

TANZANIA / JUDGMENT

19710113 TZCA Dar es Salaam

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13 January 1971

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at Dar es Salaam
Criminal Ap_p3al Nos. 140, 141, 142.,. 14B and 439 of 1970
(Original Cri. minal Case No. 406 of 1969
Of the District Court of Mbeya District at Mbeya)
1. Steling s/o M.waluvanda)
2. Lsega s/o Kibina)
3. Wailesi s/o Siwambali) Appellants
4. Redison s/o Jimmy)
5. Sibaja s/o Chalmpewa .)

Versus: Republic Respondent

JUDGMENT

BIRON J. - On the 18th of June, 1969, a motor lorry towing a trailer transporting a load of second-hand clothes in bundles to ,;the value of shs. 50,000/- from this country to Zambia, driven by one Ismail Idirisa, who described himself as the Assistant Traffic Supervisor of Tanzania Road Service, Mbeya Branch, broke down on the road about thirty miles out of Mbeya towards Mbozi near Ruanda village. The driver was unaccompanied. He got a lift back to Mbeya in order to obtain some spare-parts, and he was forced to spend the night in Mbeya. The unattended vehicle left on the road was robbed and there was pilfered therefrom a large number of bundles of clothes. Nine men were subsequently arrested of stealing clothes from the consignment in the vehicle. With the exception of one man who had a previous conviction for cattle theft and was sentenced to imprisonment for two and a half years, all the other eight convicted men were each sentenced to imprisonment for two years. Of the nine men convicted and sentenced, five are now appealing and their appeals are consolidated. In this judgment for the sake of convenience, I am retaining the descriptions of the appellants as they were described in the lower court; the appellants being the first, second, seventh, eighth, and ninth accused. The nine men convicted fall into two main divisions. The first four accused belong to one group, whilst the case against the other five accused and the evidence connecting them with the offence was

individual and specific to each of these five . accused. Three police officers, Detective Corporal Chachila Isangula (PW2), Detective Corporal William Mbungu (PW3) and Detective Constable Stafford Mlambya (PW8) testified that they were in a police vehicle patrolling along the Mbozi Road on the 18th June, 1969, and they passed the Ruanda village at about 8 p.m. They passed a vehicle with the consignment of second-hand clothes saw a large number of people taking bundles, the vehicle and hitting them in the bush. / stopped their vehicle a little beyond the, to which they went back on foot. One of them fired a gun in the air to frighten away the people from the vehicle, and the police caught and apprehended the first four accused in the very act of carrying away a bundle of clothes from the vehicle. After a search of the vehicle, the police found hidden in the bush fourteen large bundles and twenty-two smaller bundles of clothes. Subsequently and on different days, acting on information received, the police found the other five accused in possession of some clothes, which Ismail Idirisa, the Assistant Traffic Supervisor and driver, identified as emanating from the consignment of second-hand clothes he was transporting to Zambia. It is now necessary to examine the case against each of the appellants separately. The first and second accused were as noted, amongst the first four men caught and arrested, according to the three police witnesses, in the very act of carrying away bundles of clothes on their heads from the vehicle. The first three of these accused in their defence all stated that they were going to a mourning ceremony when they were met by the police party on the road, and accused of having taken clothes from the abandoned vehicle, which they denied. The fourth accused in his defence stated that he was actually arrested at his house and accused of stealing from the vehicle. But we are not, however, concerned with him in these appeals. If the evidence of the three police officers is to be accepted, and no reason has been advanced, nor does any suggest itself why it should not be, the first and second accused who are appealing, were caught red-handed in the very act of stealing from the vehicle. Their appeals from their convictions are therefore devoid of any merit. The case against the other three appellants must be considered separately and individually. Acting on information received from the local Village Executive Officer, Detective Corporal William Mbungu (PW9), on the 26th of June, found the 7th, 8th and 9th accused who had actually been apprehended by the Village Executive Officer, in possession of some clothes which Ismail Idirisa, the Traffic Supervisor and driver of the vehicle, identified as coming from his consignment of second-hand clothes. In the possession of the 7th accused, there were found a shirt and an underwear (sic). In the possession of the 8th accused were found a pair of trousers, two shirts and also an 'underwear', and in possession of the 9th accused, there were found two items described by the police witness as blouses, but by the Village Executive Officer as shirts. In his judgment, in convicting these three appellants, the magistrate stated inter alia, 'Accused persons did not satisfy the Court as to how they came by the clothes in question. Furthermore, I do not believe their stories to be true in that they failed to call witnesses in support of their evidence. In identifying the clothes allegedly stolen, actually all the clothes which were recovered and produced in Court, the Ismail Idirisa stated and I quote; 'I identify the whole exhibits in Court to be the property of the ZRS, Mreya Branch, in that it is the only company in Tanzania which exports the second-hand clothes to Zambia. As agreed by learned State Attorney, this hardly constitutes proper identification of the clothes found in possession of the accused particularly

so in the: case :If the three accused who are apr;ealing and with whose appee.ls we are now ... dealing;When so tew iterLs were found in their possession., I>"lurthermore, as conceded by learr:ed State Attorrey, the magistrate appears t:J have throim the onus of proving trl; innocence of' their _possession em the accused, vhen as the clothes f:>u1.t'i in tl.leir possession were n::>t sufficiently, or even at all ictentified as having been stolen, so as to lay any .t::mnuation or oasis for the presumption al'i.. "3ing from the possession of recently stolen property. These three c:litfff.ftr.1t, those of the appellants , accused No. 7 - Isega Kibina, accused No. 8 - Radison Jimmy ~d accused No. 9 - Sibaje Chakupewa are accordingly allowed, and trt3ir convictions, which are •not supported by the Republic, ar~ quashed and. the sentences imposed thereon a.re set aside .• If these three appe.llants are not otrerwise la.wfully held in custody, they are to be released forthwith. To revert t.) til: appeals o:t' -the first accused, Stelin:fz s/o M.waluvenda and the second accused, Wailesi s/o Siwamba1J., whose convictions have been sustalred, although the sentences imposed on •them are severe, they are not in all tl~ circumstan::es, so excessive as to just~fy interference. by ttms Court. The appeals of these tw:) appellants are accord1n~ly dismissed in toto, and the sentences imp.;-;;ised on t h~1!1-, which .require c~nfirmination by this Court; are hereby c~nfirmed •....4 / For the sake of the record, I ought to add of the .four convicted men who have not appealed, two like appellants whose appeals•" ~ave been •di>smissesq, were caught red-handed stealing from the vehicle, whils4; in the possession of the other two accused there were found resp; cti vely, twenty-seven and twenty-eight items of clothing, in respect of which they could not give satisfactory explanation.s;;, Delivered in Conrt at Dar es Salaam this 13th day of January, 197~. { PIITLIP BIRON) JUDGE ' \ \

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Prepared on 23 October 2026 · Esheria