

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 28/2000

(ORIGINAL CRIMINAL CASE NO. 865 OF 1998 OF
THE DISTRICT COURT OF ILALA AT KIVUKONI)

THE REPUBLIC APPELLANT

- Versus -

SHOSHO YOHANA & OTHERS RESPONDENTS

J U D G M E N T

SHANGWA, J.

In this case, the Director of Public Prosecutions is appealing against the judgment and Order of the District Court of Ilala District at Kivukoni in Criminal Case No.865 of 1998.

In the said case, there were eight accused persons namely Shosho Yohana, Asenterabi Wangael Mushi, Sheikei Slaa, Eliamdiwe Helphe Kimaro, Frederick Stephen Atei, Grace Laban Molel, Elieza Nestory and Mathias Sentu Ruboa. They were respectively charged as 1st to 8th accused on two respective counts namely conspiracy to commit a felony c/s 384 of the Penal Code and stealing c/s 265 of the Penal Code.

On the first count, it was alleged that on 28th July, 1998 at Kimara Agip, Kinondoni District, Dar es Salaam Region, the accused persons did conspire to steal a motor vehicle with Registration

No. TZM 2447 make Toyota Hiace, Supper Roof Valued at Shs. 8,500,000, the property of one Hirimina Aloyce Massawe.

On the second count, it was alleged that on the same date and place, they stole the same motor vehicle belonging to the same person.

In general, it is being alleged that the accused persons conspired to steal and did steal one Hirimina A. Massawe's motor vehicle with Registration No. TZM 2447 make Toyota Hiace Supper Roof. All of them were acquitted on both counts.

Before proceeding into the merits of this appeal, I have just a little observation to make that is:

On the 8th November, 1999, it was indicated by the trial Principal Resident Magistrate that the 8th accused is dead. The coram shows that the Public Prosecutor who was present on that day is one Herman but it is not indicated on record as to whether he is the one who informed the Court that the 8th accused is dead. It is also not indicated as to whether the case against him did abate.

For the purposes of this appeal, I will assume that the Public Prosecutor did inform the Court that the 8th accused died but this information was not put on record and the abatement of the case against him was equally not recorded.

It appears from the record that the 3rd, 4th, 5th, 6th and 7th accused did defend themselves but the 1st, 2nd and 8th accused

never gave their respective defences. They did not do so because the 1st and 2nd were at large and the 8th had died.

In his amended memorandum of appeal, the Director of Public Prosecutions states inter - alia that the trial Principal Resident Magistrate erred in Law and fact in acquitting the respondents while there was enough evidence against them, and that she erred in Law by not convicting the accused persons who absconded in their absence when a Prima facie case had been made against them, and that she erred in Law and fact in holding that the motor vehicle found in the possession of the 7th respondent is not the one stolen from P.W 1.

It is prayed by the Director of Public Prosecutions that the lower court's judgment and order be set aside, the respondents be convicted and the motor vehicle be returned to P.W 1 who is a lawful owner.

I wish to state at this juncture that the charge on the 1st count should not have been preferred as conspiracy to commit a felony or laid down under S.334 of the Penal Code. It should have been preferred as conspiracy to commit an offence c/s 384 of the Penal Code. S.334 of the Penal Code provides for a definition of what a false document means. Under S.2 (2) of the Penal Code (Amendment) Act, 1980, it is provided that a reference to a "felony" or a "misdemeanour" in the Penal Code or in any other written law for the time being in force... shall be construed as a reference to an offence...

Under S.4 of the Penal Code (Amendment) Act, 1980, it is provided that S.5 of the Penal Code is amended (a) by deleting the definition 'felony' and 'misdemeanour'. By virtue of S.4 of the said Act, the classification of an offence as a felony or a misdemeanour is no longer in existence.

In order to establish the charge of conspiracy to commit an offence c/s 384 of the Penal Code, the prosecution had to establish that there was a common intention by the respondents to steal the motor vehicle in issue. The trial court had to determine whether there was such intention. Evidence of P.W 3 No C 1716 Det. Corp. Samwel is to the effect that the 5th accused Frederick Stephen Atei made a statement before him in which he confessed to have conspired with the 3rd accused Sheikei Slaa and the 4th accused Eliamdiwe Helphe Kimaro to steal the motor vehicle in issue. In his statement exh. P8, the 5th accused was recorded as saying that discussions and plans to steal it were made in two places. First, at Mabibo area under a tree. Second place is at Kimara in the house of the 3rd accused Sheikei Slaa and 4th accused Eliamdiwe Helphe Kimaro.

Furthermore, he was recorded as saying that before stealing it they planned to do so by pretending to be its owner, and by using a forged key, and that after stealing it from Kimara Agip Petrol Station, they should take it to one Frank Maungu at Arusha which they did, but as Frank Maungu was in Dar es Salaam, they left it with his wife one Grace Laban Molel who was charged as the 6th

accused.

Let me now examine the true nature of the statement made by the 5th accused before P.W 3 No. C 1716 Det. Corp. Samwel in which he confessed to have conspired and stole the motor vehicle in issue with the 3rd and 4th accused persons. It appears to me that before taking this statement, Det. Corp. Samwel did inform the 5th accused that he was free to make any statement. It appears to me also that after being so informed, the 5th accused made his statement which was recorded down and signed.

The 5th accused said in his defence that he was tortured by the Police at Magomeni so that he may tell them where the motor vehicle in issue was taken after stealing it. He did not explain how he was tortured. A mere allegation by an accused person that he was tortured by the police before making his statement is not enough. The accused has to explain how he was tortured so as to lead him into an untrue admission of guilt. In this case, there was no such explanation. Therefore, I believe that the 5th accused made his statement voluntarily to P.W 3. Det. Corp. Samwel. In this statement, the 5th accused person does not implicate the 1st, 2nd, 6th, 7th and 8th accused persons in the conspiracy to steal the motor vehicle in issue. He implicates the 3rd and 4th accused only.

As there is no evidence whatsoever to prove that the 1st, 2nd,

6th, 7th and 8th accused persons did participate in the conspiracy to steal the motor vehicle in issue, the trial court should have acquitted them on the 1st ~~count~~ at the close of the prosecution's case on ground of no case to answer instead of acquitting them after the close of the defence case. It was technically wrong also for the trial Principal Resident Magistrate to pronounce an acquittal about the 8th accused whose case on this count had abated upon his death which occurred before judgment.

With respect to the 3rd, 4th and 5th accused persons, I find that there is evidence to prove that they committed the offence charged on the 1st count. This evidence is a confession made by the 5th accused before P.W 3 Det. Corp. Samwel in which he implicates himself and the 3rd and 4th accused persons. Under S.33 (1) of the Evidence Act, 1966, a confession made by an accused person may be taken into consideration against a co-accused if they are tried jointly for the offence or offences arising out of the same transaction just as it happens to be the case here.

But under sub-section (2) of S.33 of the said Act, a conviction of an accused person cannot be based solely on a confession by a co-accused. This means that evidence of a confession by the 5th accused that the 3rd and 4th accused persons participated in the

conspiracy to steal the motor vehicle in issue has to be corroborated before they can be convicted of this offence.

I find that evidence of P.W. 3 C 1716 Det. Corp. Samwel that on interrogating the 6th accused Grace Laban Molel, she mentioned the 3rd, 4th and 5th accused persons to be the ones whom she saw at Arusha with the motor vehicle in issue and informed him that from Arusha it was taken by her brothers in law Yoram and Walter to Shinyanga where it was recovered, corroborates the confession by the 5th accused which implicates the 3rd and 4th accused in the charge of conspiracy to steal the motor vehicle in issue.

I find, therefore, that the 3rd, 4th and 5th accused are guilty as charged on the 1st count and I substitute their acquittal with a conviction.

I now go straight to the second count. I went through the entire lower court's record but I did not find any evidence to connect the 1st and 2nd accused on this count. In his statement exh. P8 which was wrongly marked as exhibit P7, the 5th accused did not confess to have stolen the motor vehicle in issue with the 1st or 2nd accused but he confessed to have done so with the 3rd and 4th accused. I hold therefore that the 1st and 2nd accused could have been acquitted on this count at the close of the prosecution's case for having no case to answer instead of being acquitted at the close

of the defence case. But as both of them did jump bail, their sureties should have been called to show cause as to why they should not be penalized according to their bail bonds.

As I have already indicated when I was dealing with the charge on the first count, the statement made by the 5th accused before P.W.3 was voluntarily made to the effect that the motor vehicle in issue was stolen by him together with the 3rd and 4th accused from Kimara Agip Petrol Station where it had been parked and thereafter took it to Arusha and handed it over to the 6th accused pending the return of her husband Frank Maungu who was in Dar es Salaam and who knew that it had been stolen.

Let us now look at the testimony of P.W 3 and P.W6 which I find to be very informative in this case. P. W. 3 Det. Corp.Samwel stated that when he interrogated the 6th accused, she informed him that after receiving the motor vehicle in issue, her brothers in law Yoram and Walter took it to Shinyanga. And P.W. 6 Deogratias Kaholwe who is a resident of Kahama stated that on 3rd September, 1998, he bought a Hiace Min Bus Supper Roof with Reg. No. TZL 545 from the 7th accused at Shs. 3,000,000 after being informed by the 8th accused that the 7th accused who is his brother had a motor vehicle on sale. He said that in October, 1998 the police followed him and told him that the said motor vehicle was a stolen one upon which he informed them that it had been sold to him by the 7th and

8th accused at Shinyanga.

During his defence, the 7th accused claimed that he bought the motor vehicle he sold to P.W. 6 at Mnazi Mmoja Dar es Salaam from Taimili Manyilizi at Shs. 5,000,000 and that its sale agreement was prepared by Mr. Sengalawe Advocate on 30th July, 1998.

The trial Principal Resident Magistrate found that the motor vehicle which was seized by the police from P.W 6 after it had been sold to him by the 7th accused does not belong to P.W. 1 Hirimina Aloyce Massawe. She ordered that it should be handed over to the 7th accused who in turn should hand it over to P.W. 6. This vehicle was tendered in evidence as exhibit P.6 and it is being kept by the police.

I will now dwell on the issue as to whether the said motor vehicle belongs to P.W.1 or not and whether the 3rd, 4th 5th and 7th accused's acquittal was justified on this count.

P.W 1 testified to have bought a Toyota Hiace Supper Roof with Registration No.TZM 2447 at Lumumba show room through Selomani Ahmed Gunza who bought it from one Mohamed Ali.

According to the record from the office of the Registrar of Motor Vehicles which was given by P.W. 2 Francis Andrew Moshi is that P.W 1's stolen motor vehicle was registered as TZM 2447 Toyota Hiace in the name of Mohamed Ali of P.O.BOX 24172 Dar es Salaam.

According to the 7th accused, the motor vehicle which was

seized by the police from P.W. 6 after he had sold it to him is with Registration No. TZL 545 make Toyota Hiace, Mini Bus, White in colour with Engine No. 2y-0460861, Chassis No. YH 50V 0052593, 1998 Model and with Registration Card No. C 00230236.

According to P.W. 4 Det. Serg. Evarist, the engine No. of motor vehicle with Registration No. TZL 545 had not been tempered with. The chassis number had been cut leaving a hole from where it was cut and placed on another place.

The reasons which were given by the trial Principal Resident Magistrate in finding that this motor vehicle did not belong to PW1 are as follows:-

1. The chassis number of Motor Vehicle with Reg. No. TZL 545 differs from the chassis number of PW1's stolen motor vehicle with Reg. No. TZM 2447.
2. The Registration number of the motor vehicle which belonged to the 7th accused before he sold it to P.W 6 i.e. No. TZL 545 differs from the Registration No. of PW1's motor vehicle i.e. TZM 2447.
3. P.W1' stolen motor vehicle is diesel. The one which was sold by the 7th accused to P.W. 6 is Petrol.
4. The engine capacity of P.W.1's stolen Motor Vehicle differs from that of Motor Vehicle with Registration No. TZL 545. The former is 1812. The latter is 2446.
5. The engine No of Motor Vehicle TZL 545 was not tempered with.
6. No reason advanced to show that the engine No of Motor Vehicle TZL 545 is that of Motor Vehicle TZM 2447.

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In her findings, the learned trial Principal Resident Magistrate ignored the fact that the chassis number of motor vehicle with Registration No. TZL 545 was found cut from where it was originally placed as testified by P.W. 4 No. 0757 Det. Serg. Evarist and the fact that the key of Motor Vehicle with Registration No. TZM 2447 which P.W.5 No. C 7560 Det. Corp. Gottard took with him from Dar es Salaam to Shinyanga did start Motor Vehicle with Registration No. TZL 545.

I find that the trial Principal Resident Magistrate was wrong to ignore the above mentioned facts which are very crucial to this case. These facts raise great doubt as to whether this motor vehicle exh. P6 is the one which the 7th accused bought from Taimili Manyilizi.

This great doubt is based on two grounds. First, DWI Advocate Semgalawe saw the chassis number of motor vehicle with Registration No. TZL545 at its normal place without being cut from where it is supposed to be when he prepared its sale agreement for the 7th accused. Secondly, no different motor vehicles can be started with a similar key.

In his testimony D.W. 1 stated that at the time of preparing the sale agreement of motor vehicle Registration No. TZL 545, the 7th accused told him that he was buying it for his son Eliud Elieza. This raises another great doubt as to whether the motor vehicle he

bought from Tainuli Manyilizi is the one which he sold to P.W. 6.

I find that had the trial Principal Resident Magistrate addressed herself to the evidence before her, she should have found as I do that P.W.1's motor vehicle with Registration No. TZM 2447 exh. P6 was stolen from Kimara Agip Petrol Station on 28th July, 1998 at about 6.00 p.m., and that those who stole it are the 3rd, 4th and 5th accused, and that after stealing it they drove it from Dar es Salaam to Arusha where it was left in the hands of the 6th accused whose husband Frank Maungu who knew about this deal was away in Dar es Salaam, and that from Arusha the 6th accused's brothers in Law Yoram and Walter drove it to Shinyanga and left it with the 7th accused who in turn sold it to the resident of Kahama District namely P.W.6 before it was seized by the police at Shinyanga where it had been stationed by P.W. 6 for transport business of passengers.

Obviously, after stealing this motor vehicle, they changed its registration number to read any other number. They cut its chassis number leaving behind a hole at its place which can be seen on it upon its examination. They did so in order to change its identity. The engine number was not tampered with for reasons best known to themselves.

Knowing that this was a stolen motor vehicle, the 7th accused put Registration No. TZL 545 from another motor vehicle which he

bought from Taimili Manyilizi in order to change its identity. It can be remembered that the motor vehicle he bought from Taimili Manyilizi had its chassis number at its proper place but the chassis number of this motor vehicle is seen to have been cut from where it is ordinarily supposed to be.

Mr. G. K. Mushumba for the 7th accused submitted that as the 5th accused statement made to P.W. 3 was retracted it cannot be used to convict any of the accused persons whom it affects. That is the 3rd, 4th and the 5th accused himself unless it is corroborated. He said that it is not certain whether the key taken from P.W 1 started the motor vehicle in issue and that there is no evidence from the motor vehicle expert to prove that the chassis number cannot be placed in other place other than where it is supposed to be.

As I stated earlier, the 5th accused's statement to P.W.3 was voluntarily made. The confession he made to P.W 3 affected him and the 3rd and 4th accused whom he mentioned to have participated in stealing P.W1's motor vehicle. Personally, I have no reason to doubt the evidence of P.W5 Det.Corp. Gottard that the key taken from P.W.1 in Dar es Salaam did start the motor vehicle in issue at Shinyanga from where it was recovered. I maintain that its chassis number was cut in order to change its identity.

In actual fact, the evidence of a confession by the 5th accused is corroborated by the evidence of P.W 5. Basing on the

totality of this evidence, I do find that the 3rd, 4th and 5th accused are guilty as charged on the second count. I would, therefore, substitute their acquittal with a conviction on the said count.

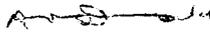
I would think that the 6th accused Grace Laban Molel wife of Frank Maungu is a mere victim of circumstances having been handed over this motor vehicle of which she perhaps knew nothing except her husband Frank Maungu. Therefore, I will not interfere with her acquittal.

The 7th accused should have been found guilty of receiving stolen property c/s 311 of the Penal Code. The available circumstances strongly show that when he received this motor vehicle from Yoram and Walter, he must have known that it was stolen and if he did not know that it was stolen, he was informed by them that it is a stolen motor vehicle but he did not take any steps to report the matter to the Police. I would therefore find him guilty of receiving stolen property and I convict him thereof.

As the 8th accused is dead, I will not pass any verdict on him because when an accused dies the case abates.

Finally, I order that the motor vehicle in issue exh.P6 which is under Police custody should immediately be handed over to P.W1 Hirimina A. Massawe. Otherwise, I now remit the case to the District Court of Ilala under S.382(1) (a) (i) of the Criminal Procedure

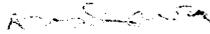
Act, 1985 for passing Sentence on the 3rd, 4th and 5th accused on the 1st and 2nd counts as well as for passing sentence on the 7th accused for the offence of receiving stolen property c/s 311 (1) of the Penal Code.


A. SHANGWA

JUDGE

9/7/2003

Delivered in Court at Dar es Salaam in the presence of Miss Msabila, State Attorney and Mr. G. K. Mushumba, Advocate this 9th day of July, 2003.


A. SHANGWA

JUDGE

9/7/2003

AS/jn.