IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

CRIMINAL APPEAL NO.33 OF 1975

(In the District Court of Tabora District at Tabora)
Original Criminal Case No.495 of 1975.

BEFORE: L.A.A. Kyando, Esq., Resident Magistrate.

The Director of Public Prosecutions ..... Appellant
(Prosecutor)

versus

Romanus Otto Mkinga ..... Respondent
(Original Accused)

CHARGE: Stealing by the person employed in Public Service contrary to section 270 and 265 of the Penal Code.

J U D G E M E N T

MWAKASENDO, J.

This is an appeal by the Director of Public Prosecutions against the decision of the District Court Tabora acquitting the Respondent, original accused, ROMANUS OTTO MKINGA, in a case which the respondent was charged with the offence of stealing, to wit, shs.1,200/= by a person employed in the public service contrary to sections 270 and 265 of the Penal Code. The particulars of offence alleged inter alia, that Romanus Otto Mkinga being a person employed in the Public Service as an Assistant Accountant between the 14th October, 1970 and 20th December, 1971 stole shs.1,200/= the property of his employer the Ministry of National Education which was given to him by the Principal of Ndala College of National Education, Tabora, for the purpose of buying a safe for the said college.

The evidence led in the case is not in any serious dispute. Briefly the facts desclosed from the record are these: At all material times in 1970 the respondent, Romanus Otto Mkinga, was employed in the Ministry of National Education Headquarters as an Assistant Accountant in-charge of the Examination's section of the Ministry. His duties in this section included among others the examination of accounts and in discharging these duties, he had to make frequent visits to Secondary Schools and Colleges of National Education and report thereon, In October, 1970 the respondent made such a visit to Ndala College of National Education within Tabora region. After completing the inspection of the college's financial accounts the respondent by arrangement met the college Principal and members of staff of the college for a discussion in respect of some of the flaws he had found in the

....2/college's management

college's management of its accounts, one of the topics discussed at this meeting concerned the question of a safe for the proper and secure custody of the college's finances. As a result of this discussion the Principal of the college agreed to provide Shs.1,200/- from the school fund for the purchase of a second-hand safe. The respondent who received this money and acknowledged its receipt by appending his signature to a payment voucher - EXHIBIT P.2, agreed to make every effort when he got back to Dar es Salaam to buy for the College a second hand safe from any of the auction marts in Dar es Salaam. This transaction was also witnessed by a member of the staff one James Andrew Shija (P.W.6). The respondent then returned to Dar es Salaam. In his evidence the respondent told the trial court that immediately on his arrival in Dar es Salaam he contacted several auction dealers and asked them to inform him as and when they had a second-hand safe in their possession. After doing this the respondent continued with his official visits to other educational institutions of the Ministry but, whenever he returned to Dar es Salaam he contacted the auctioneers and inquired about the safe. He still had the money proveded by the college for this purpose on his person or under his control.

On 10th November, 1970 the respondent by letter of that date informed the Principal of Ndala College one Suzana (P.W.5) of all the fruitless efforts he had made in acquiring a second safe for the college. This letter which appears on record as EXHIBIT P.3 reads inter alia:-

"Mkuu wa Chuo,
Ndala, Chuo cha Walimu,
P.O. TABORA.

UAGIZAJI WA SEFA

Nasikitika kuwa kwa ajili ya safari nyingi za kuondoka ofisini mambo mengine mengi yamelazimika kucheleweshwa.

Mpango sasa umefanywa na makampuni yashughulikayo na uuzaji wa sefa na mara itakapokuwa tayari nitatoa habari haraka.

Kwa muda huu mpaka sefa itakapopatikana fedha zipelekwe bank, ila sehemu ndogo inayotakiwa kutumiwa. Sina shaka taarifa yangu ya ukaguzi imekwisha fika na kwamba mtafuata maongozi niliyotoa.

Napenda kutoa ahasante kwa makaribisho mema niliyopewa wakati nikiwa nanyi siku zile zote nilizokaa ndala.

Salamu za heri,

R. OTTO MKINGA
k.n.y.MHASIBU MKUU

....3/This letter has a

This letter has a reference No.EDF.A/31/159. The respondent wrote another letter to Suzana (P.W.5) on 19th March. 1971. This letter was tendered in evidence and appears on record as EXHIBIT P.4. The letter reads:-

"Mkuu wa Chuo,
Ndala, Chuo cha Elimu ya Taifa,
P.C. TABORA

UAGIZAJI WA SEFA

Tafadhali rudia tena barua yangu EDF.4/31/159 ya 10/11/70 kuhusu sefa ya chuo.

Nahakikisha kuwa Wizara hii imekwisha agiza sefa kwa ajili ya shule na vyuo na chuo chako ni moja ya zile zenye matatizo kutokuwa na sefa.

Mpaka hapo zitakapopatikana sefa ni muhimu kupunguza kiasi cha kuwa na fedha zaidi ya shs.200/= chuoni, na kwamba fedha zaidi ya shs.200/= chuoni, na kwamba fedha zinazozidi jumla hiyo ziwekwe banki. Fedha ya mishahara zichukuliwe banki na kulipwa kwa siku hiyo hiyo ili kuepukana na uwingi wa kutokuwa na fedha nyingi chuoni.

Sgd. MKINGA
k.n.y. MHASIBU MKUU

Nakala kwa: Stores Officer i/c.,
Elimu Makao Makuu,
DAR ES SALAAM.

At or about this same time the Principal of Ndala College attended a Principals' Conference at Dar es Salaam and in the course of her stay in Dar es Salaam she met the respondent. The respondent assured her that he was still in possession of the money she had handed to him for the purchase of a safe and that he was still making every effort to make the purchase but there were as yet no second hand safes available on the market. The Principal accepted these assurances by the respondent.

At the end of the conference she returned to Ndala and as far as she was concerned there the matter rested until she left a course to Canada, in August, 1971.

Then in September, 1971 Dora Fanuel (P.W.4)took over as Principal of Ndala College. In taking over the affairs of the college she learned about the sum of shs.1,200/= which was stated on the records of the college to have been handed to the respondent the previous year for the purchase of a safe. On investigating the matter further she found the two letters Exhibits P3 and P4. Subsequently armed with these two letters she went to Dar es Salaam to inquire about this matter but on going the rounds at the ministry it became apparently clear that no responsible officer there knew anything about the sum of Shs.1,200/= or the safe.

.....4/However, the

However, the Ministry instead of checking on the matter with the respondent as they ought reasonably to have done decided to advise the Principal to place the matter before the police, Tabora. The matter was duly reported to the police on 15/11/71 and investigations commenced on 17/11/71. The police strangly enough took no further steps on the matter until nearly three years later when on 30/12/74 they arrested the respondent and charged him with stealing by a person employed in the public service the sum of shs.1,200/=.

The respondent who gave evidence in his own defence denied the charge contending firstly that as there was no fixed time within which to purchase the safe or return the money to the Principal Ndala College he could not be held to have stolen the money merely because he had taken so long to return the money. Moreover, as conceded by the learned state attorney it is clearly established on the evidence on record that the respondent return of the money in December, 1971 had nothing to do with the report made to the Police by the Principal Ndala College because as he asserts he felt his transfer to Bukoba would make it nigh impossible for him to fulfil his promise to the college to purchase a second hand safe for them. The respondent also put forward another defence which is shortly this that since at all material times he had on him the money alleged to have been stolen, the charge by the Republic was to say the least utterly misconceived. The learned trial Resident Magistrate accepted the submissions made by the respondent and acquitted him of the offence charged. Mr. Mr. Ntabaye, learned State Attorney representing the appellant, the Director of Public Prosecutions, while conceding that the agreement made between the Principal and the respondent for the purchase of the safe made no provision for a time limit, submitted that notwithstanding the learned trial Resident Magistrate was in error in failing to take into account a number of factors among which are (a) failure by the respondent to report to his superior officers in Dar-es-Salaam regarding the receipt of the money in question (b) absence of copies of Exhibits P3 and P4 from the appropriate Ministry's file. I do not think this criticism of the trial Magistrate has any basis whatsoever. The learned trial Resident Magistrate in fact considered all these factors and quite properly, in my opinion, found nothing in them which could irresistably point to the accused guilt. The part of his judgement dealing with these points reads:-

"On these facts did the accused steal the shs.1,200/=? The prosecution base their allegation of theft on the part of the accused on the grounds that first, the accused omitted to mention in Exhibit P5 the fact that he had taken the shs.1,200/= from the college; secondly, that it was improper for the accused

.....5/to handle cash during

to handle cash during his inspection duties and lastly that he returned the shs.1,200/= when he got wind of the fact that the police were making investigations into the shs.1,200/= he had taken. With respect, I do not regard these grounds to be pointing to a theft on the part of the accused. As to the first one, the accused says it was not necessary, there being a record of the money in Exhibit P2, to mention it in his inspection report. He has been backed up on this by a prosecution witness, P.W.5, I agree with the defence on this myself and hold that the fact that the accused omitted to mention the shs.1,200/= in Exhibit P5 does not mean that he stole the money. Neither am I prepared to hold that the omission was made deliberately. As to the second ground, it may well have been improper for the accused to handle cashe during his inspection tours, but that was merely an administrative fact; I do not think that the fact that he handled cash in this case did result in a theft on his part. The cash was handed to him and I do not think that he got it by theft or for the purpose of stealing it. Regarding the last ground, there is no evidence whatsoever to show that before the accused returned the shs.1,200/= he had heard that he was under police investigation, none of the prosecution witnesses has said he or she did notify the accused on that. Further as found above, there was at no time any demand for the return of the money to the college and actually, there were no complaints received by the accused regarding the money. It is difficult, therefore, for me to find for the prosecution that the accused was prompted by police investigations when he returned the money."

With the utmost respect to the learned State Attorney, I fail to see where in this analysis of circumstantial evidence the learned trial Magistrate erred. The circumstantial facts on which learned state attorney has rested the major and important part of his submissions to this court are clearly in my opinion quite consistent with the innocence of the accused and could not even by a stretch of the imagination be said to be incapable of explanation upon any other resasonable hypothesis than that of his guilt. The accused has in fact provided a very sound and reasonable explanation for all the so-called omissions - an explanation which in my opinion the trial court properly and correctly accepted.

Be that as it may, I think at his stage of my judgement I should discuss briefly what I believe was the fatal flaw in the case brought by the prosecution against the respondent. As already stated this case related to moneys which lawfully came into the possession of the respondent. It is trite law of course that if a person who receives money in circumstances such as the accused

....6/received the shs.1,200/=

received the shs.1,200/= in this case subsequently forms the intention to approprite the money and convert it to his own use, the fact that such moneys came into his possession lawfully in the first place is no defence to a charge of theft. So long as it is proved that subsequent to the lawful receipt of the money the accused formed the intetion to use it at his will or convert it to his own use, he will rightly be found guilty of stealing the money. Support for this view is to be found from paragraph (e) sub-section (2) of section 258 of the Penal Code which provides as follows:-

"258 - (2) a person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say:-

(a) ----------

(b) ----------

(c) ----------

(d) ----------

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner."

Now in this case, as Mr. Kwikima, learned counsel for the respondent, has properly submitted there is one startling fact which stands out and this is the bismal failure by the prosecution to establish an essential ingredient of the offence, that is, the convertion of the money, the subject-matter of the charge, to his own use. No where in the entire evidence led in the case are we told directly or by necessary inference when the alleged convertion of the money took place. This could of course be done in several ways. First, it could be done by showing for instance that when the money was demanded the accused failed to account for it and secondely by establishing as a fact that the return of the money was as result of the accused hearing of the police investigations mounted three or so weeks before he returned the money to the college. The prosecution made no attempt to adduce evidence to establish any of these facts. Therefore, in view of the evidence before me, I entirely fail to see on what basis the charge brought against the respondent could be sustained. I entirely agree with learned counsel for the respondent that failure by the prosecution to prove that the accused/respondent at any stage between 14th October, 1970 and 20th December, 1971 converted the money given to him by the Principal of Ndala College for the purchase of a second hand safe to his own use or to purposes other than the purchase of a safe, was a serious and fatal flaw in the case put up by the prosecution.

....7/For the foregoing reasons,

For the foregoing reasons, I find no merit in this appeal by the Director of Public Prosecutions and accordingly dismiss it.

It is so ordered.

Y. M. M. MWAKASENDO,
JUDGE
10/7/75

Judgement delivered in open court in the presence of the Mr. Temba, Learned State Attorney for the Republic and Mr. Kwikima learned counsel for the respondent.

Y. M. M. MWAKASENDO,
JUDGE
11/7/75

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