IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MNZAVAS, J.A., MFALILA, J.A., And LUBUVA, J.A.)

CRIMINAL APPEAL NO. 10 OF 1987

BETWEEN

JOSEPH MWANAKAMBA. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the Conviction of the
High Court of Tanzania at Mbeya)

(Mtenga, J.)

dated the 22nd day of December, 1986

in

Criminal Appeal No. 73 of 1986

JUDGEMENT OF THE COURT

LUBUVA, J.A.:

In the District Court of Mbeya the appellant Joseph s/o Mwanakamba together with STANLEY s/o MWAKALINGA and MATILDA d/o MWAMBENE who at the trial were referred to as the first, second and third accused respectively, were charged in the first count with the offence of stealing by servant contrary to sections 285 and 271 of the Penal Code. In the second count in which the appellant was also charged with the third accused for the offence of stealing by servant, both of them were acquitted. The appellant and the second accused were convicted on the first count and were sentenced to Eight (8) years imprisonment. They were further ordered to refund shillings 289,381/10, the amount involved in the theft to the Mbeya Regional Trading Company, the employer of the appellant and his co-accused. Dissatisfied with the conviction and sentence imposed in respect of the first count, the appellant and the second accused appealed to the High Court where the appeal was dismissed (Mtenga, J.). From the decision of the High Court, the appellant has appealed to this Court. The other co-accused (second accused) did not appeal.

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The facts which gave rise to this case are generally not disputed. Briefly, they may be set out as follows: The appellant and his co-accused were employed by the Mbeya Regional Trading Company based at Chimala depot within Mbeya District. The appellant held the dual position of a supervisor and branch manager at Chimala depot. The second accused at the trial was the cashier and the third accused was a godown keeper. The appellant was the over-all incharge of the depot. As a cashier, the second accused was responsible for receiving money in cash or cheques realised from the sales of various items at the depot. At the close of the working hours, the second accused normally prepared bank reconciliation statements which were counter checked by the appellant before the money was kept in the safe ready for banking. For purposes of security and safety of the money, the safe had two different keys one of which was kept by the appellant and the other was kept by the second accused. In order to open or lock the safe, it was necessary to use both the keys which were under the custody of the appellant and the second accused.

On 26.7.1984, the appellant left Chimala, his working place for Kyela to attend a funeral of a relative. The appellant stayed in Kyela until 2.8.1984 when he returned and reported on duty on 3.8.1984. On 4.8.1984, the appellant left Chimala for Mbeya to collect provisions for the depot. He (appellant) returned to Chimala from Mbeya on 6.8.1984 at a time when the second accused had disappeared from the depot at Chimala without notification of the depot attendant, Matilda d/o Mwanbene, the third accused at the trial. With the safe locked and the disappearance of the second accused at the time when the appellant was away from the depot, a search for the second accused was mounted. On arrival at the depot and upon finding the prevailing situation there, the appellant was asked to hand over to the police (PW.10) the key to the safe which

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he used to keep. In the presence of the police (PW.10) and the third accused, the office door was opened where, in the room in which the safe was kept, the appellant located the second key to the safe tucked away in a red bag. This was the second key to the safe which was in the custody of the second accused.

With the two keys for the safe availed, the safe was opened (9.8.1984). From the auditing of the sales books and accounts as well as the money found in the safe, it was revealed that out of the money realised from the sale of the goods at the depot for the period 17.7.1984 to 4.8.1984, there was a shortage of shillings 289,381/10. This was the basis of the case against the appellant and his co-accused at the trial. As the second accused had disappeared from the working place at Chimala, the appellant set about looking for him (second accused) at Kyela and Malawi from where he (second accused) was arrested and brought to Mbeya for trial in this case together with the appellant.

Before the trial court, the appellant's defence was that the money was stolen when he (appellant) was away in Kyela. He claimed that in his absence, he had entrusted the third accused with the responsibility to take charge of the office whose keys and the key for the safe he had left with his daughter Leah Jonathan (DW.2) with instructions that the third accused would collect the keys from her (DW.2) and return the same to her (DW.2) at the end of the working day. In support of the appellant's testimony, Leah Jonathan (DW.2), the appellant's daughter gave evidence before the trial court to the effect that when the appellant left for Kyela on 26.7.1984, she was given the key for the safe which she in turn handed over to the third accused, Matilda d/o Mwanbene. She further said that since that day, the third accused remained with the key for the safe until 3.8.1984 when the appellant had returned from Kyela. After hearing and evaluating the evidence from both sides,

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the trial court was satisfied that both the appellant and his daughter (DW.2) were not telling the truth in connection with the key for the safe. That aspect of the defence was rejected as an attempt to implicate the third appellant. On appeal to the High Court, Mr. Bateyunga, learned Counsel for the appellant with eloquence, repeated the same argument that the appellant was not responsible for the money stolen while the appellant was away in Kyela when the keys for the office and the safe were left at the disposal of the third accused. Upon close scrutiny of the evidence adduced before the trial court, the High Court was of the view that the trial court was justified in rejecting the appellant's defence that the third accused had been appointed by the appellant to take charge of the office at the R.T.C. Depot at Chimala when the appellant went to Kyela.

Arguing the appeal before us on behalf of the appellant, Mr. Ndibalema learned counsel raised one ground of appeal. He argued that the prosecution had failed to prove that the appellant was involved in the crime of stealing. It was further submitted that on the evidence as adduced before the trial court, it was not established who between the appellant and the second accused at the trial was the actual perpetrator of the crime. Mr. Ndibalema finally submitted that as no common intention to steal had been established, it was erroneous for the learned judge on first appeal to hold that there was collusion between the appellant and the second accused. In support of this submission, Mr. Ndibalema referred to page 78 of the proceedings lines 29 to 32. There, the learned judge concluded that there was collusion between the appellant and the co-accused.

For the submission that there was no common intention between the appellant and the second accused to commit the offence of stealing, both the appellant and the second accused should have

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been acquitted, we were referred to the case of JULIENNE SALUM PAZI v REPUBLIC (1981) T.L.R. 246. The learned counsel urged the court to allow the appeal.

On behalf of the respondent Republic, Miss Mwaiteleke, learned State Attorney supported the conviction and sentence imposed. She submitted that there was no point of law involved in this appeal and that it was a case whose decision depended on the credibility of the witnesses. The learned State Attorney urged the court to dismiss the appeal because the case for the prosecution had been proved beyond reasonable doubt that the appellant and the second accused had colluded to steal the money. She insisted that as the appellant and the second accused were the sole custodians of the two keys to the safe, no one else had access to the money kept in the safe.

We have closely addressed ourselves to these submissions on both sides. The only issue for determination in this appeal is whether the case against the appellant was sufficiently proved. That infact is the only ground argued before us by the learned counsel for the appellant. It is common knowledge that in a criminal charge the prosecution has the duty to prove the case beyond all reasonable doubts. Any lingering doubts are resolved in favour of the accused. In the instant case, we are with respect in agreement with the learned State Attorney that the determination of the case entirely depended on the credibility and acceptance of the evidence of the witnesses. It was a question of fact on which there was the concurrent findings of the two courts below. The trial court found correctly in our view, that the appellant and the second accused were not telling the truth in their claim that the third accused was left with the keys to the safe when the appellant left Chimala R.T.C. Depot for Kyela. On the evidence, it is quite clear to us that the third accused had nothing to do with the keeping of the key for the safe.

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In our considered opinion, in the light of the evidence which was accepted by the trial court, the appellant's move to implicate the third accused with the theft of the money at the R.T.C. Depot at Chimala was nothing but a last minute attempt on the part of the appellant and the second accused to shift the blame from them. As to who was responsible for keeping the keys to the safe, the second accused (AC. D.W. Stanley Mwakalinga) in his defence page 43 of the proceedings also states:

> "When the 1st accused (appellant) was on leave i.e. 27/7/84 to 2/8/84 I was keeping the money in a cupboard as there (sic) the second key was with 1st accused. During this time I never saw 3rd accused open the safe. She was not given the key. (emphasis supplied).

From this evidence which is also supported by the evidence of PW.1 and PW.X the police officers to whom the appellant handed over the two keys for the safe, it is clear that only the appellant and the second accused could open the safe in which the money was kept. In these circumstances, we think the appellant was, by this evidence strongly implicated in the theft of the money stolen from the safe.

Furthermore, apart from the fact that the appellant and the second accused were the custodians of the keys to the safe, there are other factors which as correctly found by the courts below, also connect the appellant with the theft of the money in collaboration with the second accused at the trial. In the first place, it was established that when the appellant returned from Kyela on 3.8.84 the second appellant who, as already indicated had the second key to the safe also left Chimala, the working place on 4.8.84 left for Kyela too (PW.3, PW.4). According to the evidence of PW.X Detective Constable Jacob, the appellant

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who asked about the keys to the safe, readily produced one key from his pocket and also located the other key which was kept by the second accused in the red bag within the office in which the safe was installed. If as already shown, the second accused had disappeared from Chinsala at that time, how did the appellant know of the whereabouts of the second key to the safe unless there was some understanding between the appellant and the second accused. Secondly, it was also established in evidence that the appellant informed the police that the second accused had absconded to Malawi. As a matter of fact, it was the appellant who physically went to locate the whereabouts of the second accused in one of the villages in Malawi from where the second accused was arrested. To our minds, it raises the question, how did the appellant know that the appellant had absconded to a particular village in Malawi if he had no knowledge of it.

There is yet another aspect which we think is also relevant in linking the appellant with theft of the money. As already indicated, the appellant reported back on duty on 3.8.1984. He met the second accused at the work place at Chinsala Depot. The following day i.e. 4.8.1984, the appellant left Chinsala for Mbeya without notifying the third accused, who according to his (appellant) defence, he had appointed to act in his (appellant) place while he (appellant) was away in Kyela but merely left a message with a clerk at the Depot. On the same day (4.8.84) the second accused left Chinsala for Kyela in the evening via Mbeya where, as indicated, the appellant had already gone to. It is also in evidence that when the appellant returned from Mbeya on 6.8.84, there was no documentary evidence to show that the appellant returned to Chinsala with the goods which the appellant claimed to have gone to collect for the depot at Chinsala. This again in our view, raises doubts as to whether the appellant was telling

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the truth about the trip to Mbeya at that time.

Finally, as regards the money, the subject matter of this case, it is most strange and unusual too, that the appellant upon his return to work on 3.8.1984 counted the money received from sales for the period covered under the charge but did not mention any shortage of money. If there was any shortage, we think it was natural that, that would be the immediate thing for him to do. He did not. On this, when cross examined by Mr. Tumunjeba at page 37 of the proceedings, he states:

> "I left on 26.7.84. I returned on 2.8.84. I was on duty on 3.8.84. On 3.8.84 I counted money from cash sales. The third accused was my assistant. From cash sales I saw there were sales amounting to Shs. 590,437/45. These were for cash sales from 17.7.84 to 4.8.84." (Emphasis supplied).

From these circumstances, we are of the settled view that the learned judge on first appeal was justified in his conclusion that the appellant colluded with the second accused in stealing the money from the safe. In his judgement the learned judge stated:

> "All these factors point out to only one conclusion as rightly stated by the learned Senior Resident Magistrate that the appellant colluded with the second accused to open the safe and steal the money for each one of them had a key to the safe. It could also be possible as well that the appellant alone opened that safe and stole the money in the safe for he had his key to the safe and also he knew that the other key used to be kept by the second accused who

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absconded was in the red bag."
(emphasis supplied).

As indicated, in support of his submission that the appellant should be acquitted because no common intention had been established between the appellant and the co-accused, Mr. Ndibalema, learned counsel relied on the decision in the case of JUMANNE SALUM PAZI v REPUBLIC (1981) T.L.R. 246. That case involved unlawful possession of government trophies. On the evidence as analysed on first appeal before the High Court, it was held that the appellant as a joint possessor, was a principal to the commission of the offence. On this basis, the appeal was dismissed. However, in the instant case, we think the distinction is clear. Here, as the evidence analysed above shows, the circumstances and the various factors surrounding the case indicate quite clearly that the appellant unlike in the case cited, colluded with the other co-accused (second accused) to jointly prosecute an unlawful purpose i.e. stealing money from the safe. In our view, this was a case in which it was established on the evidence that the participants to the crime were ascertainable - i.e. the appellant and the second accused. In the circumstances of this case, we are with respect, in agreement with Miss Mwaitolaka, learned State Attorney that Mr. Ndibalema learned counsel for the appellant has misapplied the case of JUMANNE SALUM PAZI v REPUBLIC to the instant case.

We now turn to the sentence imposed. As rightly pointed out by the learned State Attorney, the offence involved is scheduled offence under the Minimum Sentences Act, 1972. For such an offence, the maximum term of imprisonment that a subordinate court can impose in terms of the provisions of Section 170 of the Criminal Procedure Act, 1985 is 3 years imprisonment, subject to confirmation by the High Court. The sentence of eight (8) years imprisonment

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imposed was confirmed by the High Court, we are satisfied that it was lawful. In the result, we are satisfied that there is no merit in this appeal and we accordingly order that it be dismissed in its entirety.

The appeal is accordingly dismissed in its entirety.

DATED AT MBEYA THIS 29TH DAY OF AUGUST, 1994.

M.S. MNZAVAS
JUSTICE OF APPEAL

L.M. MFALILA
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

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

(M.S. SHANGALI)
DEPUTY REGISTRAR