IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 23 OF 2004

LAURENT MPEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Date of last order 4/12/06

Date of Judgment 30/3/07

JUDGEMENT

MLAYJ.

The appellant was convicted of the offence of Stealing contrary to section 265 of the Penal Coe and was given a Conditional Discharge not to commit an offence for two years and ordered within two years to pay the complainant Shs 3,80,000/=. This was the sum alleged in the particulars of the charge to have been stolen by the appellant. Being aggrieved, the appellant through Mkoba & Co Advocate has appealed to this court, on the following grounds:

1. That the honourable trial District Magistrate erred in law and fact in convicting the appellant despite this fact that the prosecution failed to prove its case beyond reasonable doubts.

2. That the honourable trial district magistrate erred in law and fact in convicting the appellant or the basis of Hearsay Evidence which was not admissible in the circumstances of this case.

3. That the honourable trial district magistrate erred in law and fact in failing to consider the appellant's defence.

At the hearing of this appeal Mr Mkoba advocate who appeared for the appellant

submitted that the case against the appellant was not proved at the trial. He contended that the only evidence was that of the complainant PW1, who having discovered the theft four minutes after the appellant had left PWl'S office, did not report the matter to the police, but instead he told the court that he went to the appellants house to negotiate repayment. Mr Mkoba submitted that the steps taken by PW1 were not in conformity with a person whose money had been stolen, particularly when PW1 knew the appellant for the first time on the day of the incident.

Mr Mkoba further submitted that the evidence of PW2 and PW3 was hearsay as it was the story they obtained from PW1. Mr Mkoba contended that the appellants explanation that there was s sale of a motor vehicle for which he was making payment by instalments by issuing cheques, was more probable. He contended that the only reason the trial magistrate rejected it was that there was no sale agreement of the said motor vehicle. He submitted that this finding was wrong on grounds that an accused person should not be convicted on the weakness of the defence case but on the strength of the prosecution's evidence. He submitted that the evidence of PW1 taken on its totality, does not prove that there was any theft and that the appellant gave plausible reasons for issuing the cheques.

Ms Lushagara learned State Attorney supported the conviction. She submitted that the evidence of PW1, PW2 and PW3 proved that there was theft. She disputed the submission that the evidence of PW2 and PW3 was hearsay because PW2 and PW3 heard from the appellant himself that he took the money from the office of PW1 and the appellant took PW3 to his office and gave him cheques to give to PW1. She contended that PW2 was present in PWl'S office where the appellant agreed that he took the money. Ms Lushagara submitted that the appellant's act of drawing cheques does prove that he took the money. She contended that the appellants allegation that the cheques were for payment for a motor vehicle had no merit, because the appellant did not mention what type of motor vehicle he was paying for. She submitted that it was immaterial that PW1 knew the appellant for the first time and PW1 did not immediately report the theft to the police.

In reply Mr. Mkoba reply reiterated that the evidence of PW2 and PW3 was hearsay as

he is recorded saying that he was told of what happened on the day of the theft by PW1. He submitted that the appellant's version that there was a business transaction between him and PW1, was more plausible than the version by PW1 of discovering the theft by the appellant and reaching an agreement with the appellant for repayment.

The principle witness for the prosecution was PW1 SURJIT SING. He told the trial court that on 11/1/2002, the appellant went to him to buy maize and paid only Shs 975,000/= for 50 bags which the appellant said he would collect the following day. On the following day at 11.30 am, the appellant came back but disagreed with the weight of the maize bags and asked to be refunded his money. PW1 said he took out his bag of money containing Shs, 5,800,000/= and put it on the table. PW1 look out Shs 1,000,000/= and put it on the table. The appellant asked for a plastic bag and when PW1 turned to look for the plastic bag, he found the appellant gone with his bag containing Shs 4,800,000/= having left the Shs 1,000,000/= on the table. PW1 started looking for the appellant and on a Sunday, PW1 and two other people, JOSWEND SIGHLAL who testified as PW2 and KASEKA MAJUTO who did not testify, went to the house of the appellant. At page 5 of the proceedings PW1 Stated:

> " *On Sunday we went with Jaswend Sighlal and Kaseka Majuto to the house of the accused we found him. I asked him why he stole my money and left his money. He denied. After discussion he agreed I asked him to return the money. He said he will return. On Monday at 11.00 am he will come to my office. Then I asked Yohana and Jaswend Sighlal to come to my office to hear. Then accused came and I explained the issue before witnesses Yohana and Joswald and the said witnesses asked accused and he agreed. Said the money at bank. Accused said he will return my money by using cheque. Then told me to find one who they will go together to his office to write cheque of and gave him. I told Yohana to go. Then Yohana return with cheques and letter I produce before the court as exhibit...*"

The witnesses produced six cheques to which there was no Dbjection from Mr Kusikila

the appellants advocate.

> PWl said: "*Then I wondered why he wants to pay me by installment while he took my money. I went to the police to report the matter*".

> PW2 having narrated the story of the theft as told by PWl stated:
> "*I told him to go to the accused person. When asked the issue he agree and said he will return the money Monday. We were with Kaseka and PWl.*
> *On Monday we went to the office of Singh we were with Albert Yohana and accused. We asked him how he will pay. He said he will pay us by installment. Then we asked PWl and agreed.*
> *Then Mpeka (accused) said he was no cheque book and asked for one person to follow him to took (sic) cheque. We told Albert Yohana to follow of the said cheques. After Vi an hour Albert came with the said cheques and handed to PW1* ".

PW 3 was Yohana Albert whose testimony includes the story of the theft as told by PW1 up to the stage where the appellant agreed to bring the money the following day at 11. 00 am. The evidence of PW3 on what took place on that day is as follows:

> " *we interrogated that this accused and he agreed but he said at that day he was no money and PW1 agreed. Then accused said he had no cheque book and that the cheque book was in his office. Then accused asked for one person to go with him to look the said cheque (sic) PW1 appointed me to go to the accused's office and he wrote cheques addressed to me and also wrote a paper. Then I return to the office of PW1 and handed the cheque*".

The trial magistrate having considered both the prosecution and defence evidence, stated at page 7 of the judgments:

> " To *my opinion when the money was return nobody was present more than accused complainant but the act of the accused person to admit before the prosecution witnesses and agreed to pay the money post dated cheques showed that he took the said money. 1 failed to consider that they have agreed that the complainant to bring the motor vehicle for the said money because he failed to show the court that it was true model of car they agreed the accused person to bring it. So it is not possible for accused to trust the appellant to the big amount of money without putting in writing and if so why he paid the said money by post dated back. This showed that it was that as said by the prosecution side that during interrogation he said that he had already banked the said money. I failed to consider the defence of accused that the prosecuted evidence have many doubt. This doubt case denied (sic) by accused himself to admit to pay the said money and gave the complainant post dated cheque* ".

First, I am unable to agree with the learned counsel for the appellant that all the evidence of PW2 and PW3 was hearsay evidence. So much of the evidence, of PW2 and PW3 as it related to when and how the theft took place, was hearsay evidence as that is the story they were told by PW1. However, PW2 went with PW1 to the house of the appellant also with KASEKA MAJUTO who did not testify. PW2 testified on what he heard at the house of the appellant who agreed to bring the money to PWl's office the following day. PW2 was also a witness to what took place in the office of PW1 the following day, when the appellant came and offered to repay this money by cheque and asked for one person to accompany him to

the appellants office to collect the cheque. PW3 was present in the office of PW1 on the day the appellant came to repay the money and he is the one who accompanied the appellant to his office to write the cheques and he did in fact receive the cheques from the appellant and took them to PW1. This was direct evidence.

It is in evidence and the trial magistrate recorded the finding correctly, that when the theft took place, only PW1 and the appellant were present. The only issue is whether the evidence of PW1 was credible. The trial magistrate who heard and saw both the prosecution and the defence witnesses, is better placed than this appellate court to determine the issue of credibility. The trial magistrate did consider the defence evidence but decided to believe the prosecutions witnesses. I am unable to find fault with the trial magistrate. I find no reason to conclude that the trial magistrate was wrong not to have accepted the appellants version that there was a business transaction for the purchase of a motor vehicle for which

the appellant was paying by installments, by issuing the post dated cheques. On the evidence on record, I do not see why this evidence should have been preferred to that of the prosecution.

This appeals has no merit and it is accordingly dismissed.

There is a question whether conditional discharge was appropriable in the circumstances of this case, but as the Republic did not cross appeal on the sentence**,** this court will not interfere with it.

The appeal is dismissed in its entirety

J.I. Mlay
JUDGE

Delivered in the presence of Ms Lushagara State Attorney and Mr Mkoba's clerk being present this **30th** day of March **2007.**

J.I. Mlay
JUDGE
30/3/2007