

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CRIMINAL APPEAL NO. 248 OF 2013

(KILEO, J.A., And MASSATI, J.A.)

**ERIOT EZEKIEL DZOMBE APPELLANT
VERSUS
THE REPUBLICRESPONDENT**

**(Appeal from the Decision of the High
Court of Tanzania
at Dodoma)**

(S. S. Mwangesi, J)

Dated 13th day of September, 2010

In

Criminal Appeal No. 22 of 2008

JUDGMENT OF THE COURT

17th & 23rd September, 2013

MASSATI, J.A.:

The appellant, along with 2 other persons were charged with one count of conspiracy to commit an offence, and one count of stealing by servant. The offences are alleged to have been committed between 1st January 2001 and 19th June, 2004 at SALDINA INVESTMENTS LTD in Dodoma. They were alleged to have stolen a total of 42^{1/2} cartons of cigarettes, and 25 Nacet Razor Blades, all valued at Tshs 28,279,000/= . At the end of the trial, the District Court of Dodoma, convicted the trio and sentenced them to 7 and 10 years imprisonment for the 1st and 2nd counts

respectively; ordered them to pay a compensation of Tshs 2,000,000/= each and on top of that, ordered a confiscation of the appellant's shops at Sabasaba. On appeal, the High Court quashed the convictions of the appellant's compatriots, and the consequent sentences and orders of compensation. The appellant's appeal against conviction in the first count was allowed, but the one in the second count was disallowed. However the sentence of 10 years was reduced to 6 years. With regard to the order of compensation, the High Court said:

"It is the view of this court that the order of confiscation of all items recovered from the premises of the first accused premises did suffice, to that end the order of compensation of money is annulled to all".

Although in his Notice of Appeal, the appellant had sought to challenge both conviction and sentence, in his Memorandum of Appeal, he appears to have abandoned the idea and so he concentrated on challenging the propriety of the order of confiscation of his properties. This, he sought to do on the following grounds:

- (i) That the confiscated items were not listed in the preliminary hearing and therefore not part of the prosecution case.
- (ii) That as the said items were his, the order of confiscation was wrong.

At the hearing of the appeal, the appellant appeared in person, and insisted that it was wrong for the Courts below to have made an order of confiscation, and prayed that these properties be restored to him. Thus he prayed that his appeal be allowed.

Mr. Angaza Mwipopo, the learned Senior State Attorney, who appeared for the respondent/Republic resisted the appeal, and submitted that, there was overwhelming evidence on record, including the appellant's own confession (Exh. P4) that he acquired all the properties by stealing from PW1. Therefore the order of confiscation was legit. He thus prayed that the appeal be dismissed.

The issue in this appeal is a narrow one; whether the order of confiscation of the appellant's properties following his conviction was proper and lawful?

Generally, the execution of sentences and other orders in all trials in the subordinate courts and the High Court are spelt out in Part IX of the Criminal Procedure Act Cap 20 RE 2002. The powers of the *courts* to order compensation, costs, forfeiture, restitution, confiscation, and disposal of exhibits is covered in section E of Part IX.

In the present case the two courts below used the word "confiscate." This word is used in section 351, which reads:

351(1) where a person is convicted of an offence

and the court which passed the sentence is satisfied that any property which was in his possession or under his control at the time of his apprehension;

- (a) has been used for the purpose of committing or facilitating the commission of an offence or*
- (b) was intended by him to be used for that purpose that property shall be liable to forfeiture and confiscation and any such property so forfeited under this section shall be disposed of as the court may direct".*

So, to our understanding, "confiscation" can only be ordered if the property found in possession of an accused person has been used or is intended to be used for the purpose of committing or facilitating the commission of an offence. In the present case, there is uncontroverted evidence that the appellant was found in possession of several properties which were tendered as exhibits; but there is no suggestion or evidence that these items were used or intended to be used to facilitate the commission of an offence or offences. Rather, all the evidence points to the direction that they were ill gotten, they were proceeds of crime. In our view the trial court could not have issued an order of confiscation. It was wrong.

However that wrong is not without a remedy. The trial Court had and this Court has in this appeal the power and jurisdiction to order the return of the properties tendered as exhibits to the person who appears entitled to such properties. These are provided in section 353 and 358 (1) of the CPA.

In the present case, the appellant was charged with stealing 42^{1/2} cartons of cigarrates. Cigarrates were among the items which were tendered in court as Exhibits P1, P2, P3, P8, P9 and P10. These could easily be ordered to be returned to the owner on the authority of section

353 of the CPA. But the other exhibits such as P5 (the 22 T shirts etc) P6 (shs 1 million which the appellants denied any knowledge of) P7 (shs 1165,000/= found in artory) P11 (other properties) P12 (female shoes) P13 (female shoes) P14 (the appellant's signature) P15 – P16 (the sewing machine) P17 (TV screen) P18 (20,000/=)cash, P19 (19 (a bunch of keys to the three shops), P20 (TIN Certificate), P21 (appellant's photos) P22 (Business licence) and P23 (lease agreements to the shops) were remotely connected with the charges facing the appellant and could not legitimately be ordered to be restituted to the complainant. The trial court also ordered that the appellant's kiosks be confiscated. Assuming the trial court had such powers, it ignored the evidence on record (PW11) that the plot on which the kiosks were built belong to CCM Youth League. Such an order was therefore contrary to land law (which defines land as including anything built on it;) let alone the clear provisions of the CPA.

That said, we think that the order of confiscation was made in excess of the trial court's jurisdiction. If the court wanted to see that the complainant was justly compensated for what was stolen from him, it could only do so in respect of those properties directly related to the offence, recovered from and with which the appellant was convicted. That is as far

a court in a criminal case could go. If he was dissatisfied with the quantum of the compensation, it was open to him to institute civil proceedings to recover whatever he believes he is entitled.

For these reasons, this appeal succeeds in part. The order of restitution is modified to cover only the value of Exhibits P1, P2, P3, P8, P9 and P10. As there is no evidence to establish the complainant's ownership to the other exhibits, they should, in all fairness, be restituted to whomsoever they were seized from. The order confiscating the shops is equally illegal, in view of the evidence that the land in which they are built does not belong to the appellant.

Ordered accordingly.

DATED at DODOMA this 18th day of September, 2013.

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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


M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL