IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KILEO, J. A., OTHMAN, J. A. AND MASSATI, J. A.)

CRIMINAL APPEAL NO 137, 140 AND 161 OF 2005

1. ADAM SHABAN
2. THEREZA YEYEYE
3. WILBARD RWEZAURA

..... APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba
[Luanda, J]

dated 19th July, 2005
In
HC Consolidated Criminal Appeal No. 3/2004, 4/2004 and 5/2004)

JUDGMENT OF THE COURT

19th & 26th May, 2009

KILEO, J.A.

The three appellants, Adam Shaban, Thereza Yeyeye and Wilbard Rwezaura were arraigned before the District Court of Biharamulo for the offences of stealing (for first appellant) and stealing by servant (for second and third appellants). They were convicted and sentenced to five years imprisonment. Their appeals to the High Court were unsuccessful, hence this appeal.

Prior to the hearing of the appeal, the first appellant had filed a notice of withdrawal of appeal pursuant to Rule 70 (1) of the Court of Appeal Rules (The Rules). His appeal was in the event dismissed.

The appeal by the third appellant was also dismissed in terms of Rule 65 (5) of the Rules as he had not filed his memorandum of appeal in Court, though, he himself admitted that he was served with the record of appeal as early as May 2008. What is before us now is the appeal by Thereza Yeyeye.

The facts leading to the appellant's conviction are very brief. The prosecution, through PW1 Bernard Byenembo , PW3 Richard Kiiza and PW6 Leonidas Rwezaura led evidence which showed that the appellant, along with Wibard Rwezaura (whose appeal was dismissed), being employees of the Biharamulo Water Department, acting in conjunction with Adam Shaban (who withdrew his appeal), misappropriated some 27 water pipes belonging to the Water Department. PW1 was the watchman on duty at the site on 19/4/2003 which was a Saturday. On this day the appellant and Wilbard Rwezaura went to the Water Department premises and caused the water pipes to be removed from their owner's premises. PW3 was the transporter who was hired to ferry the water pipes to Rwejuna's garage.

On 25th April 2006 the appellant lodged a memorandum of appeal containing nine grounds of appeal. Subsequently, she lodged a supplementary memorandum of appeal with five grounds of complaint. Most of the grounds of appeal in the first memorandum are based on findings on points of fact which need not detain us this

being a second appeal. Suffice it to say that the appellant's major cause of complaint center on two main issues:-

(a) That the learned judge sitting on first appeal erred in law in making a finding that 27 water pipes belonging to Biharamulo District Council had been stolen in the absence of evidence proving any loss of pipes from the District Council.

(b) That the learned High Court judge erred in law in upholding the finding of the trial court that the appellant participated in the theft while there was no evidence to prove that the stolen pipes had been placed in her possession.

The appellant appeared in person at the hearing of the appeal. The respondent Republic was represented by Mr. Lukosi, learned State Attorney. The appellant reiterated the contents of her grounds of appeal insisting that the courts below erred to have found her guilty of stealing by servant while there was no evidence proving that the pipes alleged to have been stolen had been put in her possession. She also challenged the decision of the High Court for failure to discredit the testimony of PW1 as he had an interest to serve in mentioning her name as the one who had directed that the pipes be removed from the Water Department's premises. The appellant further complained that the High Court judge erred in law to have declined to allow her to present additional grounds of appeal

whereby she would have shown that contrary to what the trial magistrate recorded of PW3 concerning her presence at the scene of crime, PW3 did not, in actual fact, state that she was at the scene.

Mr. Lukosi vehemently resisted the appeal. In response to the appellant's assertion that there was no evidence of proof of theft of pipes belonging to the Water Department or the fact that the pipes had been put in her possession/custody, the learned state attorney pointed out that the evidence from PW6 proved ownership, by the Water Department, of the pipes. The learned state attorney also submitted that the evidence of PW1 and PW3 who had no interest to serve sufficiently proved participation of the appellant in the theft of the water pipes.

We have given due consideration to the matter before us. We have failed to see any error on the part of the High Court in sustaining conviction and sentence imposed on the appellant by the trial court. The High Court re- evaluated the evidence adduced at the trial court and found that it sufficiently established the charge against the appellant. The learned High Court judge observed in his judgment as follows:

> *"Back to the evidence. The evidence of PW1 and PW3 is loud and clear that the 2nd and 3rd appellants were also involved in the stealing. The taking of the pipes was done during the day*

time. The issue of mistaken identity does not arise. The defence of alibi was rightly rejected."

We may also add, as rightly observed by the learned state attorney, that ownership of the water pipes by the government was proved by the evidence of PW6 who was the water engineer at Biharamulo district. The witness gave a lucid narration of how the water pipes came to be stored in the office yard and how after a discovery of the theft he instructed that they be returned to the yard. The fact that the pipes were three less when they were returned did not affect the credibility of the witness's testimony.

It is obvious that the trial court had found the prosecution witnesses to have been credible. This Court has said time and again that a trial court is the one best placed to determine credibility of a witness- See for example; **AUGUSTINO KAGANYA, ATHANAS NYAMOGA AND WILLIAM MWANYENJE v REPUBLIC** (1994) TLR 16 (CA)and **ALI ABDALLAH RAJAB v SAADA ABDALLAH RAJAB AND OTHERS** (1994) TLR 132 (CA). In the later case the Court held that:

(i) Where a case is essentially one of fact, in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to an erroneous conclusion;

(ii) Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record.

The appellant, in her submission before us did suggest that the courts below should not have convicted her on the evidence of PW1 and PW3 without corroboration as theirs was accomplice evidence. There is however, nothing on record to suggest that these witnesses were accomplices or had any interest to serve. The evidence against her was direct and simple. In collusion with others they stole 27 water pipes belonging to Biharamulo District Council. Fortunately, most of these water pipes were recovered.

Before we conclude we would wish to comment very briefly about the appellant's complaint that the trial magistrate did not record correctly what was said by PW3 with regard to her presence in yard on the day in question. She claimed that whereas PW3 stated during his evidence in court that she was not at the scene on that day, on the other hand PW3 is recorded as having stated that she was there.

Admittedly ours is a court of record. We have carefully perused the record of appeal. For the avoidance of doubt we also perused the original record of the trial court. The appellant appeared as the 2nd accused in the trial court and the following is a recording of what PW3 stated concerning her:

.....At that time the 2nd and 3rd accused were in the yard and the water pipes were loaded in my motor vehicle in presence of the 2nd accused and 3rd accused."

The above statement in the record speaks for itself. Needless to point out, PW1 said the same thing about the appellant's presence in the yard on that particular day. Apart from that, the law entitles this Court to presume that the evidence of witnesses was properly recorded. That presumption is not to be lightly interfered with. Section 89 of the Evidence Act, Cap. 6 R.E. 2002 provides:-

> **"When a document is produced before a court, purporting to be a record or memorandum of the evidence, or of any part of the record of evidence given by a witness in judicial proceedings or before any officer authorized by law to take the evidence, and purporting to be signed by a judge or magistrate, or by any such other officer, the court shall presume-**
>
> **(a) that the document is genuine;**
>
> **(b) that any such statement as to the circumstances in which it was taken, purporting to be taken by the person signing it, are true; and**
>
> **(c) that such evidence was duly taken."**

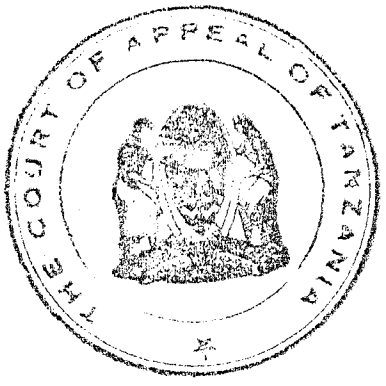
The High Court of Uganda, sitting on appeal in **Paulo Osinya v.R.** (1959) E.A. 353, declined to accept affidavits of witnesses tendered

in an attempt to show that the trial magistrate had not recorded the evidence of the accused and his witnesses properly. Referring to section 112 of the Uganda Evidence Ordinance (now appearing as section 79), which is more or less similar to section 89 of our Evidence Act, Bennet, Ag. C. J held that by virtue of s. 112 of the Evidence Ordinance the court is entitled to presume that the evidence of witnesses was properly interpreted and recorded. As we have endeavored to show above, our views are not any different.

In the circumstances we find the appellant's complaint that the evidence of PW3 was not properly recorded to be completely unfounded.

Having considered the matter as above we find the appeal by Thereza Yeyeye to be lacking in substance. We accordingly dismiss it in its entirety.

DATED at MWANZA this 21st day of May 2009.



E. A. KILEO
JUSTICE OF APPEAL

M. C. OTHMAN
JUSTICE OF APPEAL

S.A. L. MASSATI
JUSTICE OF APPEAL

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

(P. A. LYIMO)
DEPUTY REGISTRAR