

TANZANIA / JUDGMENT

19741213 TZCA Dar es Salaam

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13 December 1974

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t., • 1. IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM ~-_,....~--- HIGH;, COURT
CRIMINAL APPEAL NOel88 OF 1974 Original Criminal Case No. 42 of 1974 of the District Court of
Kisarawe District at Kisarawe Before: K. Ao Kassim, Esq., District Magistrate. OSWALD MATOLA
APPELLANT versus THE REPUBLIC RESPONDENT CHARGE: Stealing by a persop employed in
public service c/s 270 and 26~ of the Penal · Code, Capo 16 of the Lawso

JUDGMENT

KATITI, AGo J. ~ The appellant in this case was charg~d, „I tried, convicted and sentenced to six
years imprisonmentto Aggrieved by the said conviction and sentence he appeals to this Court
against the same. The appellant appeared personally to argue his case. The Republic contended
that the conviction was sound and justified, and while the minimum sentence for this offence is
three years under the Minimum Sentences Act, 1972, the Republic had nothing. to say on
whether or not the•. sentence was appropriate. I shall come to the sentence aspect ' subsequently.
The sequence facts of this case appears to be that P.Wol Longford Mwaijande received payment
vouchers, hereafter to be referred to as PV, for 600/-, from the appellantto P.W.1 left the PV at the
District Development Director~s. office for a cheque in the amount for which the PV was made
out only to learn from the appellant subsequently that he had himself collected the cheque and
indeed on checking at DoD.D.'s office P.W.1 found that the cheque had already been collectedo On
2.4.74 as P.W.2 Hashim Nassoro Mtungura was going to Dar es Salaam one Faustin Cheyo asked
him to cash this cheque and hand the money to the appellante Accordingly P.W.2 proceeded to
Dar es Salaam, went to the Bank of Tanzania in company of the appellant and cashed the chequeo
It is on evidence that he went back with the appellant who said in defence that he went back by
buso According to PoW.2 he handed the 600/- to the appellant in the presence of Abdalla Yusuf
Matimbwa at Fimbo ya Mnyonge Cooperativl:!! shop Kisarawe. P.W.2 identified his signature on
Exhibit A, the cashed cheque before it was tendered in Court as Exhibit A~ As to the handing over
of the 600/- to the appellant is the evidence of PoWo3 Abdallah Yusuf Matimbwa who confirmed
that the same handing over did take place as narrated by P.W.2! Whv P .. W.. 2 decided to hand
over the money at the place and time 2 .. lead to speculation but it would appear the appellant
never cross-examined him on the sameo Nevertheless the evidence has it that the money was
handed over to the appellant on 2.4.74. Although according to PoWol in cross-examination the
appellant is said to have told him that he collected the cheque from D.DoDo 1 S office, P.W.4
Faustin Cheyo told the Court that he was the one who actually collected the cheque from the

D.DoD 1 s office and that he is the one who requested P.W.2 to cash the same and hand the proceeds thereof to the appellant. It would appear what spurred P.W.4 into endorsing it and doing all this was because he says the appellant had told him that the "money was for wages" and that as he "was going on study course", they "better worry in getting the cheque cashed". It is not ~was suggested on the evidence that the 600/- /formed. part of the appellant's wages o Since the cheque was -said to be wages and not revenue,cashing was the only procedure known, otherwise how do you get cash to pay the same wageso That the cheque was made is c.lea:r on the evidence of P.Wo5 Faith Masumba who gave evidence to the effect that the chequewas Noo 72433. That the cheque was cashed is the evidence of PoWo2 and that it was really drawn is the evidence of PoWo5, P.W.6 S/MI A.3173 Cosmas Kigonda who, in the course of investigations collected the cashed cheque, Exhibit A, from the Bank of Tanzania, also confirmso Similarly that it was the appellant that was handed the money is on the evidence by P.W.2 and witnessed by P 9 Wo3. That P.W. 2 maintains that .he never saw the appellant till after an: elapse of twenty or so days and / and indeed the appellant denies receipt of the moneyjsince the . 600/- never fpund its way into the coffers of the Government nor employees who, according to P.W.4, were :to be paid wages, it should be taken that the Government never received the 600/- at all. In defence the appellant denies receipt of the 600/~ and that when he came from Dar es Salaam he stayed at home~ ' The appellant does not say why he went to Dar es Salaam although he admits having had a lift from P.,Wo2 on the way to Dar es Salaam when all we know from PoWo4 is that he ~ent there to get the proceeds of Shs .. 600/-•s cheque from P.W.2 after it had been cashed. Although the appellant says in his defence that P.W.2 told lies, he did not cvoss-examine him on the same, rendering ap inference that this was an after-thought possible. P.W.,3 who witnessed the handing over subsequently went to the extent of standing surety for the appellant,cannot possibly tell lies. As aforementioned the trial Court was justified in believing the evidence it did,as it stands unshaken and true. On the evidence the appellant was a Government servant,. who according to P.W.4, P.W.2, was a cashier and money given to him by P .. W.2 was by virtue of his position as Government employee and the appellant could only receive the money by virtue of his employment as such. On the whole I am satisfied .that -the trial Court had material upon which to base conviction, es the evidence did establish the offence beyond reasonable doubt. However I note that the appellant was convicted under sections 2 71 and 265 of the Penal Code, Cap. 16 of the Laws. With due respect, this was a wrong section, as the right one is to my mind section 270 and 265 of the Penal Code - stea:ing by a person employed in public service. But notwithstanding this irregularity, the appel,lant was obviously aware of the charge for which he was being tried and to my mind there was no I. • 3. obviously curable under section 346 of the Criminal Procedure Code, Cap. 200 In this event conviction under 271 and 265 of the Penal Code is hereby set aside, and substituted therefor a conviction under section 270 and 265 of the Penal Code'o On the evidence and the law therefore the appeal against conviction fails and is therefore dismissedo I now come to sentence of imprisonment imposed. The appellant is a first offender, on record the prosecution has it tha,t the offence is not a prevalent one. Although deterrence was a guiding principle in imposing the sentence, the trial magistrate does not appear to have addressed himself on the mitigation given by the appellanto I would view that six years imposed was in the circumstances excessive as the appellant has pointed outo The minimum sentence for this

offence under the Minimum Sentences Act, 1972, is three years, and departure therefrom in imposing a longer sentence must be on very good grounds. In the circumstances therefore the sentence of six years is set aside and substituted/4herefor is a sentence of three years' i.mprisonmento The appeal against sentence is allowed to the extent that the imprisonment to be served is three years, otherwise appeal against sentence is relatively dismissed .. Delivered in Court at Dar es Salaam this f31L day of December, 19740 \. \ ~ ~v'v~, ~x"l~ - 1"t'Eo Wo KATI~) AGo JUDGE . '

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Prepared on 14 October 2026 · Esheria