

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: Nyalali, C.J., Makame, J.A. and Kisanqa, J.A.)

CRIMINAL APPEAL NO. 34 OF 1979

B E T W E E N

ROBERT DANIEL BOMANI APPELLANT

A N D

THE REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court
of Tanzania at Mwanza) (Katiti, J.) dated
the 4th day of March, 1978,

IN

CRIMINAL APPEAL NO. 352 OF 1977

JUDGMENT OF THE COURT

NYALALI, C.J.:

The appellant Robert Daniel Bomani was jointly charged and convicted with one John Kamuli in the District Court of Mwanza District for the offence of theft by servant - contrary to sections 265 and 271 of the Penal Code, and was sentenced to five years' imprisonment under the Minimum Sentences Act, 1971, as the value of the property stolen exceeded shs. 5,000/-. At the trial the appellant appeared as the first accused and the said John Kamuli appeared as the second accused. Both accused persons appealed to the High Court which dismissed their appeals in their entirety. The appellant makes this second appeal to this Court. In this appeal he was represented by Mr. Kahangwa, learned advocate, and the Republic was represented by Mr. Mtaki, learned State Attorney.

We have examined the record of the two courts below and, bearing in mind the proceedings in this Court, there appears to be no dispute between the parties on the following primary facts: that at the times material to this case the appellant was employed as a store-keeper by the New Era Company, which is a subsidiary of the Nyanza Industrial Company and that the other accused person, that is, John Kamuli, was employed as a driver by the Nyanza

Transport Company, which is also a subsidiary of the Nyanza Industrial Company; that on the 13th October, 1972, the appellant issued a total of 7,500 empty gunny bags from the store of his employer and had them loaded into a motor vehicle Registration No. TZ 11176 driven by the said John Kamuli and belonging to the Nyanza Transport Company; that these gunny bags were delivered to a private shop-keeper of Indian origin in Mwanza township, that private shop-keeper was not entitled to take delivery of them and that the proper destination of the gunny bags should have been Kasamwa Ginnery. The prosecution case is that the appellant acting in concert with others, including the said John Kamuli who was jointly charged with the appellant, fraudulently and for their own benefit diverted the gunny bags from their intended destination to the private shop-keeper.

On the other hand, the defence case of the appellant is a general denial and an assertion to the effect that he visited the private shop-keeper by chance and found the gunny bags being delivered and that he reported the matter to the police station.

The first point for consideration and decision is whether the appellant did make a report to the police station about the diversion of the gunny bags. The two courts below did not specifically consider this point.

Among the prosecution witnesses there was a policeman, that is, P.W.6, who claimed to have received the report about the gunny bags while on duty at the police station. This witness testified to the effect that he received the report from P.W.3. The record of the trial court shows that Mr. Rugarabamu, who appeared for the appellant at the trial, did not cross-examine P.W.6. It is obvious, therefore, that the assertion made by the appellant in his defence at his trial, that he reported the matter to the police, is just an afterthought.

The next point for consideration and decision in this case is whether the appellant was involved in the diversion of the gunny bags from their proper destination to the private shop-keeper. Both courts below came to an affirmative conclusion on this point after taking into consideration the evidence of P.W.2, P.W.4, and P.W.5, the turn-boys who assisted in loading the gunny bags at the store and unloading them at the premises of the private shop-keeper. As these witnesses were acting on the instructions of the second accused, that is, the said John Kamuli, they cannot be said to be accomplices in any way. They testified to the effect that the appellant accompanied the motor vehicle carrying the gunny bags right up to the premises of the private shop-keeper where he was found by P.W.3, who is a Traffic Inspector in-charge of the second accused. Moreover, from the evidence of P.W.2, P.W.4 and P.W.5 it is evident that the appellant was involved in some conversation with those who appeared to be the owners of the premises where the gunny bags were unloaded. In our view, there was evidence to support the findings of the two courts below.

Mr. Kahangwa, learned advocate, attacked the reliance made by the two courts below on the irregularities which P.W.3 claimed to have discovered in the transport records maintained by the second accused. According to P.W.3 the transport records of the second accused were not completed and on enquiries by P.W.3 the appellant proceeded to complete the records at the site where the gunny bags were delivered. It is true that none of the transport records was produced at the trial and no explanation was given by the prosecution for the failure to produce them.

The learned judge on the first appeal was urged to draw an adverse inference under section 122 of the Law of Evidence Act,

1967, against the prosecution for their failure to produce these documents. Section 122 of the Act reads:-

"The court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.".

The learned judge on the first appeal after considering the provisions of section 122 of the Act stated in his judgment:-

"All that this section does declare, is that the Court may in all cases whatever, draw from the facts before it, whatever inferences it thinks just. The section sort of allows the Courts, the use of discretion, to use common sense and experience, in the judging of the effects of the particular facts to particular obvious situations, instead of tying the Courts to particular rules, it has nothing to do with presumptions of law and the trial Court made no error, in not making the inference that Mr. Matemba suggested.

However the position still stands, that the lorry was being off-loaded when P.W.3 came to the scene, whether or not the books are produced. The evidence that the 2nd appellant led P.W.3 to where the 1st appellant was, was given by P.W.3. P.W.3 was a witness that was believed, by the trial Court, and on my part, I see no grounds for considering P.W.3 not truthful. From P.W.3, although the documents or books seized from the appellants, were not tendered by the prosecution, it stands clear that the first appellant was seen recording in the books, that P.W.3 subsequently seized. P.W.3 left them, off-loading with instructions to wait for him there, but when he came back with P.W.1, Peter Marco, the vehicle, the appellants were not there.".

We are of the view that if the evidence of P.W.3 is completely ignored, the evidence given by P.W.2, P.W.4 and P.W.5 is sufficient to support the findings of the two courts below.

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Since there are really no other matters of law involved in this appeal, we have to dismiss the appeal in its entirety and we order accordingly.

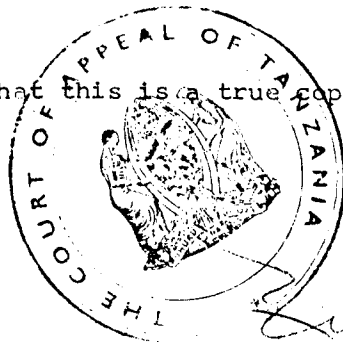
DATED at MWANZA this 3rd day of October 1980.

F. L. NYALALI
CHIEF JUSTICE

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

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



(G. A. RWELENGERA)

DEPUTY REGISTRAR