

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 15 OF 1986

B E T W E E N

1. FRANCIS MUTASHUBIRWA)
2. PETER MKAMA) APPELLANTS
3. ANTHONY SHILINDE)

A N D

THE REPUBLIC RESPONDENT

(Appeal from the convictions and sentences
of the High Court of Tanzania at Mwanza)
(Mushi, J.) dated the 16th day of April, 1980,

in
Criminal Appeals Nos. 115 and 116 of 1979

JUDGMENT OF THE COURT

NYALALI, C.J.:

The three appellants, namely, Francis Mutashubirwa, Peter Mkama and Anthony Shilinde, hereinafter called the first, second and third appellants, respectively, were charged with four others in the District Court of Nzega, at Nzega, with the offence stealing by servant - contrary to sections 271 and 265 of the Penal Code, which constituted the first count and concerned the three appellants only; whereas the remaining four accused persons were charged with receiving stolen property - contrary to section 311(1) of the same Code in the second count.

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After a full trial, the three appellants were convicted on the charge facing them; whereas one of the remaining four persons charged with receiving stolen property was acquitted and the rest were convicted on the charge facing them. The trial court sentenced the three appellants to seven years' imprisonment, and the others were sentenced to three years' imprisonment. The three appellants, together with the other persons except one, were aggrieved by their convictions and sentences and they appealed to the High Court.

On appeal to the High Court, Mushi, J. dismissed the appeal against the convictions by the three appellants, but reduced the sentences to five years' imprisonment. With regard to those convicted on the charge of receiving stolen property, the High Court quashed their convictions and set aside their sentences in respect of those who had appealed, and exercised its powers of revision and quashed the conviction and set aside the sentence in respect of the one who had not appealed. The appellants were further aggrieved by the outcome in the High Court, hence this appeal to this Court.

The proceedings in the two courts below, established that the three appellants were at all material times employed by the National Bank of Commerce, which is a parasatatal organization, and were stationed at Igunga Branch, in Nzega District. The first appellant was a Bank Accountant, whereas the second and third appellants

were a Bank Supervisor and a Bank Messenger, respectively. On the 31st December, 1978, a sum of shs. 120,000/- was found missing from the strong room of the Bank at Igunga when the Bank was opened for business that morning. The money had been safely locked in the strong room at the end of Bank business the previous day. The door of the strong room could not be^{opened} except by the use of two keys, one of which was kept by the first appellant and the other one by the second appellant. The matter was reported to the police. Acting on information, the police managed to recover a substantial part of the money, that is, the sum of shs. 119,000/- at a house in Mwamala Village, where it had been taken by one Rose Selemani (P.W.3), who is the ^{cousin} of the third appellant. The three appellants, together with others, were arrested and charged accordingly.

It was the prosecution case at the trial that the three appellants were involved in stealing the money from the Bank. It was part of the prosecution case that the money was later handed by the third appellant to P.W.3 to take to Mwamala Village to be hidden by the third appellant's relatives.

On the other hand, it was the defence case of the first and second appellants that at the material time each had left his strong room key in a drawer of his office table, and each appellant had then locked up that drawer. It was therefore part of the defence of these appellants that someone could have had access

to the strong room keys in the drawers and used them to open the strong room door, and thus steal the money. With regard to the third appellant, it was his defence that he was not in a position to have access to the money in the strong room.

The trial court, after considering the evidence on the side of the prosecution and the defence, rejected the appellants' defences and convicted them as charged. Those convictions were upheld by the High Court as already stated.

In his memorandum of appeal, the first appellant raises no points of law but complains that both the trial court and the High Court failed to consider the absence of evidence by finger prints experts which was necessary to exclude the possibility of a person other than the appellants tampering with the drawers of his table. He also complains that the two courts failed to consider the fact that the circumstantial evidence was not sufficient to incriminate the appellant. Clearly, the complaints by the appellant concern matters of fact. Since this is a second appeal, this Court is precluded from re-evaluating the evidence. It is well established that the role of this Court in a second appeal is confined or mixed matters of law and facts. to matters of law. Since there was evidence that the strong room door could not be opened except by the use of keys, one kept by the appellant, this appeal cannot succeed.

With regard to the second appellant, he complains in his memorandum of appeal, in effect, that the two courts below failed to take into account the fact that P.W.3 was an accomplice. He further complains that there was no evidence to link the money found in Mwamala Village to the money stolen from the Bank at Igunga.

With regard to his second complaint, the appellant is clearly wrong in asserting that there was no evidence to link the money recovered in Mwamala Village to the money stolen. There was evidence to the effect that the bag in which the money was found in Mwamala Village bore the Bank label of Igunga National Bank of Commerce. As to the first complaint, it is apparent from the record that his conviction was not based on the evidence of P.W.3, but on the same evidence upon which the first appellant was convicted. He was the custodian of the second strong room key. It follows, therefore, that the appeal of the second appellant also cannot succeed.

With regard to the third appellant, he raises only one point of law in his memorandum of appeal. The rest are matters of fact outside the scope of this Court. The point of law concerns the failure by the two courts below to take into account the fact that P.W.3 was an accomplice. She had taken the money for hiding in Mwamala Village. It is true that neither the High Court nor the trial court considered the possibility

of P.W.3 being an accomplice. However, we think that even if the two courts below had found P.W.3 to be an accomplice, they would have found ample evidence to corroborate her testimony. There is, for instance, the evidence which showed that the bag which contained the money hidden in Mwamala Village bore the label of National Bank of Commerce, Igunga Branch; there is also the evidence given by one Hamisi Wamba (P.W.8), who is a watchman employed by the Bank at Igunga, to the effect that he saw the third appellant riding a bicycle on which he carried a packet. He was riding from the Bank towards his home and he was reluctant to stop when accosted by P.W.8. Subsequently, he was seen coming from his home without the packet in the ^{same} evening on the day of the theft. This evidence ties entirely with the evidence of P.W.3, the appellant's sister, who testified to the effect that she was at the material time living at the appellant's home. That fact is confirmed by the third appellant himself in the evidence which he gave in his defence.

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Thus the link is established between the money stolen from the Bank being taken to the appellant's home and being given to P.W.3 to be taken ~~in~~for hiding in Mwamala Village. With such corroboration, the two courts below could not have come to any other conclusion but to convict the third appellant even if P.W.3 was found to be an accomplice. All this means that the appeal by the third appellant also cannot succeed.

With regard to the sentence, it is apparent that the two courts below did not violate any principle of law relevant to sentencing. However, it is apparent that neither the trial court nor the High Court was aware of the point that the provisions of the Minimum Sentences Act, 1972, require the appellants to be ordered to refund the money which remains unrecovered; that is the sum of shs. 1,000/-, under the provisions of section 7 of the Minimum Sentences Act, 1972.

We shall cure this defect by applying the mandatory provisions above cited and order the appellant, jointly and severally, to compensate the National Bank of Commerce by paying it the sum of money which remains unrecovered.

Since, from the evidence, a sum of shs. 748/- was seized from the third appellant in the course of investigations and was tendered at the trial as Exhibit "E", we hereby direct that this sum of money be paid to the National Bank of Commerce as part of the compensation; and we order accordingly. This means a sum of shs. 748/-

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shs. 252/- remains to be recovered from the appellants and must be paid by the appellants.

In the final analysis, therefore, the appeal is dismissed in its entirety.

DATED at MWANZA this 2nd day of December, 1986.

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.

[Signature]
(J. H. MSOFFE)
DEPUTY REGISTRAR