IN THE COURT OF APPEAL OF TAMZANIA

AT DODOMA

(CORAM: KILEO, J.A., KIMARO,J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 248 OF 2010

ERIOT EZEKIEL DZOMBE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dodoma)

(Mwangesi, J.)

dated 13th September, 2011
in
Criminal Appeal No.22 of 2008

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DISSENTING JUDGMENT

17th & 23rd September, 2013

KIMARO J.A.:-

The appellant and two others who were all employees of a company known as Saldina Investment were charged in the District Court of Dodoma with two offences. The first was conspiracy to commit an offence contrary to section 384 and the second was stealing by servant contrary to section 265 and 271, both offences falling under the Penal Code, [CAP 16 R.E.2002]. They were alleged to have conspired to steal a variety of commodities sold in the shop of Saldina Investment and also commiting the theft. The trial court convicted all accused as charged. They were

sentenced to seven years imprisonment for the first count of conspiracy to steal and ten years imprisonment for the offence of theft. The trial court in addition made the following order of compensation:-

> *"The shop items taken from the shops at Sabasaba together with the concerned three (3) shops (vibanda) are hereby forfeited and handled to the complainant (PW1) as they were obtained through the illegality i. e. stealing from his shop. Equally so, the money tendered in court, the cigarettes, the properties recovered during the search from the first accused's home, properties found with the second accused at the Tanzania Railways Corporation are for the same reasons confiscated and be handled to PW1 to recover part of the stolen properties from him. Each accused is further ordered to compensate PW1 Shs. 2,000,000/=."*

Their first appeal to the High Court was successful in respect of the other accused persons jointly charged with the appellant. For the appellant, his appeal succeeded in the offence of conspiracy. His conviction for the offence of theft and the order of compensation was sustained. The High Court also revised the sentence of ten years imprisonment that was imposed by the trial court for the offence of theft for illegality as the maximum penalty prescribed by the law for the offence is seven years. He reduced it to six years. Still aggrieved the appellant has now filed a second appeal to the Court.

His notice of appeal at pages 297 to 298 of the record of appeal shows that the appeal is against both conviction and sentence. However, his memorandum of appeal does not contain any ground faulting his conviction. His four grounds of appeal only challenge the legality of the confiscation of his shop items and the money which were tendered in court as exhibits and upheld by the first court on appeal.

The evidence that was given in the trial court was that, the appellant was an employee of Karim Halji (PW1) who was doing business in the name of Saldina Investments. His business was a mixed trade which included selling of bicycles, spares, food items, cigarettes, variety of soaps and other general sundry. He had stores which were connected with a counter. According to PW1 he employed the appellant on 7th July, 2001 and he was assigned duties in the store and at the counter. All purchases from the shop had to be made at the counter. They could not pass anywhere else. His shop was for whole sale.

It was the testimony of PW1 that on the 19th June, 2004 in the morning when he opened the shop, a customer by the name of Athuman Muhanga (PW3) went to the shop. He was the first customer. He made

an order for purchase of one box of chimney lumps and one box of Chai Bora and paid for the prices for each of the boxes after PW1 had made the calculations, for the prices. The appellant was required to bring the boxes. When he brought the boxes and put them on the ground, there was no sound from any of the boxes to indicate that one of them contained the chimney lumps. Because of that, PW1 became suspicious that the chimney lumps could have been broken. He called the shop Manager Ally Kajimbwa (PW2) to inspect the boxes. When the boxes were opened, one box contained 52 bundles of cigarettes and the other 11 bundles, No box contained lumps.

When the customer (PW3) Ally Mussa Muhanga a chips friar, was queried about the items, he said he was sent by the appellant to buy the items and that he had been doing that for the past eight months. Ally Katibwa (PW2) who was also an employee of PW1, a shop Manager who was also present when the boxes were opened, confirmed that the boxes were found to contain cigarettes and none of them had chimney lumps. Another employee of PW1 also present when the boxes were opened, was Bezareli Mkoi (PW4). He confirmed what PW1 told the trial Court.

Given that situation, PW1 put the appellant under custody on suspension that theft was committed. The matter was reported to the police. At the police station C 8911 D/SSG Ramadhani (PW8) did the investigation. His testimony was that appellant confessed before him that he was involved in the commission the offences. He also named other employees of PW1 namely Paulo Muhoja @ Ngosha and Aziz Mohamed @Mangara to have collaborated with him in the commission of the offence. These were the employees who were jointly charged with the appellant but as indicated, in this judgment they were released by the High Court on first appeal.

Following the confession of the appellant, the house of the first appellant was searched where several items were seized. PW8 said the appellant also took the police to Isidori Mseko (PW5) and Placid Edward (PW6) to whom he sold some of the items taken from the shop of PW1. The appellant was also found to be running a business of shops at Sabasaba area. Sebastian Manase (PW9), Didas Mvungi (PW10) and Athumani Abdallah (PW11) all testified that it is true the appellant was running a business of shops but he had a business licence and he paid for the relevant taxes. The search orders used in the search of the appellant's

house, and the shops were tendered and admitted in court as exhibits. The confessions made by the appellant; one, on 19th June, 2004 and the other on 21st June, 2004 were admitted as exhibits P4 and P14 respectively. Several items recovered in the search that was conducted in the house of the appellant and his shops were also tendered in court as exhibits. The appellant repudiated the confessions. He claimed that they were taken under torture and in the presence of his employer. He said he was forced to admit the commission of the offence. The trial magistrate, (Mr. Mzuna, PRM) as he then was, found that it was taken voluntarily.

In his defence the appellant insisted that he was not involved in the commission of the offence. He reiterated that his confession was not made voluntarily. He said he was tortured.

As already said, the trial court was satisfied that the appellant committed the offence and convicted him as charged.

During the hearing of the appeal, the appellant appeared in person. He had already completed serving his sentence. The respondent Republic was represented by Mr. Angaza learned Senior State Attorney. In arguing

the appeal the appellant said he repudiated his confession and he prayed that the properties confiscated by the Court be returned to him.

In supporting the conviction and the sentence that was imposed on the appellant, the learned Senior State Attorney said the appellant is not aggrieved by the conviction but by the order for confiscation. He said the appellant admitted in his confession to have committed the offence and how it was committed. Regarding the order of confiscation, the learned Senior State Attorney said that the Court cannot give an order for confiscation of an item not tendered in court as exhibit.

First, let me say that it is not true that the appellant is appealing only against the order of compensation. His notice of appeal as indicated above, is against the conviction and sentence. Rule 68(1) of the Court of Appeal Rules 2009 says:-

> *"Any person who desires to appeal to the Court shall give notice in writing , which shall be lodged in triplicate with the Registrar, of the High Court at the place where the decision against which it is desired to appeal was given, within thirty days of the date of the decision, and the notice shall institute the appeal".*

In this case the court is also required to address the issue of the conviction of the appellant, although he gave no specific ground of complaint. I say so because the appellant is not represented and this is a criminal matter and the Court is required to ensure that the rights of every party are protected. While it is not the intention of the Court to let criminal benefit from the proceeds of crime, it is also the duty of the Court to ensure that the charges laid against the suspected criminals are proved on the standard required by the law.

In convicting the appellant the trial court held:-

> *"After the mission was disclosed by the PW3 Athuman Mussa Muhanga, it was made clear that stealing through that same dubious means had been the practice for the past eight months. That stealing according to the cautioned statements of the first accused (exhibit P4 and P14) was done in corroboration with the second accused and third accused."*

The trial magistrate went on to evaluate the evidence of PW8 who recorded both exhibits P4 and P14 and the search that he made at the house of the appellant, the person to whom he sold the cigarettes and made the following conclusion:

"Given all the above evidence, can it be said that there was no stealing from the their employer PW1? Definitely there was stealing from their employer (PW1) and such stealing came into possession of the three (3) accused persons by virtue of their employment."

The first appellate court also made its own assessment of the evidence and in sustaining the conviction by the trial court held:-

"The totality of the foregoing testimonies of the witnesses, even without considering the contents of the caution statements of the appellant which did just add salt to the wound, sufficiently convinces this court that the offence of stealing against the first appellant had been proved. To that end, it declines to find merit in the contention of the appellant in this ground of appeal that the evidence of the witnesses was not properly evaluated by the trial court. As a result, the appeal by the appellant fails as it is not well founded."

I am mindful of the fact that this is a second appeal where the jurisdiction of the Court to interfere with concurrent findings of facts by the courts below is limited to mis-directions and non-directions hence resulting in a miscarriage of justice to the appellant. See the case of **Issa Said Kumbukeni V R.** [2006] T.L.R. 277 among others.

With respect to the learned judge on first appeal, I must say that he misdirected himself in the assessment of the evidence. The justification of

my finding is based on the contradiction of the evidence of the prosecution witnesses one to four. To start with, the caution statement of the appellant which he repudiated, and the evidence of PW1 and PW3 contradicts itself on how the theft was discovered to have been committed.

The caution statement of the appellant Exhibit P4 says:

> *"Mnamo tarehe 19/04/2004 mnamo saa 09.00 hrs Nilikuwa kazini. Muda huo huyu tajiri wa SALDINI INVESTMENTS LTD alinikuta na sigara katoni moja aina ya Sportsman na Auter kumi na mbili za Sportsman. Aliniuliza kuwa sigara hizo unapeleka wapi? Mimi nilimjibu kuwa namuuzia Mchaga anaitwa Mangi anakaa Makole. Dodoma Mjini. Huyu Mangi alikuwa na risiti? Hapana. Huyu Mangi mimi sikuwa nimemwandikia risiti ila nilikuwa nimeiba mimi mwenyewe kwa SALDIN INVESTMENT LTD. Baada ya hapo nilikamatwa mimi na sigara hizo ndipo alinileta mimi hapa Polisi. Baada ya kufika hapa Polisi nilikiri kuiba bidhaa aina ya sigara tu kila wakati hapo dukani lakini kwa kushirikiana na AZIZ S/O MANGALE na PAULO S/O MUHOJA. Katika wizi huo huyu AZIZ s/o MAKALE huwa anazichukua kutoka store ya duka na kuziweka kwenye mabox ambayo siyo ya sigara kama baby lotion, Chal Jaba , box za Chemli na tunafunga na gundi ila mtu mwingine yeyote hawezi kujua kama kuna mali tofauti na ilivyogunduliwa kwenye box. Baada ya kuuza fedha huwa tunagawana watu wote watatu."*

The additional statement he made on 21st June, 2004 was mostly concerned with the shops he was operating at the Sabasaba area.

On the other hand, the evidence of PW1 the owner of the shop was quite different from the caution statement of the appellant on what occurred on the 19th June, 2004. PW1 said PW3 went to the shop as a normal customer. He made an order for purchase of Chai Bora and Chimney. He paid for them. The appellant was ordered by PW1 to bring the boxes containing the commodities which PW3 purchased. He ordered the boxes to be opened because he did not hear any sound from the chimney box. The question I ask myself is; if what happened on 19th June, 2004 was what the appellant confessed to have taken place, then why did PW1 and PW3 give a different version of what took place? This was also the evidence of PW3 and PW4 both employees of PW1. All the four prosecution witnesses said they were present when the incident happened. If the confession of the appellant was true why should it differ with the evidence of the four prosecution witnesses? I am aware that this the Court held in the case of **Paul Joseph V R** Criminal Appeal No. 67 of 2001 (unreported) the court held that in criminal cases the best evidence is an accused person who confesses his guilty especially if he does so in the cause of the defence. The facts of this case however, can be

distinguished from the case of **Paul Joseph.** As indicated the appellant repudiated his caution statement even at the time of his defence.

In criminal cases the burden lies on the prosecution to prove the charge against the accused beyond reasonable doubt. The duty of the appellant was to cast doubt on the prosecution evidence and in this case I would say that he managed to do so.

In the first, place, the caution statement of the appellant was taken in contravention of section 50(1) (a) of the Criminal Procedure Act, [CAP 20 R.E.2002]. That section required PW8 to record the statement of the appellant within a period of four hours after his arrest. PW8 while giving his testimony said he saw the appellant on that day at the police station at 9.00 a.m. However, he recorded his statement at 7.00 p.m. That was beyond the four hours required for taking a statement of a suspect and no explanation was offered by PW8 why there was a delay in recording the statement. The caution statement of the appellant ought to have been disregarded.

Secondly, because the appellant repudiated that statement, it was not safe for the court to convict the appellant because the evidence as

given by PW1, PW2, PW3 and PW4 did not prove the offence of theft. Going by the evidence of the four witnesses, the boxes had not left the shop of PW1.

Section 258 of CAP 16 which gives the ingredients of theft says:

> *"A person who fraudulently and without claim of right takes anything capable of being stolen or fraudulently converts to the use of any person, other than the general or special owner there of anything capable of being stolen steals that thing."*

Since there was no evidence at all from the prosecution witnesses that the appellant was found carrying the boxes of cigarettes without the same being paid for, and he was taking them to a person who was not even disclosed, the appellant could not be charged with offence of theft after repudiating the caution statement which I have said substantially differed with the evidence of prosecution witnesses one to four.

Thirdly, the evidence of PW3 showed that the offences which were allegedly committed by the appellant were committed on different dates. According to the charge sheet, it was between 1st January, 2001 and 19th and 19th June, 2004. However, the evidence of PW1 was that he employed

the appellant on 1st July, 2001. How could the appellant have committed the offence even before he was employed? This shows that it was necessary for the prosecution to sort out how the offences were committed and on what dates, and lay proper charges for the appellant instead of just laying an omnibus charge which not only made it difficult for the prosecution to prove but also prejudiced the appellant's defence. PW3 while giving evidence, he said he used to go to the shop of PW1 after getting instructions from the appellant and he was issued with commodities after paying for the same and after being issued with a receipt. He said he did that for the past eight months. However, he did not mention the dates. Under such circumstances, it was improper for the prosecution to charge the appellant with only one count. That contravened section 132 of CAP 20. That is why even the learned judge on appeal remarked, when dealing with the order of compensation order made by the trial court that:

> *"I believe that the trial court did give that general order after failing to find a method that could have been used to single out the items that might have been legally obtained and those obtained illegally. This court is in the same dilemma, as such it has no sound justification to fault the order of the trial court for confiscation of the items regarding the first appellant."*

Given the deficiencies in the prosecution case, I find the appeal by the appellant having merit. I quash the conviction and set aside the sentence and the order for compensation. I order that all properties taken from the appellant be returned to him.

DATED at **DODOMA** this 21st day of September, 2013;

N. P. KIMARO
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL