

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
CRIMINAL APPEAL NO. 304 OF 2017
PAULO MINJAAPPELLANT
VERSUS
REPUBLIC..... RESPONDENT

30/4/2018 & 29/5/2018

JUDGMENT

I.P.KITUSI,J.

Paulo Minja, the appellant was charged before the District Court of Morogoro, at Morogoro, and convicted of stealing contrary to section 258 and 265 of the Penal Code, it being alleged that on 6th April 2016 and 11th December 2016 at an unknown place within the township, District and Region of Morogoro, the appellant being the Treasurer of Chama Cha Madereva wa Daladala Kihonda (CHAMADATAKIMO) stole a total of Shs 22, 504, 500/= the property of the said Chama cha Madereva wa Daladala Kihonda.

The appellant denied the allegations which the prosecution sought to prove by leading evidence of four witnesses whose account go like this;

Drivers of Morogoro town commuters popularly known as Daladala formed and registered an Association which was known by its acronym CHAMADATAKIMO. Kujolo Miraji Pazi (Pw2) was the

Association's Vice Chairman, while Simon Matiku (PW1) was the secretary General, PW1, PW2 Adolf John Nyagawa (PW3) and Alipha Omary (PW4) who were members of the Association testified that the appellant was the Treasurer.

As Treasurer, the appellant's duty was to receive monetary contributions from the members and keep the same. According to PW1, the appellant insisted on keeping the money at his house instead of keeping it in a bank, and told the members that keeping the money at his house made it easy for him to access it whenever a member required it urgently.

Pw1 and PW2 testified that when the appellant last presented a report of funds, he had with him a balance of shs 19,500,000/= and that eventually he must have collected more money to make the balance reach Shs 22, 504, 500/=. PW3 and Pw4 were responsible for collecting contributions from other members and in turn submitting the same to the Treasurer.

The prosecution's case as told by PW1, PW2, Pw3 and PW4 was that the appellant had earlier promised members that when the Association's funds would have come to a total of Shs 15 million he would buy for it a bus. So in October 2016 members knowing that the funds were in excess of shillings 15 million demanded for the fulfillment of the promise by the appellant but he could not. Nor could he exhibit any money left. The matter was reported to the police who preferred the charges against the appellant.

In defence the appellant claimed that the case had been fabricated by PW1 with whom he had bad blood and that even the documentary exhibits, minutes of meetings, Registers and books of accounts, had been fabricated to suit PW1's ill intention. The appellant disowned what is shown to be his signature. He also referred to contradictions in the testimonies of the prosecution witnesses regarding the amounts stolen.

The trial court found the appellant guilty basing its decision on circumstantial evidence, and accordingly convicted him for stealing. It observed that the evidence did not establish the amount stolen.

The appeal challenges this decision on a number of fronts. There are a total of eleven numerical grounds of appeal including a complaint on ground 2 that the amount of money allegedly stolen as reflected in the charge was not the same as in the evidence. This ground was supported by Ms Rachael Magambo learned State Attorney who represented the respondent Republic. The learned State Attorney went along with the appellant's contention generally appearing in almost all grounds that the prosecution did not prove the case beyond all reasonable doubt.

Though unrepresented the appellant was armed with three unreported decisions of the Court of Appeal which he cited for the court's consideration. Understandably the appellant did not elaborate the principles to be deduced from the cited cases. The case are ;

(i). **Justine Kasusura@ John Laicer V. Republic**, Criminal Appeal No. 175 of 2010, CAT (unreported)

(ii) **Sadick Ally V. Republic**, Criminal Appeal No. 81 of 2015, (CAT (unreported)

(ii). **Seif Suleiman V. Republic**, Criminal Appeal No. 130 of 2005 CAT (unreported).

Of the three cases, I find that of **Justine Kasusura** (supra) to be most relevant as it discussed the effect of the prosecution's failure to prove the stolen amount. With respect I agree with both the appellant and the learned State Attorney that there was variance between the charge sheet and the evidence. The learned trial Magistrate proceeded to find the appellant guilty of stealing despite concluding that there was no proof as to how much had been stolen. This in my view was a grave error.

It is a settled position of the law that the charge and evidence must be consistent so as to give the accused a fair trial. So what happens when the charge sheet varies with the evidence? The Court of Appeal has provided an answer in **Mohamed Abubakar Vs. Republic**, Criminal Appeal No. 273 of 2015, CAT at Arusha(unreported), when it held;

"In this case the charge sheet and evidence on record are at variance. Obviously the prosecution did not prove the charge preferred

against the appellant. The prosecution had failed to prove its case. The conviction cannot stand"

The prosecution failed to prove its case in the instant appeal and I can do no better than quash the conviction and set aside the sentence. The appeal is allowed. If the appellant is not lawfully held for some other reason, he should immediately be released.




I.P. KITUSI

JUDGE

29/5/2018

Date: 29/5/2018

Coram: Hon.Magutu, Dr.

Appellant: Present

Respondent: Ms Ellen Masuhili SA

CC: Banza

Ms Ellen Masuhuli : Your honour the matter is coming up today for judgment. We are ready to receive it.

Court : The judgment delivered on 29/05/2018 in presence of the appellant and Ellen Masui for Respondent

A.A.MAGUTU

DR

29/5/2018

Right appeal full explained.

A.A.MAGUTU

DR

29/5/2018