

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

CRIMINAL APPEAL NO. 39 OF 2004

SHABANI ALLY.....APPELLANT

VERUS

REPUBLIC.....RESPONDENT

JUDGMENT

ORIYO, J

The appellant, SHABANI ALLY, was employed by the TRA at its Regional Branch in Morogoro as a TAX COLLECTION ASSISTANT (Cashier). He worked in the Computer Department. His duties included receiving payments, issuing of receipts, posting the transactions in the computer and later on, he handed over the day's collections to the Chief cashier, accompanied with the relevant documents.

Sometimes in November, 1998, TRA received information that the appellant was preparing and issuing CASH copy receipts with figures that differed from those in the originals. After some investigations they were able to get hold of some of the original receipts from customers. After comparing the original receipts of the taxpayers and the duplicates in the taxpayers file, it was discovered that those figures differed, with those in the third copies, which are

given to the cashier; and the fourth (book) copies which showed lesser sums of money. The appellant was summoned to explain the discrepancy in one of the receipts he issued to one ANDREW MKUDE, with serial No. A 394020, whereby the original and duplicate receipts showed the sum paid as Shs. 190,000/= but the third and fourth copies showed the lesser sum of shs. 100,000/= only; which reflected a difference of Shs. 90,000/=. He admitted the discrepancy and explained that it was due to "bad luck" because on the material date he had a deficit of Shs. 90,000/= in his books. He also admitted to have failed to notify those in charge. This prompted an investigation which discovered similar other discrepancies. Subsequently, an audit was carried out on the accounts and a loss of Shs. 5,376,624/= was discovered. TRA reported the matter to the police.

The appellant was charged at the District Court of Morogoro and charged with 35 counts of Fraudulent False accounting, each, contrary to SECTION 317(b) of the Penal Code and 35 other counts of Stealing by person in the public service, each contrary to SECTION 270, Penal Code. He pleaded not guilty to all the 70 counts. At the end of the trial, he was convicted on all the counts. He was sentenced to two years imprisonment for each count of Fraudulent False Accounting; subject to confirmation by the High court. He was also sentenced to 6 years imprisonment for each count of stealing by public servant. The sentences were to run concurrently.

At the trial, 7 witnesses testified for the prosecution. These were the TRA Morogoro regional Revenue Officer, Lusekelo Mwaseba (PW.1); a Senior Tax Collector and in-charge of the Income Tax Department where the appellant worked, Godfrey Lawrence Kilapilo (PW.2); the Chief Cashier in the Income Tax Department, Vendelin Raphael Mashayo (PW.3); and a Senior Internal Auditor at the TRA Head Office, Dar es salaam Kashwambo Mzamini, (PW.6). Others were two of the customers whose payments were affected by the said discrepancies; Miraji Said Mgalula, an accountant with Tanzania Tobacco Cooperative Apex, (PW.4) and Marco Kirongamaka, a businessman (PW.5). The last prosecution witness was a handwriting expert from the Identification Bureau of the Police; No. C8565 D/CPL Othman Amour Abdullah , (PW.7). The appellant who called no witnesses, defended himself.

PW.1,PW.2 and PW.3 who worked with the appellant in the TRA branch office in Morogoro had similar testimonies. They told the court how they received the information on the discrepancies, conducted an investigation, got hold of some of the original receipts given to customers with the actual sums of money paid and confirmed that the corresponding third and fourth copies of the receipts showed lesser sums of money. They also testified on the appellant's reaction when asked to explain the discrepancy in one of the receipts (Andrew Mkude's) as mere bad luck due to a shortage in

the accounts on the particular date. They further stated that the appellant's response prompted further investigation in which several other discrepancies were unearthed and an audit of the accounts had to be carried out. They told the court that the audit revealed a loss of Shs. 5,376,624/= had been occasioned through such discrepancies.

These witnesses further explained that there was a laid down procedure in the accounts section in respect of payments received. It was explained that when issuing a receipt the appellant had to record the receipt number and the corresponding sum of money in a special form called "cash/ cheque received sheet". There were four copies in the issued receipt which were distributed as follows:-

"The original is given to tax payer, duplicate is kept in the file of tax payer; the triplicate and the cash/cheque received sheet is given to chief cashier with the day's collection and the fourth copy is the book copy which remained in the receipt book. The chief cashier verified the third receipt copy and the cash /cheque received sheet; and if the figures tallied would send the third receipt copy and the original of the sheet together with duplicate and triplicate copies to the accounts section and return the cash/cheque received book to the appellant. The Chief Cashier did the banking; and thereafter

submitted one copy of pay-in-slip to the accounts section and one copy retained in the records of the chief cashier."

PW.4, Miraji Saidi Mgalula, testified how on 10/12/97 he went to the TRA offices in Morogoro to make payment for income tax assessed for his employer, Tanzania Tobacco Cooperatibe Apex (T.T.C.A), for the year 1995. He stated that he paid Shs. 570,000/= in cash to the cashier whom he identified as the appellant in the dock. Further, he stated that the appellant issued him with an original receipt number A. 381413 of the same date for the full amount of Shs. 570,000/=.

The testimony of PW.5, Marco Kilongomaka, a businessman was similar to that of PW.4. He informed the court that he annually paid income tax for his timber and furniture business at the Morogoro TRA Offices. He testified that on 5/5/98, he paid income tax of Shs 218,00/= in cash. The said sum was received by the appellant whom he identified as the one in the dock and was issued with an original receipt number A.385 908 for the sum tendered.

PW.6, Kashwambo Mzamini, carried out the auditing of the accounts books and discovered the loss of Shs. 5,376,624/= occasioned during the period covered in the audit; from May, 1997 to

November 1998. He told the court that the loss was occasioned due to non compliance with the laid down cash procedures and that some of the taxpayers names were fictitious because they were not listed in the Taxpayers Register. The Audit Report was admitted as Exhibit "P1" .

PW.7, the handwriting expert, told the court that he had examined specimen handwriting and signatures of the appellant taken before the police and compared them with the appellant's handwriting and signatures taken in his ordinary course of work. He testified that in his opinion, the handwriting and signatures in the specimen and those in the disputed TRA documents such as receipts, cash/cheque received sheets, etc, were of the same person. With regard to the signatures he said that he found.

"significant similarities in letter and stroke formation
common to the disputed and specimen signatures."

As for the handwriting he found:-

"similar common characteristic letter formation".

His report was admitted as Exhs. P.2, P.3,P.4".

The appellant, DW.1, told the court in his testimony that he was not the only one issuing receipts at the TRA offices in Morogoro. He stated that there were many of them and they did the job in rotation. He testified that during the period under inquiry he remembered to have been on duty and issued receipts on the following dates, namely:-

10,17,18,23 and 30 December, 1997 and 5/5/98, 12, 19,23 and 26 October, 1998. He complained on why the customer, Mkude; and the investigating/arresting police officer were not summoned to testify so that he could have cross examined them.

The appellant appealed to this court against the conviction and sentence. The appeal was based on 11 grounds, most of them being on the insufficiency of the the prosecution evidence to prove the case beyond reasonable doubt. His other ground is on the failure to summon D/CPL Mosses, for cross examination.

At the hearing of the appeal, as in the trial court, the appellant had no legal representation; he appeared in person. The Republic was represented by Mr. Mweyunge, learned state attorney. He supported the conviction and sentence on the ground that the prosecution had proved its case beyond reasonable doubts through the testimonies of PW.1 to PW.7. On the failure to summon D/Cpl Mosses. Mr Mweyunge submitted that the same can be

cured/rectified pursuant to the provisions of SECTION 388, of the Criminal Procedure Act, 1985. He further submitted that if the omission cannot be so rectified; this court has discretion to summon D/Cpl Moses as it deemed appropriate.

Let me begin by identifying the issues for determination. It is my considered view that there is only one issue for determination here, that is, whether on the totality of the evidence on record, the charges of Fraudulent False Accounting contrary to section 317(b), Penal Code and Stealing by public servant contrary to Section 270, Penal Code against the appellant were proved beyond reasonable doubt.

It is not in dispute that the appellant's duties at the TRA Office, Morogoro branch included receiving income tax payments from taxpayers, issuing of receipts for the sums received and posting the details of such payments into the computer. During his testimony at the trial he admitted to have been on duty as a cashier and he received income tax payments and issued receipts for the payments received. The relevant dates were the dates of December, 1997; on 10th, 17th, 18th, 23rd and 30th. Other dates were in October 1998; on the 12th, 19th, 23rd, 26th and 5th May. 1998. According to the record, several discrepancies were committed on those dates. The appellant is on record to have admitted to have intentionally made discrepancies on 12/10/98 on receipts issued in respect of Andrew

Mkude in order to cover up a deficit he had occasioned in the books of accounts but did not inform his superiors at the office. Further, PW,4 and PW.5, were customers/tax payers, who testified that it was the appellant who received their cash payments and issued them with receipts. They identified the appellant in the dock. The triplicate and quadruplicate receipt copies of the customers were discovered to show lesser sums than those in the original and duplicate receipts.

Examples of some of the payments made and the relevant receipts issued with discrepancies by the appellant on some of the dates he admitted to have been on duty are as shown here:-

DATE	CUSTOMER	RECEIPT NO	AMOUNTS PAID AND RECEIPTED		LOSS
			ORIGINAL AND DUPLICATE	TRIPLICATE AND QUADRUPLICATE	
10/12/97	Tanzania Tobacco Cooperative Apex	381413	579,000/=	50,000/=	519,500/=
18/12/97	Mohamed Abdulrasul	381,646	256,762/=	56,766/=	199,996/=
17/12/97	- " -	381033	300,034/=	33,750/=	260,284/=
23/12/97	Mehboob H. Gulamali	381099	200,000/=	20,000/=	180,000/=

30/12/97	Ram Singh H and Sons	38182 8	525,000/=	50,225	474,775/=
- " -	Bachoo B. Bachoo	38178 9	77,000/=	6,700/=	70,300/=
5/5/98	Marco S.L Kitongamaka	38590 8	218,000/=	6,000/=	212,000/=
- " -	Syat A.M. Salum	38591 8	218,000/=	6,00/=	212,000/=
- " -	Gabriel M. Kinyonge	38592 1	70,000/=	7,500/=	62,500/=
- " -	Hassan M. Hamza	38592 6	80550/=	8,000/=	72,550/=
12/10/98	Andrew Mkude	39402 0	100,000/=	10,000/=	90,000/=
- " -	Doropet Malenga	39402 9	463,418	40,663/=	422,755/=
19/10/98	Edward Shaid	39424 6	79,830/=	7,900/=	71,930/=

In the light of the abundance of evidence, available on record on the discrepancies occasioned and taking into account the appellants own admissions made, the prosecution had proved its case beyond reasonable doubt. In my view, actually the appellant's conviction was on his own constructive plea of guilt. In the result,

the trial court cannot be faulted for convicting the appellant as charged.

On account of what I have stated above; the failure to summon D/CPL Mosses did not create any weakness in the prosecution case or occasion any injustice to the appellant. D/Cpl Moses testimony as an investigator/arresting officer would not have changed the material testimonies of PW.1 to PW.7. Further to that the appellant's own admissions were sufficient to convict him.

Now let me turn to the sentences imposes. The penalty imposed by law for the offence of Fraudulent False Accounting under Section 317(b), is 14 years imprisonment. Upon conviction on the offence of stealing by public servant under Section 270, Penal Code, one is liable for imprisonment of 14 years. The trial court sentenced the accused to two years imprisonment on each of the 35 counts of fraudulent false accounting; and six years on each of the 35 counts of stealing by public servant. The sentences were ordered to run concurrently.

There is no doubt that both offences are rampant in the society and should be curbed. The sentence of 2 years imprisonment on each count of Fraudulent false accounting is on the low side. Taking into account also the manner the appellant was committing the offences with impunity against all the laid down procedures; I

substitute the sentence of 2 years with that of four (4) years imprisonment on each count of fraudulent false accounting. For the offence of stealing by public servant, the sentence of 6 years imprisonment is sufficient under the circumstances and is upheld. Both sentences to run concurrently.

I wish to conclude with a word on the offence of stealing by public servant, contrary to Section 270 of the Penal Code. I noted that the trial court stated that it is a scheduled offence and therefore subject to the Minimum Sentences Act of 1972. I wish to draw the attention of the trial court that the offence is no longer subject to the Minimum Sentence Act pursuant to the amendments effected by the Written Laws (Miscellaneous Amendments) (No.2) Act 2002. Act No. 9/02 amended Section 4 of the principal act by deleting paragraph (a) thereof and deleting the First Schedule as well. Therefore the offences listed under the First Schedule including stealing by public servant are no longer scheduled offences since 12/4/2002. The remaining schedules were renumbered accordingly.

In the result and for the reasons above, the appeal is dismissed in its entirety conviction upheld and the sentence is varied to the extent indicated.

K.K. ORIYO

JUDGE

3/5/05

Date: 30/5/2005

Coram: S. Lila DR. DSM

For the Appellant - Present

For the Respondent - Mwema S.A

C.C. Ms. Msekwa

Order: Judgment delivered today in the presence of the appellant and learned Mwema S.A for the Respondent.

**S.A. LILA
DISTRICT REGISTRAR
30/5/2005**

2,447 words