

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MROSO, J.A., MUNUO, J.A., and NSEKELA, J.A.)

CRIMINAL APPEAL NO. 56 OF 2000

BETWEEN

ALLY TABU POLE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the conviction of the High Court
of Tanzania at Mtwara)**

(Kaji, J.)

**dated the 28th day of June, 2000
in
Criminal Appeal No. 18 of 1997**

JUDGMENT OF THE COURT

MUNUO, J.A.:

In Lindi District Court Criminal Case No. 159 of 1996, the present appellant was convicted with the offence of stealing by agent c/s 273 (6) of the Penal Code, Cap 16 for allegedly stealing from one Modesta Makala, assorted items valued at Shs. 346,750/= which had been entrusted to him for safe custody. Upon conviction, the trial magistrate sentenced the appellant to 6 months conditional discharge under the provisions of Section 38 of the Penal Code. The trial court also ordered that some of the exhibits, comprising 23 pieces of second hand corrugated iron sheets and two overalls be returned to the appellant. All the other exhibits

were restored to the complainant, Modesta Makala. Aggrieved by the conviction, sentence and the restoration of exhibits to the complainant, the appellant lodged Criminal Appeal No. 18 of 1997 in the High Court of Tanzania at Mtwara, before Kaji, J. The appeal against the conviction and sentence succeeded. Furthermore, the order restoring exhibits to the complainant was upheld by the High Court. Hence the present second appeal against the order restoring the exhibits to the complainant.

Before us, the appellant was represented by Mr. Sylvester Shayo, learned advocate. Mr. Mulokozi, learned Senior State Attorney, represented the Respondent Republic.

Counsel for the appellant faulted the courts below for restoring the exhibits in dispute to the complainant. He contended that because the complainant had given the properties in question to the appellant in lieu of wages, the latter lawfully acquired the same so the courts below should have ordered the restoration of the material exhibits to the owner, the present appellant. He thence criticized the learned Judge for erroneously restoring the properties in dispute to the complainant whereas they belonged to the appellant. Counsel for the appellant further asserted that the learned Judge should have restored the exhibits to the appellant under the provisions of Section 353 (3) of the

Criminal Procedure Act, 1985. Alternatively, he argued, ownership of the exhibits in question ought to have been established by civil action. All in all, counsel for the appellant prayed that the appeal be allowed and the order restoring the properties in question to the complainant be reversed in favour of the appellant.

Mr. Mulokozi, learned Senior State Attorney, conceded that the best option would have been for the parties to establish their ownership of the exhibits in dispute by civil action, under the provisions of Section 353 (1) of the Criminal Procedure Act, 1985. He maintained that subject to the law of limitation, the appellant could still proceed to recover the exhibits by civil action. The learned Senior State Attorney, nonetheless, supported the order restoring the exhibits in question to the complainant on the ground that the latter deposed that she never gave the material exhibits to the appellant so they were rightly restored to her. For that reason, Mr. Mulokozi prayed that the appeal be dismissed in its entirety.

The issue before us is whether the exhibits were rightly restored to Modesta Makala, the complainant.

To begin with, we wish to refer to the provisions of Section 353 (1) and (3) on the disposal of exhibits. Section

353 (1) provides, *inter alia*:

353(1) Where anything which has been tendered or put in evidence in any criminal proceedings before any court has not been claimed by any person who appears to the court to be entitled thereto within a period of twelve months after the final disposal of such proceeding or if any appeal entered in respect thereof, such thing may be sold, destroyed or otherwise disposed of in such manner as the Court may by order direct and the proceeds of such sale shall be paid into the general revenues of the Republic.

Section 353 (3) of the Criminal Procedure Act, 1985 states:

353(3) Notwithstanding the provisions of subsection (1), the court may if it is satisfied that it would be just

and equitable so to do, order that anything tendered, or put in evidence in criminal proceedings before it should be returned at any stage of the proceedings or at any time after the final disposal of such proceeding to the person who appears to be entitled thereto, subject to such conditions as the court may see fit to impose.

It appears to us that the provisions of Section 353 (1) of the Criminal Procedure Act, 1985 are inapplicable to this case because they apply where tendered exhibits have not been claimed by any person. Here, both the complainant and the appellant are claiming the exhibits restored to the former.

Back to the issue of whether or not the learned Judge should have upheld the order restoring the exhibits to the complainant, we are bound to come to a different conclusion for two reasons. First, this being a criminal case, the courts below ought to have resolved only the issue of criminal liability, which was, whether the appellant stole the properties entrusted to him by the complainant for safe

custody. The trial court convicted the appellant, but on appeal to the High Court, the conviction was quashed and the sentence was set aside, which is to say, the learned Judge found the appellant not guilty of the offence charged and rightly acquitted him for want of *mens rea*. Second, the question of the ownership of the exhibits recovered from the appellant's house was one of civil and not criminal liability so the trial court and the learned Judge erroneously issued the order for restoring the properties in dispute to the complainant.

Under the circumstances, and for the reason stated above, we allow the appeal.

DATED AT DAR ES SALAAM this 12th day of May, 2005.

J.A. MROSO
JUSTICE OF APPEAL

E.N. MUNUO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR