 86 does not require the prosecution to give reasons for withdrawal but it only says - with the consent of the court. The court may withhold its consent and if it does what happens? If the provision has any meaning as I think it must mean what it says, it is obvious that the court can withhold such consent. As to what will happen next, very much depends on the conduct of the prosecutor. The most difficult situation will arise if the prosecutor simply decides to adduce no evidence. The trial magistrate might be tempted to act under section 205 of Criminal Procedure Code but such action would be wrong as clearly stated in *Martin Nguma & Others v. Republic*. In this particular appeal the state did not arise since the prosecution continued to adduce evidence. That then should be the principles which should guide the court "whether to withhold consent in a situation like the one where reasons were not given"? Unlike in the High Court, the District Court is not placed in a position to know what evidence is likely to be adduced in a case before it. The prosecutor with the Police is the one who knows the quality and content of the evidence likely to be adduced against the accused assuming that the witnesses will abide by what they have stated to the investigator. This puts the prosecutor in a better position to guess the outcome of a trial. According to the evidence it may be he sees no chance at all of succeeding and thus he may see no justification to waste the court's time and material. If such was the position, the prosecutor would be expected to withdraw the charge under section 200 of C.P.C. but he might not be disposed to act under that section 'even though he knows that the chances of recharging the accused on the same facts are nil and yet he may not wish to reveal to the court all these reasons. Or the prosecutor may feel that more evidence is likely to be available but it might take too long time to finalize and thus it might be reasonable to temporarily withdraw the charge until such time as the remaining evidence is available to warrant trial and recharge. For some reasons the prosecutor might not wish to reveal this to the court. The principle concern for the court should be to see to it that the charge with which the accused is charged is finalized as soon as possible so that the accused knows the result. A withdrawal under section 86(a) of C.P.C. does not legally finalize the matter but it could as well be to the advantage of the accused. But it does provide in a realistic approach the reading in the prosecutor's mind that the case is not so good for him. In deciding therefore whether to refuse or grant application where reasons have not been given the court should among other things, look at the nature of the charge and time it has been pending in court and naturally what the accused says in connection with the application and to keep all three (prosecution, accused, court) properly adjudicated such order must, and I may be excused if I borrow a sentence from the judgment of Court of

Appeal in Martin Ngunba & Others v. Republic of Kenya, 2011 eKLR. The learned trial magistrate did not seriously consider the matter before he made the order refusing to withdraw. I now turn to consider grounds 2, 3, 4, 5 and 6 which in a nutshell alleged insufficiency of the evidence and misinterpretation of the same and without sufficient consideration of the defence evidence. The learned counsel for the defence submitted that as the evidence was that of a Police decoy, the court erred in acting on such evidence without corroboration and for this proposition the learned counsel cited the case of *Mrs. A. Parenti v. Rex* 1937 T.L.R. 208. Apart from the evidence, and make my own findings. I think it can be taken that the appellant did not know that P.W.2 Mazengo had come to trap her - and thus would not suspect that the alleged notes were special and thus hide the same. The witness said that after he had received the shirt, another customer came and asked for a trouser and appellant gave him the trouser and then received money from P.W.2 and gave back Shs. 30/- change immediately apparently while holding the note and as the witness deposed to a cash, she received receipt and after telling the witness that there was no receipt book, she later decided to call her sister and thus she went inside. Is it the normal practice for shopkeepers to hold money in their hands as alleged in this particular case when dealing with customers? Would it not be expected for the appellant to have put the money into the till when she took out the change? Taking for granted that he was holding the money in her hands and she went with it inside the house to call her sister, why then should she leave the money in her room? Is it the usual practice that the business money is kept anywhere in the house? Even if we assume she left the money in the room somewhere she could not have hidden the money so far away as for the Police not to find it because we are told the Police who apparently came in as she came out did a thorough check but could not find any trace of that money. There is no evidence that after the Police had come the appellant went inside before the search. Therefore under the circumstances, there is no reason not to believe the appellant that she did not receive the money. Apart from this, there is a very important aspect of the case which was left out. When the Police found no money on the appellant or in the premises, the witness P.W.2 William Mazengo should have been searched to find out if he had in fact parted with the money as stated assuming that he had in fact received such money. This was not done. Why? Again the witness showed Shs. 30/- or the change he received from the appellant. There was no evidence, and no effort was directed to that effect, that before P.W.2 entered the shop he did not have it. Is he was showing as being a change from the appellant. Further there was evidence from P.W.2 to the effect that similar shirts to the one he bought, and labels indicating price of Shs. 135 per shirt. If that was the case was so stupid as to accept to pay Shs. 270/- for a similar shirt? I have no doubts at all in my mind, that P.W.2's evidence cannot be relied upon as truthful and I am certain had the trial magistrate subjected it to the same scrutiny he would have come to the same conclusion. With the evidence of P.W.2 on 9/6/2011 I am of the opinion that the appellant is innocent and should be acquitted. I hereby order that the appellant be acquitted and the charges against her be dropped. I also order that the costs of the appeal be paid by the respondent.

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Prepared on 13 October 2026 · Esheria