

**IN THE HIGH COURT OF TANZANIA  
(MTWARA DISTRICT REGISTRY)  
AT MTWARA**

**CRIMINAL APPEAL NO. 1 OF 2021  
(Original Mtwara District Court Criminal Case No. 15 of 2020)**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT  
VERSUS  
FARAJI ISMAIL CHIPOKA.....RESPONDENT**

**JUDGMENT**

**17<sup>th</sup> August & 8<sup>th</sup> October, 2021**

**W.P.DYANSOBERA, J.:**

The respondent Faraji Ismail Chipoka stood trial before the District Court of Mtwara in Criminal Case No. 15 of 2020 charged with stealing by servant c/ss 258, 265 and 271 of the Penal Code [Cap.16 R. E. 2002] now Revised Edition of 2019, hereinafter called the Code.

The particulars of offence alleged that the appellant on the 20<sup>th</sup> December, 2018 at CRDB Bank Mtwara Branch area within the Municipality and Region of Mtwara, being an employee of CRDB Bank PLC, did steal cash money Tanzanian Shillings Sixteen Million and Eighty Thousand (Tshs. 16, 080,000/=) only, being the property of CRDB BANK PLC which came into his possession by virtue of his employment.

He was tried but found not guilty and subsequently acquitted. The appellant was dissatisfied, hence this appeal which, according to the petition of appeal filed on 31<sup>st</sup> December, 2020, bears the following complaint:-

**'that the Honourable trial Magistrate erred both in law and fact by acquitting the respondent on the offence of stealing by servant without taking into consideration the fact that the conduct of the respondent as a banker to process transaction of Tshs. 16, 080, 000/= to a person who had no bank account, and by suing a withdrawing slip that had no bank account number was a sufficient evidence to hold him liable'.**

The case for the prosecution established that the respondent was the employee of CRDB Bank PLC and was stationed at Mtwara Branch. According to F. 66 44 D/Cpl. Sembuko who investigated the case, respondent did not follow bank procedure as he served a person who was not a CRDB bank client and who had no CRDB bank account number. This evidence was supported by that of Ramadhan Ayubu Semvua (PW 2), then Branch Controller of CRDB Bank, Mtwara branch who testified that he asked the respondent on the cash shortage and the respondent admitted to have that shortage. PW 2 insisted that the respondent did not follow bank procedures. The other witness Paul Lameck Kefa (PW 3) who was

working as a customer service Manager at the Bank informed the trial court that on 20.12.2018 in the evening, the respondent reported to him on cash shortage of TZS 16, 080, 000/= and PW 3 relayed that information to PW 2.

Further, the prosecution through Arnold Joseph Rwamtoga (PW 4) who was, at the material time, a Branch Manager, CRDB Mtwara Branch revealed that at his branch there was a loss of TZS 16, 080, 000/= occasioned by the respondent who was a bank teller. He tendered in court a withdraw slip (exhibit P 1). John Paul Kinimo, the head of forensic bureau charged with making fraud examination of reported fraud cases testified to the effect that his investigation detected that the transaction of withdrawal of TZS 16, 080, 000/= did not pass through the bank system completely, that it was written in the name of Amir Hussein Mussa dated 20.12.2018 had no its account number written and that although the cash was withdrawn, the voucher did not posted to the bank system. The investigation report was admitted as exhibit P 4.

In his defence, the respondent denied to have stolen he money arguing that misfortune had occurred causing him to occasion a loss of TZS 16, 080, 000/=and immediately reported to his superiors. He informed the

trial court that disciplinary proceedings were held against him leading to the termination of his employment contract. His reference of the labour dispute to the Commission for Mediation and Arbitration was successful whereby the termination was nullified. The respondent tendered in court exhibits D1-5 in support of his defence.

In his judgment, the learned Resident Magistrate was satisfied that the case against the respondent was not proved beyond reasonable doubt. He reasoned that the whole evidence revealed that the money alleged to have been stolen did not come into the possession of the respondent but in the possession of Amir Hussein Mussa who was neither charged nor called in court as a witness.

As said before, the respondent was acquitted. The appellant, the Director of Public Prosecutions, is challenging the acquittal and contends that the conduct of the respondent as a banker to process the transaction of TZS 16, 080, 000/= to a person who had no bank account and by using a withdrawing slip that had no bank account number was sufficient evidence to hold him liable.

I have considered this complaint vis-à-vis the evidence and the impugned judgment of the lower court. However, in view of the

insufficiency of evidence implicating the respondent in the charged offence, I have no material to fault the decision of the trial court. In the first place, as the learned Resident Magistrate found, the respondent did not steal the money within the meaning assigned to it by section 258 of the Penal Code. All the evidence unfurled at the trial shows that there was shortage the respondent occasioned. This was not only the respondent's own version but was also supported by all the five prosecution witnesses. Indeed, the record shows that the respondent did not steal the money but was negligent in the discharge of his duties. It is on record that on 20<sup>th</sup> day of December, 2018 the respondent made cash payment of TZS 16,080,000/= to one Amiri Hussein Mussa who was a non-bank customer which is in contravention of the Bank's procedures of confirming customers account number on the cash withdraw slip and that transaction was not posted in the system hence causing the bank to suffer a loss of TZS 16, 080, 000/=. It was also established that this conduct amounted to gross negligence, a violation of Rule 12 (3) (d) of offences which constitute serious misconduct under the Employment and Labour Relations (Code of Good Practice), Rules, 2007, GN No. 42 read together with section 6.2 of the Cash

Operating Manual. This cannot, by any stretch of imagination amount to stealing by public servant.

Second, the salutary principle in criminal cases of this nature is that it is upon the prosecution to prove beyond peradventure that the accused committed the charged offence. In the case of **Seuri v. R** [1971] HCD. 360 it was held:

"Once he (the accused) pleads not guilty, it is for the prosecution to prove affirmatively, beyond all reasonable doubts that the person charged has committed a criminal offence".

As hinted earlier, the prosecution proved that there was shortage of TZS 16,080, 000/= and that the respondent was negligent in the discharge of his duties. The law is clear that in a charge of stealing by public servant, it is not enough to prove mere shortage, or merely that the accused person was negligent in the performance of his duties as a public servant. There must be evidence that the accused stole the money. In other words, *animus furandi*, or fraudulent conversion must be proved. This position was well elucidated in the case of **Jackson Sumuni v R**: [1967] HDC n. 152. Besides, the court in the case of **Fanuel s/o Kiula v R**. [1967] HCD n. 369 held the same legal position when it observed, *inter alia*, that:-.

"In a charge of stealing by public servant, it is not enough to prove mere shortage, or merely that the accused was negligent in the performance of his duties as a public servant. There must be evidence that the accused stole the money".

In the instant case, as rightly found by the learned Resident Magistrate, there was no evidence that the respondent stole the money.

The charge against the respondent was not proved beyond reasonable doubt. The acquittal of the respondent was, in the circumstances of the case, the right course justice demanded.

This appeal fails and is dismissed. The trial court's decision is endorsed.

Order accordingly.

  
**W.P. Dyansobera**

**Judge**

**8.10.2021**

This judgment is delivered under my hand and the seal of this Court this 8<sup>th</sup> day of October, 2021 in the presence of Mr. Paul Kimweri, learned Senior State Attorney for the appellant and in the presence of the respondent in person.

Rights of appeal to the Court of Appeal explained.

  
**W.P. Dyansobera**

**Judge**