

TANZANIA / JUDGMENT

oswald abubakari mangula vs republic 1999 tzca 36 10 june 1999

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IT THE COURT OF APPEAL OF TANZANIA AT MHEYA (CORAIdt RA, :.AD:iAin:. J.A. . 3AZATTA, J .A .. And LUGAid NGIRA. J .A .) CRIMINAL APPEAL HO. 153 OF 1993 BETWEEN OSWALD A3U3AKARI MAKGULA. APPELLANT AID THE REPUBLIC.....

RESPONDENT (Appeal from the judgement o f the High Court o f Tanzania at Mbeya) (Mwipopo, J .) dated the 7th da3^ o f October, 1993 in ' Criminal Rev i s i o 11 No. 35 of 1993 JUDGMENT OF THE COURT SAKATTA. J . A . : This i s an appeal from an order fo r r e s t i t u t i o n o f property, made against the ap p ellan t, Oswald Abubakari Mangula, by the High Court (llwipopo, J.)under s . 353 (3) o f the Criminal Procedure Act, 1985, in e x e r c i s e o f i t s r e v i s i o n a l j u r i s d i c t i o n . The appellant had been acqu itted by the D i s t r i c t Court of Njombe o f a charge o f r e c e i v i n g s t o l e n p r o p e r t y , c o n t r a r y t o s . 311 (1) o f the Penal Code, h e r e i n a f t e r r e f e r r e d t o a s :!the Code'5, and an order fo r r e s t i t u t i o n made in his favour. In view o f the conclusion we have a r r i v e d a t o n the l e g a l i t y o r o t h e r w i s e o f the t r i a l i n the D i s t r i c t Court, we do not fin d i t necessary to state the background to the appeal i n d e t a i l . As a l r e a d y i n d i c a t e d , the charge which was l a i d a t the a p p e l l a n t ' s d o o r was that o f r e c e i v i n g s t o l e n p r o p e r t y , c o n t r a r y t o s , 311 (1) o f the Code. It was a l l e g e d i n the p a r t i c u l a r s o f o f f e n c e that the a p p e l l a n t : between 1st day o f September, 1989 and 3rd day o f November 1989, at Mtwango Minor Settlement w i t h i n the D i s t r i c t o f Njombe i n I r i n g a Region knowingly and without r i g h t d i d r e c e i v e the fo l l o w i n g 1 . 160 corrugated i r o n sheets gauge 28 x 3 © 1565/= 250,400/= 2, 40 Bags o f cement valued 3 t - 36,000/=

3. 81 Timbers o f 2;t x 6 ' % 2 " x 4 1 and 4 ° x 8 :t valued © 55/= 4,550/=

4. 20 Kgs. o f r o o f i n g n a i l s value d 3 j 4 0 0 /= T o t a l 294.0)0/= from Modestus Oswald knowing the same to have been obtained from money s t o l e n a t Uwemba Mission by the said Modestus Oswald Kangula5'. (the emphasis i s supplied) The case f o r the prosecution a t the t r i a l was e s s e n t i a l l y t h i s : the a p p e l l a n t ' s son, Hodestus Oswald (Hodestus), used to work as a housekeeper a t the Roman C a t h o l i c Mission a t Uwemba, i n I ' T j o m b e D i s t r i c t . Between the d i t e s mentioned i n the p a r t i c u l a r s o f o f f e n c e the young man s t o l e a b o u t Shs. 1,600,000/=, the p r o p e r t y o f the Mission. He then disappeared from the M s s i o n 5 he was s t i l l a t l a r g e when the t r i a l took p l a c e . He used part o f the money to buy the items o f p r o p e r t y l i s t e d i n the charge, which he handed

over to the appellant. That property was later seized by the police when they searched the appellant's premises on November 6, 1989. The appellant's defence was simple: he had acquired the property by using his own money and not the money his son had allegedly stolen. He said he was a successful farmer, owning, among other properties, a thirty-acre farm, forty head of cattle and a garden. The appellant also asserted that he was a traditional healer. During the trial, on May 24, 1990, to be more specific, one of the prosecution witnesses, Brother Otto, produced before the Court as exhibit its one parcel of bamboo, one stamp pad and six porcelain plates as being some of the property which the appellant was found in possession of and which Modestus had stolen from the Mission when he stole the money. The learned trial District Magistrate found the charge not proved and, therefore, acquitted the appellant. He said, among other things: "... there is no dispute that the accused in this case was on the 6/11/89 searched and found with items listed on the charge sheet tendered as exhibit PB. However there is no evidence of any kind which proves that those items were given to him by Modestus as alleged on the charge sheet. Also there is no evidence... adduced to prove that those items were stolen property. With reference to the three receipts tendered as exhibit PA, P3I and PB II, the items have been proved to have been bought by the accused from different shops. At the same time the explanation regarding how the accused managed to raise the funds he used to purchase those items has not been rebutted by the prosecution and the same is reasonable and credible". Later, the learned trial District Magistrate made an order in the following terms: "I will exhibit its collected from the residence of the accused and produced in court as P/exh, are to be returned to the accused forthwith. Following a complaint by one Father Thienie Biechale against the district court's decision acquitting the appellant, the High Court called for the file and later, after examining it, directed that revisional proceedings be conducted, which direction was carried out. Concluding his ruling in the revision, Kwipopo, J., said; "I am satisfied that despite the dubious acquittal of the accused... the prosecution's case and proposition during the trial that all the exhibits seized from the accused's premises or the premises of his collaborators or of Modestus Mangula his son were proceeds of crime emanating from the stolen goods or money of the Uwemba Roman Catholic Mission (sic). I therefore quash the order of the District Magistrate restoring the property produced in court and order that under s.353(3) of the CPA all these properties produced by the prosecution in this case be returned to Father Ihiemo Biechele or Uwemba Roman Catholic Mission for their permanent and undisturbed ownership and use as a meagre restitution of their stolen properties and money." It is that decision which the appellant has appealed against to this Court. He has advanced two grounds why the decision on restitution should be reversed. At the hearing of the appeal he appeared in person. The respondent Republic was represented by Hr. Mbago, Senior State Attorney. The appellant said very little in addition to what is contained in his Memorandum of Appeal. We have found it necessary in exercise of this Court's revisional jurisdiction under s. 4(2) of the Appellate Jurisdiction Act, 1979 (the Act), as amended by the Appellate Jurisdiction

(Amendment) Act, 1993, to examine the propriety of the charge which was preferred against the appellant in this case. As will be recalled, in that charge the appellant was accused of receiving "without right" various items of property knowing the same to have been purchased by use of the money which had been stolen. We enter into no doubt whatsoever that that charge was misconceived in law. It is closed no offence known to law. Property can be the subject matter of a charge preferred under s. 311 (1) of the Code only if it was "feloniously stolen, taken, extorted, obtained or disposed of". Since the property listed on the charge sheet in the instant case was not the property which Modestus stole, the provisions of s. 311 (1) of the Code do not apply and he brought in to play in respect of it. The fact that the money which was used to purchase it was stolen money did not make that property unlawfully acquired in terms of the subsection. No contravention of the subsection takes place if the subject matter of the charge was not property "feloniously stolen, taken, extorted, obtained or disposed of". In the eye of the law there was no charge preferred against the appellant in this case. That being so, when the purported charge was presented, the learned trial District Magistrate should have formed that opinion and proceeded to make an order in accordance with s. 129 of the Criminal Procedure Act, 1985, which reads; "129. Where the magistrate is of opinion that any complaint or formal charge made or presented under section 128 does not disclose any offence, the magistrate shall make an order refusing to admit such complaint or formal charge and shall record his reasons for such order." We wish to remind the magistracy that it is a salutary rule that no charge should be put to an accused person before the magistrate is satisfied, in the trial, that it is closed as an offence known to law. It is intolerable that a person should be subjected to the rigours of a trial based on a charge which in law is no charge. It should always be remembered that the provisions of s. 129 of the Criminal Procedure Code are mandatory. The charge laid at the appellant's door having disclosed no offence known to law, all the proceedings conducted in the district court on the basis thereof were a nullity. Since you cannot put something on nothing, the learned judge of the High Court should have so held and proceeded accordingly. Since he did not do so, it falls upon us to do it. Exercising the revisional jurisdiction conferred upon this Court by s. 4 (2) of the Act, we declare the purported proceedings conducted in the district court a nullity. Having so declared the purported proceedings in the district court, we are constrained to allow the appeal. Accordingly, for reasons we have given, though they are very different from those relied upon by the appellant, we quash the order of restitution made by the High Court, which, very fairly, Mr. Mbago, at the close of his submission, declined to support. We order that the items of property listed in the purported charge, namely, 160 corrugated iron sheets, 40 bags of cement, 81 timbers and 20 kgs of roofing nails be returned to the appellant. Since the articles tendered before the trial court on May 24, 1990, should not have been tendered and when they were tendered should not have been admitted in evidence, as they had absolutely nothing to do with the "charge", we say no award about them. DATBD at O E Y A. This is the last day of June, 1999.

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