

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. 36 OF 1980

B E T W E E N

SHAIKU HAMISI NOWA APPELLANT

A N D

THE REPUBLIC RESPONDENT

(Appeal from Judgment of the High Court
of Tanzania at Mtwara) (Maganga, J.)
dated the 2nd day of May, 1979,

in

Criminal Appeal No. 116 of 1978

JUDGMENT OF THE COURT

MUSTAFA, J.A.:

The appellant was in charge of cash to buy agricultural produce from villagers. He had collected cash of shs. 200,000/- in bundles of shs. 10,000/- each of ten-shilling notes. He went out to the villages and made payment. He made three payments of shs. 10,000/- each and he should have a balance of shs. 170,000/-. However, when he counted his cash at the end of the day he found he was shs. 10,000/- short. He was charged before a magistrate's court of theft. The trial magistrate found the money was in fact lost by negligence, as he could not find any evidence of theft, but nevertheless found him guilty of stealing. He appealed, and the first appellate judge was of the view that the magistrate's basis of conviction was wrong, but upheld the conviction on the ground that the appellant had two opportunities of stealing, and therefore he found the appellant guilty of theft.

Throughout the appellant's period in possession of the money, he was accompanied by the driver P.W.2 and an askari P.W.5. When he was paying out money, he was accompanied by these two witnesses. When he was counting the money at his office at the end of the day P.W.5 was in the room. The judge merely said that

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the opportunity to steal could have occurred when the appellant was paying out, but he did not spell out how that could have been done, nor how it could have been done when the money was counted at the end of the day. With respect, we think that the learned judge merely speculated on the possibilities. He upheld the conviction on circumstantial evidence. We are satisfied that the circumstances in this case do not point to the guilt of the appellant irresistibly. In fact the more likely possibility was that he lost the money through negligence.

We allow the appeal, quash the conviction, set aside the sentence and order that he be released forthwith unless otherwise lawfully detained.

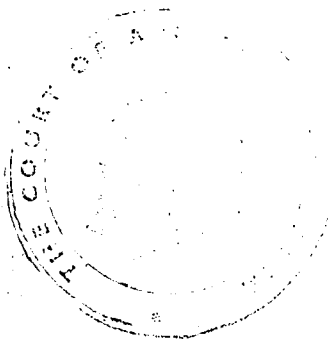
DATED at DAR ES SALAAM this 2nd day of March, 1981.

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.



(G. A. RWELENGERA)
DEPUTY REGISTRAR