

IN THE HIGH COURT OF TANZANIA  
AT MTWARA

CRIMINAL APPEAL NO.22 OF 2007  
ORIGINAL MTWARA DISTRICT COURT  
CRIMINAL CASE NO. 270 OF 2006  
BEFORE: M.C. MTEITE, ESQ: RM

SOMOYE HAMISI ..... APPELLANT  
VERSUS  
THE REPUBLIC ..... RESPONDENT

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DATE OF LAST ORDER – 18/10/2007  
DATE OF JUDGMENT - 05/12/2007

JUDGMENT

MJEMMAS, J.

The appellant Somoye Hamisi was tried, convicted and sentenced to five years imprisonment by the District Court of Mtwara for the offence of Stealing by agent contrary to sections 265 and 273(b) of the Penal Code, Chapter 16, Volume I of the Laws.

It was alleged in the charge sheet that the appellant "on 9/6/2006 at about 0800 hrs at Majengo area within Municipality of Mtwara Mikindani, Mtwara Region did steal cash TSh.850,000/= the property which had been entrusted to her by Abdallahmani s/o Dadi to buy 10,000 kg of maize instead she converted the said money for her own use." The appellant denied the charge.

The prosecution called three witnesses to prove its case. PW.1 – Abdulrahman Dadi testified that he is a businessman doing business of buying commodities from Mozambique, Lindi and Mtwara. He said that the appellant who is also a businesswoman is related to his wife. PW.1 went on to tell the court that on 9/6/2006 the appellant went to his house and informed him that there was a lot of maize in her village (Nkohe) and a kilograme was sold at TSh.80.00. PW.1 gave the appellant 850,000/= shillings for purchasing ten (10) tones of maize i.e TSh.800,000/= and TSh.50,000/= for purchasing containers. According to PW.1, when he gave the appellant the money there were other people including Salum Said. During cross examination by the appellant he said that his wife and two persons were present when he gave the appellant the money. After sometime, PW.1 received information that the maize was ready for collection. He went to Nkohe village but the appellant could not show him the maize. The complainant – PW.1 informed one Mzee Lichika who is the brother of the appellant about the incident. The said Mzee Lichika organized a meeting whereby the appellant promised to refund the money. She failed to refund the money so PW.1 decided to report the matter to the Police.

PW.2 told the court that on 9/6/2006 he went to the house of PW.1 to watch a football match. While at the house of PW.1, the appellant and her husband arrived whereby PW.1 introduced them as his inlaws. According to this witness, PW.1 informed him that he wanted to give the appellant some money to buy maize from the village and since his wife was not present PW.2 could be his witness.

Then Pw.1 gave the appellant 850,000/=. PW.2 went on to tell the court that in August, 2006 they (PW.1 and PW.2) went to Nkohe village to collect the maize but they did not get any. He said further that he attended a meeting at Mzee Lichika's house whereby the appellant promised to repay the money to PW.1.

During cross examination this witness said that the money was given during day time and that the appellant left after receiving the money. He also said that he did not know where the complainant's (PW.1) wife went.

Another prosecution witness – PW.3 told the court that on 9/6/2006 he was present when PW.1 gave the appellant Tsh.850,000/= for purchasing ten tones of maize. He also said that PW.1 instructed him to go to Nkohe village to collect maize from the farm to the place where the same would be transferred to Mtwara. He managed to collect forty (40) bags of maize and he left the village after had received a telephone call that his child was sick. The witness said that he attended conciliation meeting which discussed about the missing maize.

When the appellant was called to make her defence she simply said that on 9/6/2006 she was at Nkohe village. She also narrated how on 15/6/2006 when she was at the market in Mtwara, was called to go to the Police Station where she met Riadha Abdurhman who is also known as Abdurahman Dadi (PW.1) and was told to find sureties. She did not mention anything about Tsh.850,000/=.

At the hearing of this appeal the appellant appeared in person, unrepresented. She did not have much to say. She asked the court to look into her petition of appeal and decide the matter. The appellant has raised about six grounds of appeal which for the purpose of clarity could be reduced into the following:

- (a) No written document which was tendered to prove that I received such a huge amount of money.
- (b) PW.2 and PW.3 are close friends of PW.1 so they fabricated the evidence.
- (c) The prosecution failed to confirm what PW.1, PW.2 and PW.3 said about reconciliation meetings at his house.
- (d) The prosecution failed also to summon important witnesses who were mentioned in the evidence of PW.1, for example the lorry driver who was hired to collect the maize in Nkohe village, the landlord and the appellant's husband.
- (e) Failure of the trial Magistrate to consider her alibi.

The respondent-Republic was represented by Ms. Shio, learned State Attorney. Ms. Shio did not seek to support the conviction of the appellant. She said that there were short falls in the prosecution case which made the case against the appellant weak. To start with, she said that there was material contradiction between the evidence of PW.1 and that of PW.2 and PW.3. She pointed out that PW.1 said that when he was

giving the appellant Tsh.850,000/= his wife was present as well as PW.2 and PW.3.

However PW.2 said that when PW.1 was giving the appellant the money his (PW.1) wife was not present.

According to Ms. Shio it appears that PW.2 and PW.3 are close friends of PW.1 so there was need to have an independent witness such as the driver of the lorry who was alleged hired by PW.1 to collect the maize or the landlord of the house where the maize was alleged stored. Those two people were not called to testify. Ms. Shio went on to submit that there was evidence that some meetings were called to reconcile the parties, for example, the one held at the house of Mzee Lichika, however the said Mzee Lichika was not called to testify. The learned State Attorney finished her submission by saying that in the absence of a written document it is difficult to prove that the appellant took or stole the money. Those are the reasons why she did not support the conviction of the appellant.

Let me start with what the trial Magistrate said in convicting the appellant. After reviewing the evidence of both the prosecution and defence the trial Magistrate said, I quote:

“I am of the view that the accused person is tried to lie the court (sic) and also it shows that now was she was (sic) intending to steal because she persistently denied to know the issue of being given price money for buying maize. I am of the view that

the prosecution case proved its case beyond reasonable doubt to the standard of proof, that the accused is guilty as charged. And I do hereby convict him."

With respect, I am unable to agree with the learned Resident Magistrate that the prosecution proved its case against the appellant beyond reasonable doubt. The major issue in this case was whether the appellant was entrusted with money by the complainant (PW.1) for purposes of buying maize and that she failed to do so or instead she stole the money. From the evidence on record I must say that I entirely agree with most of the arguments raised by the appellant as well as the learned State Attorney.

On the question whether the complainant or Pw.1 gave the appellant Tshs.850,000/= for purposes of buying maize, the evidence which was adduced to prove that fact was that of PW.1, PW.2 and PW.3. The evidence of these witnesses contradict each other such that one wonders who was speaking the truth. PW.1 said in his evidence that in addition to PW.2 and PW.3 his wife also was present when he gave the appellant the money. He (PW.1) said during cross examination:

"I gave you TSh.850/= without any written document, but there were some witnesses. My wife and other 2 persons were present at the time when I was giving you the said amount of money....."  
(Emphasis mine)

However when PW.2 – Saidi Ally was testifying he said:

“On 9/6/2006 I went to Abdulrahman to watch a football match of the world cup. Suddenly appeared a woman and her husband. Abdurahman introduced to us as his inlaws. He told us he wanted to give them money to buy maize from the village. Abdurhman entered inside the house and brought some money, who gave it to his female inlaw. He told us that his wife was absent so we could be his witnesses” (Emphasis mine)

When he (PW.2) was cross examined by the appellant he said:

I don't understand where complainant's wife went.”

According to PW.2, after the appellant was given the money she left/departed. However, according to the complainant (PW.1) the appellant did not leave instead she entered into the room which she used to sleep in his house and kept the money. She left the following morning. When PW.3 was cross examined on the same issue he said, I quote:

“I didn't understand if after receiving that money you departed or not, because myself I am not living there.”

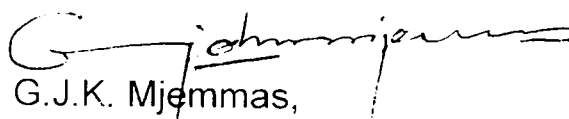
As noted earlier, those contradictions among the three prosecution witnesses cannot be said to be minor ones, they are fundamental and raises doubt on the credibility of those witnesses. That doubt ought to be resolved in favour of the appellant.

There is another point which was raised by both the appellant and the learned State Attorney in relation to the reconciliation meetings which were held and the appellant is alleged promised to refund the money. It was claimed that the said meetings were convened by one Mzee Salum Lichika at the request of Pw.1. As correctly argued by the appellant and the learned State Attorney one would have expected the said Mzee Salum Lichika to be called to testify but he was not called. That omission has the effect of weakening the prosecution case. Infact, as the learned State Attorney correctly argued, if the said Mzee Salum Lichika had been called to testify he would have been an important independent witness as compared to PW.2 and PW.3 who are close friends of PW.1. I am not saying that in law close friends are prohibited from giving evidence on and for each other but what I am saying is that under certain circumstances they (close friends) may have interests to serve so their evidence has to be taken with caution.

I think the above reasons are enough to resolve this appeal and I find it unnecessary to dwell on the other grounds which I think have no merit. This appeal therefore succeeds, the conviction of the appellant is hereby quashed and the sentence of five years imprisonment is set aside. The appellant is to be released from custody forthwith unless otherwise lawfully held.



Order accordingly.

  
G.J.K. Mjemmas,  
Judge  
5/12/2007



Date: 5/12/2007

Coram: Hon. G.J.K. Mjemmas, J.

Appellant: Present

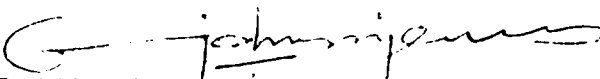
Respondent: Ms. Shio, State Attorney for the Republic

B/C: G. Luoga, RMA

Ms. Shio: This appeal is coming for judgment.

Order: Judgment delivered in chambers this 5<sup>th</sup> day of  
December, 2007 in the presence of Ms. Shio, learned  
State Attorney for the Republic and the appellant.



  
G.J.K. Mjemmas,  
Judge  
5/12/2007