

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: Mustafa, J.A., Mwakasendo, J.A. and Kisanga, J.A.)

CRIMINAL APPEAL NO. 17 OF 1979

B E T W E E N

EVANCE HEMED APPELLANT

A N D

THE REPUBLIC RESPONDENT

(Appeal from the Judgement of
The High Court of Tanzania
at Mtwara) (Makame, J.)
date the 25th day of May, 1978,

IN

Criminal Appeal No. 97 of 1975

JUDGMENT OF THE COURT

KISANGA, J.A.:

The appellant was convicted on one count of forgery and two counts of stealing by servant, all the offences being under the Penal Code, and was sentenced to various prison terms resulting in a substantive term of 6 years' imprisonment. His appeal to the High Court was dismissed, and he is now appealing to this Court.

The appellant was employed by the then Tanganyika African National Union (TANU) as an accountant and was posted in Mbinga. His duties included collection of revenue and keeping the accounts of the Party in the District. It would appear that there was started in the District what was described as the Mbinga Development Fund which consisted of contributions of money from various members of the public including teachers. The appellant was assigned the duty to collect such contributions for this fund. The offences which the appellant was convicted of

were in connection with that fund. On the count of forgery the evidence disclosed that he altered a receipt to show that he received shs. 20,447/05 for the fund whereas in fact he had received only shs. 20,414/05. On the remaining two counts he was charged with stealing respectively shs. 10/- and shs. 13,726/75 which he had received as contributions to this fund.

It is at once apparent that on the forgery count no fraudulent intent is discernible, because in the altered receipt the appellant showed that he collected a bigger amount of money than he actually received. On the face of it therefore what the appellant did would appear to be against his own interest, and we think that such conduct is not conclusive of an intent to defraud. Mr. Ntabaye, the learned advocate for the Republic did not, rightly in our view, wish to support conviction on this count. We would accordingly quash the conviction and set aside the sentence of six months' imprisonment on this count of forgery.

On the count of stealing shs. 10/- the appellant's defence was that this money was not paid to him. But both courts below found that it was in fact paid to him. There was some evidence on which the courts below could have made such a finding and we see no good reason to interfere.

On the remaining count of stealing shs. 13,726/25 the appellant's defence was that this money was borrowed by him for the Party and was duly spent on the affairs of the Party. Both courts below rejected such defence and we think that they were entitled to do so.

Mr. Lakha, appearing for the appellant, severely criticised the trial magistrate for failing to admit in evidence, or to consider at all, two payment vouchers dated 17/7/75 and 29/7/75 in support of the appellant's contention that he deposited at the bank a total of shs. 20,300/- being the loan from the Development Fund to the Party and that the shs. 13,726/25 alleged to be stolen was part of the loan money so deposited. We have given anxious thought to this submission but we have come to the conclusion that it would not avail the appellant. For, the appellant says that he borrowed the money from the Development Fund in August against the receipt dated 21/8/75. And yet he claims that he deposited this loan to the bank on two earlier dates viz. 17/7/75 and 29/7/75. The question is, how could he deposit the money in July when he had not borrowed it yet? In other words the money which was allegedly borrowed in August could not be deposited in July before it was borrowed. It is quite apparent from this that the monies from the Development Fund which are alleged to have been paid into the bank in July vide the two payment vouchers have nothing to do with an alleged loan taken from the Fund a month later.

The trial magistrate, therefore, must have been satisfied that the two payment vouchers supporting payments of Development Fund monies into the bank were irrelevant to the case and consequently he ignored them. Even if the said vouchers were before us, we are satisfied from what is on record that it would not have made any difference to the case. In the circumstances, we do not feel justified to disturb the concurrent finding of both courts below on this point.

In the result, the appeal is allowed on the count of forgery but is dismissed on the remaining two counts of stealing by servant.

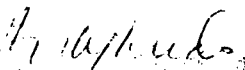
Dated at Dar es Salaam this 7th day of November, 1979.

A. MUSTAFA
JUSTICE OF APPEAL

Y. M. M. MWAKASENDO
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


DEPUTY REGISTRAR