

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

( CORAM: Mustafa, J.A., Mwakasendo, J.A. and Kisanqa, J.A.)

CRIMINAL APPEAL NO. 9 OF 1979

B E T W E E N

SUITBERT MTELLA . . . . . APPELLANT

A N D

THE REPUBLIC . . . . . RESPONDENT

(Appeal from the Judgment of  
The High Court of Tanzania  
at Dar es Salaam) (Mkame, J.)  
date the 30th June, 1977,

IN

Criminal Appeal No. 255 of 1976

JUDGMENT OF THE COURT

KISANGA, J.A.:

The appellant was convicted of stealing by public servant contrary to sections 270 and 265 of the Penal Code and was sentenced to 3 years' imprisonment. He appealed unsuccessfully to the High Court, hence the present appeal.

The appellant was employed by the Judiciary as a clerk and his duties included the collection of revenue and keeping exhibits. He was transferred to the Temeke Primary Court where he took over his duties from another clerk, one Jumbe who gave evidence as D.W.1. Thereafter the appellant was, for some reason, remanded in custody following which he was required to hand over the safe, exhibits, etc. to the Primary Court Magistrate (P.W.1). In the course of such handing over there was detected a cash shortage of shs. 620/- which was said to have been received as exhibits on two files, viz. No. 1694 of 1975 and No. 960 of 1975. The appellant duly acknowledged this shortage by signing the handing over certificate, a copy of which was tendered in evidence.

In his defence the appellant in effect denied to have received the alleged monies or the files on which the monies were said to have been received in court as exhibits. Both courts below, however, rejected that defence and found the case against him duly proved.

Mr. Ismail, the learned advocate for the appellant, submitted that the learned judge who heard the first appeal erred in that he upheld the appellant's conviction on the weakness of the defence rather than on the strength of the prosecution case. In particular, Mr. Ismail referred to the following passage in the judgment of the learned judge:-

"It is evident that the system of keeping records and of handing over responsibilities was lousy and the superintendence not particular efficient. The Republic did not come up with very clear evidence that the money alleged to have been stolen by the appellant was ever handed over to him. With great respect, I am unable to agree that Exhibit B, the so-called Handing-Over Statement, is conclusive evidence against the appellant. In it he owns merely that there is a shortage, not that he had been aware of it, or that he was responsible for it. From the format and wording of the document it might have been intended merely to denote that the 'shortage' is the inevitable Arithmetical conclusion. Having said all that, however, I am convinced that the Appellant took advantage of the unsatisfactory state of affairs and stole the money as alleged. That was why he was so shifty and undecided regarding his line of defence."

It seems that there is merit in Mr. Ismail's submission. If, as the learned judge rightly found, it was not established clearly that the monies in question were, in fact, handed to the appellant, then the prosecution had failed to prove one essential ingredient of the offence charged. Although the appellant may have been shifty and undecided in his line of defence, this could not be taken to make up for the deficiency in the prosecution case; the burden was still on the prosecution to prove the charge against the appellant, which was not done.

Both courts below also made a reference to the appellant's failure to comment on the evidence of his own witness (D.W.1) who testified that there was a handing over in writing between

the witness himself and the appellant, it being noted that according to the appellant the handing over was only done orally. But it seems that such criticism of the appellant could hardly hold. For, the alleged handing over certificate between D.W.1 and the appellant was never put in evidence. If it were put in evidence, it might very well support the appellant's claim that the monies in question were not handed over to him. Thus the alleged handing over certificate between D.W.1 and the appellant could not properly be held against the appellant because such document has not been proved in the first instance.

Mr. Ntabaye, the learned advocate for the Republic, did not wish to support the conviction, and for the reasons briefly set out above we think that the appeal ought to succeed. Accordingly, we quash the conviction and set aside the sentence and order that the appellant be released from custody forthwith unless he be held on some other lawful ground.

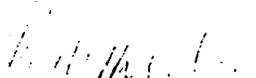
Dated at Dar es Salaam this 7th day of November, 1979.

A. MUSTAFA  
JUSTICE OF APPEAL

Y.M.M. MWAKASENDO  
JUSTICE OF APPEAL

R.H. KISANGA  
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

  
DEPUTY REGISTRAR