IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RAMADHANI, J.A., SAMATTA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 153 OF 1993

BETWEEN

OSWALD ABUBAKARI MANGULA. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

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

(Mwipopo, J.)

dated the 7th day of October, 1993

in

Criminal Revision No. 35 of 1993

JUDGMENT OF THE COURT

SAMATTA, J.A.:

This is an appeal from an order for restitution of property, made against the appellant, Oswald Abubakari Mangula, by the High Court (Mwipopo, J.)under s.353 (3) of the Criminal Procedure Act, 1985, in exercise of its revisional jurisdiction. The appellant had been acquitted by the District Court of Njombe of a charge of receiving stolen property, contrary to s.311 (1) of the Penal Code, hereinafter referred to as "the Code", and an order for restitution made in his favour.

In view of the conclusion we have arrived at on the legality or otherwise of the trial in the District Court, we do not find it necessary to state the background to the appeal in detail. As already indicated, the charge which was laid at the appellant's door was that of receiving

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stolen property, contrary to s. 311 (1) of the Code. It was alleged in the particulars of offence that the appellant:

> "... between 1st day of September, 1989 and 3rd day of November 1989, at Mtwango Minor Settlement within the District of Njombe in Iringa Region knowingly and without right did receive the following:-
>
> 1. 160 corrugated iron sheets gauge 28 x 3 @ 1565/= - 250,400/=
> 2. 40 Bags of cement valued at - 36,000/=
> 3. 81 Timbers of 2" x 6", 2" x 4" and 4" x 8" valued @ 55/= - 4,550/=
> 4. 20 Kgs. of roofing nails valued - 3,400/=
>
> Total 294,000/=
>
> from Modestus Oswald knowing the same to have been obtained from money stolen at Uwemba Mission by the said Modestus Oswald Mangula". (the emphasis is supplied)

The case for the prosecution at the trial was essentially this: the appellant's son, Modestus Oswald (Modestus), used to work as a housekeeper at the Roman Catholic Mission at Uwemba, in Njombe District. Between the dates mentioned in the particulars of offence the young man stole about Shs. 1,600,000/=, the property of the Mission. He then disappeared from the Mission; he was still at large when the trial took place. He used part of the money to buy the items of property listed in the charge, which he handed over to the appellant. That property was later seized by

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the police when they searched the appellant's premises on November 6, 1989. The appellant's defence was simple: he had acquired the property by using his own money and not the money his son had allegedly stolen. He said he was a successful farmer, owning, among other properties, a thirty - acre farm, fourty head of cattle and a garden. The appellant also asserted that he was a traditional healer. During the trial, on May 24, 1990, to be more specific, one of the prosecution witnesses, Brother Otto, produced before the Court as exhibits one parcel of ball pens, one stamp pad and six porcelain plates as being some of the property which the appellant was found in possession of and which Modestus had stolen from the Mission when he stole the money. The learned trial District Magistrate found the charge not proved and, therefore, acquitted the appellant. He said, among other things:

> "... there is no dispute that the accused in this case was on the 6/11/89 searched and found with items listed on the charge sheet tendered as exhibit PB. However there is no evidence of any kind which proves that those items were given to him by Modestus as alleged on the charge sheet. Also there is no evidence ... adduced to prove that those items were stolen property. With reference to the three receipts tendered as exhibits PA, PBI and PBII, the items have been proved to have been bought by the accused from different /shops/. At the same time the explanation regarding

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> how the accused managed to raise the funds he used to purchase those items has not been rebutted by the prosecution and the same is reasonable and credible".

Later, the learned trial District Magistrate made an order in the following terms:

> All exhibits collected from the residence of the accused and produced in court as P/exh. are to be returned to the accused forthwith.

Following a complaint by one Father Thieme Biechale against the district court's decision acquitting the appellant, the High Court called for the file and later, after examining it, directed that revisional proceedings be conducted, which direction was carried out. Concluding his ruling in the revision, Mwipopo, J., said:

> "I am satisfied that despite the dubious acquittal of the accused... the prosecution's case and proposition during the trial that all the exhibits seized from the accused's premises or the premises of his collaborators or of Modestus Mangula his son were proceeds of crime emanating from the stolen goods or money of the Uwemba Roman Catholic Mission (sic). I therefore quash the order of the District magistrate restitating the property produced in court and order that under /s./353 (3) of the CPA all these properties produced by the prosecution in this case be

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> returned to Father Thiemo Biechele
> or Uwemba Roman Catholic Mission
> for their permanent and undisturbed
> ownership and use as a meagre
> restitution of their stolen
> properties and money."

It is that decision which the appellant has appealed against to this Court. He has advanced two grounds why the decision on restitution should be reversed. At the hearing of the appeal he appeared in person. The respondent Republic was represented by Mr. Mbago, Senior State Attorney. The appellant said very little in addition to what is contained in his Memorandum of Appeal.

We have found it necessary, in exercise of this Court's revisional jurisdiction under s. 4 (2) of the Appellate Jurisdiction Act, 1979 (the Act), as amended by the Appellate Jurisdiction (Amendment) Act, 1993, to examine the propriety of the charge which was preferred against the appellant in this case. As will be recalled, in that charge the appellant was accused of receiving "without right" various items of property knowing the same to have been purchased by use of the money which had been stolen. We entertain no doubt whatsoever that that charge was misconceived in law. It disclosed no offence known to law. Property can be the subject matter of a charge preferred under s. 311 (1) of the Code only if it was "feloniously stolen, taken, extorted, obtained or disposed of". Since the property listed on the "charge sheet" in the instant case was not the property which Modestus stole, the provisions of s.311 (1) of the Code

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could not in law be brought into play in respect of it. The fact that the money which was used to purchase it was stolen money did not make that property unlawfully acquired in terms of the subsection. No contravention of the subsection takes place if the subject matter of the charge was not property "feloniously stolen, taken extorted, obtained or disposed of".

In the eye of the law there was no charge preferred against the appellant in this case. That being so, when the purported charge was presented, the learned trial District Magistrate should have formed that opinion and proceeded to make an order in accordance with s.129 of the Criminal Procedure Act, 1985, which reads:

> "129. Where the magistrate is of opinion that any complaint or formal charge made or presented under section 128 does not disclose any offence, the magistrate shall make an order refusing to admit such complaint or formal charge and shall record his reasons for such order."

We wish to remind the magistracy that it is a salutary rule that no charge should be put to an accused person before the magistrate is satisfied, inter alia, that it discloses an offence known to law. It is intolerable that a person should be subjected to the rigours of a trial based on a charge which in law is no charge. It should always be remembered that the provisions of s.129 of the Criminal Procedure Code are mandatory.

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The charge laid at the appellant's door having disclosed no offence known to law, all the proceedings conducted in the district court on the basis thereof were a nullity. Since you cannot put something on nothing, the learned judge of the High Court should have so held and proceeded accordingly. Since he did not do so, it falls upon us to do it. Exercising the revisional jurisdiction conferred upon this Court by s.4 (2) of the Act, we declare the purported proceedings conducted in the district court a nullity.

Having so declared the purported proceedings in the district court, we are constrained to allow the appeal. Accordingly, for reasons we have given, though they are very different from those relied upon by the appellant, we quash the order for restitution made by the High Court, which, very fairly, Mr. Mbago, at the close of his submission, declined to support. We order that the items of property listed in the purported charge, namely, 160 corrugated iron sheets, 40 bags of cement, 81 timbers and 20 kgs of roofing nails be returned to the appellant. Since the articles tendered before the trial court on May 24, 1990, should not have been tendered and when they were tendered should not have been admitted in evidence, as they had absolutely nothing to do with the "charge", we say no more about them.

DATED at MBEYA this 10th day of June, 1999.

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