IN THE HIGH COURT OF TANZANIA

AT TABORA

MISCELLANEOUS CRIMINAL CAUSE NO. 40 OF 1 975

In the matter of an application for

LEAVE TO APPEAL OUT OF TIME

and

In the matter of Criminal Case No. 26 of 1975 in the District Court of Mpanda District at Mpanda.

THE REPUBLIC

versus

WILLIAM SIKAZWE

JUDGEMENT

KIMICHA, J. - This is an appeal against conviction and sentence.

The appellant in this case William Sikawe was convicted, with another person, whose appeal was allowed by the Tabora High Court vide criminal Appeal No. 85 of 1975, of office breaking and stealing shs. 460/-.

The Tabora High Court judgement which allowed the appellant's co-accused in the lower court is reproduced below for easy reference.

JUDGEMENT

"The appellant SALVATORY S/O BARABARA was convicted of office breaking, contrary to Section 296(1) of the Penal Code. Another accused William s/o Sikazwe who was tried jointly with him was also convicted and has, apparently, not appealed. They were referred to as the first and second accused respectively and I will continue calling them so in this judgment.

The particulars of the offence recited that on 28/12/74 at about 17.30 hours, at Mpanda, the two accused persons broke into the office of the Mbeya Region Co-operative Union whence they stole cash,

shs. 460/-, the property of the said Union. Both pleaded 'Not Guilty' to the charge.

The prosecution's case established and there was no dispute that the office was in fact broken into and the money which belonged to the Union stolen during the night in question. At that time the first accused and the second accused were in employ of the Union at that office as cashier and watchman respectively. It was also not in dispute that the offence was committed when the second accused was on duty or supposed to be on duty at the office.

There were three pieces of evidence against the first accused. The first was an allegation that he had been absent from duty from 24/12/74 to 30/12/74, during which period the offence took place. Very obviously, this by itself was too weak to connect him with the crime. And in any case, the accused who admitted that he was absent during that period, gave an explanation in that regard, which explanation was fully backed up by P.W.2 Mlimbila who was incharge of the office. It was simply that there was no work for him to do at that time and he did not see any sense in going to the office. Indeed, the learned Magistrate found that explanation reasonable.

The second piece of evidence was that on 28/12/74 during the afternoon, the first accused had gone to the house of P.W.2 and asked for a salary advance. P.W.2 told him that the money was in the office and promised that he would lend him the amount he needed on the following day. In substance, the first accused did not deny that account and, needless to observe, that fact alone could not have implicated him in the offence.

The third piece was a statement to Detective Sergeant David (P.W.1) by the second accused in which he fully implicated him. According to both P.W.1 and P.W.2, the second accused first denied any knowledge of the culprit and that it was only when he was giving a statement to the Police in writing, that he started to implicate the first accused. But, in effect, the second accused retracted that statement when he gave evidence on oath at his trial. He claimed that what he wrote at the Police Station was what was dictated to him by the Police.

The learned trial Magistrate held that the statement of the second accused to the Police was true and that the fact that the first accused was at the material time in great need of money fortified him in that belief. He concluded his judgment in the following terms:

> "There have been all evidence that there was money received by P.W.2. There is agreement that P.W.2 and first accused agreed to meet on 29/12/74 so that the first accused could be advanced the money. So the first accused after knowing that the money was in the drawer. of P.W.2, he went and conspired with the second accused and stole it. The second accused was not an accused when he revealed what happened (which is debatable). I feel that there is enough circumstantial evidence to make this court safely act

> on it. I believe that the accuseds had conspired and broke the office and stole money as alleged .... I convict both accused as charged."

The appeal is mainly on the following four grounds (with suitable alterations):

> "(1) That if really the second accused saw me enter the office through the window, why did he not take any step to apprehend me;
>
> (2) That if the second accused saw me breaking into the office, why did he not say so at the first instance when he was questioned about it;
>
> (3) That if what the second related to the Police at the Police Station was true, why did he not repeat it in court throughout the trial; and
>
> (4) That the fact that I had approached P.W.2 for money could not have established the offence against me beyond reasonable doubt".

I must say at once that there is considerable merit in each of these arguments. It is clear that the learned Magistrate based the conviction principally on the statement of the second accused at the Police Station. That statement, as the learned Magistrate found, conflicted with what he had earlier told the Police in material particulars, and as earlier remarked, it was actually retracted by the second accused when he gave evidence in court. Let alone that the repeated inconsistencies were a reflection on his credibility, the fact that he was, in the circumstances of this case, naturally the first prime suspect, introduced a big element in his motivation for shifting the blame for the offence on another person. And since he did not at all implicate himself in that statement, there was strong cause to doubt the veracity of his story.

But, that is only on the assumption that the statement was evidence against the first accused. The true position is that it was not and thus it should not have been taken into consideration against the first accused. I will remind the learned Magistrate that even in a situation where an accused implicates his co-accused in an unsworn statement made in court, that statement cannot in law be taken into consideration against the co-accused: See Patrici Ozia VR - 1957 at 36, among many authorities. It would have been different if the second accused had given such evidence in court on oath or affirmation.

In that event his evidence would have been on the same footing as that of any other witness and might have been taken into consideration against the first accused irrespective of whether the second accused would have implicated himself or not: Of course, bearing in mind that it is essentially accomplice evidence.

The sum of it all is that the conviction was certainly based on evidence which was bad in law and weak in fact and it is not surprising that Mr. Mtabaye for the Republic felt bound to concede straightaway that he did not support the conviction.

The appeal is accordingly allowed and the conviction quashed. The sentence of five years imprisonment, which incidentally was excessive, as well as the order for compensation, are set aside and the appellant is to be set free from custody forthwith unless he is detained on another lawful ground."

The appellant's grounds of appeal are that

(1) That I neither saw the 1st accused nor anybody else enter the office through the window during all that time when I was on guard.

2. That the Police threatened to harm me and then they forced me to sign on the paper they had prepared without my knowledge. In actual fact I signed for something which I had not a prior knowledge of its contents.

3. That had there been any trouble at the office I would not have hesitated to contact my fellow watchman on the matter.

4. That I was conducting my duties very smoothly. Therefore I did not know what happened in the office as I had checked the door and the window and seen that they were locked and shut respectively.

5. That the trial learned Magistrate made an error by considering the statement which the police prepared and forced me to sign. In fact this evidence was completely unreliable.

6. That I never know where the money was left at our office and therefore I was completely inocent of the alleged stolen money. Whether the money was kept in a safe or in a drawer I could not know. And to the best of my knowledge no one opened the window and entered the window during my office hours.

In view of the 1st accused's acquittal by the High Court nd in view of the fact that ap ellant's ground 6 of his ppeal could be true and that It was possible that the omplainant P.W.2 Martini Mikimbila could have misappropriated he money hurridly and then stage the theft, I find it unsafe o uphold the appellant's conviction.

The appeal is for the above reasons allowed. The onviction is quashed and the sentence and orders made there nder are set aside.

The appellant is to be set at liberty forthwith unless held lawfully under other charges.

M. P. K. KIMICHI

JUDGE

4/5/1977

Delivered in open court this 6th day of May, 1977.

(M. P. K. KIMICHI)

JUDGE

6th May, 1977