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IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPEAL NO..... 44 OF 1997

EDWIN WIGIRA KARONGAMINI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

J U D G M E N T

BUBESHI, J.

The appellant was convicted with the offence of stealing by clerks and servants c/s 271 and 265 of the Penal Code and was sentenced to five years custodial term. He was also ordered to compensate his former employer ALAF Tsh. 94,632,415/15 after execution of the sentence. Being aggrieved he has filed this appeal against both conviction and sentence.

Mr. Chemribe learned counsel has appeared on his behalf and has filed four grounds of appeal. These are:

- that the learned trial magistrate erred in law in convicting the appellant with the offence of theft which was never proved against him.
- the the learned trial magistrates finding that the appellant was guilty of negligence and conspiracy to steal and his act of making the finding the basis of conviction was both a factual and a legal error and was unsupported with the evidence on record.
- that the learned trial magistrate finding of fact that the appellant appointed a fake transport company to ferry the consignment leaving the well known companies was far fetched and wrong
- that the appellant acted diligently and in accordance with the instructions of his supervisor with their prevailing business practice at the company. Had the learned trial magistrate analysed properly the evidence on record he would have and ought to have found that there existed no negligent action on the part of the accused.

Mr. Chamriho submitted that the duties of the appellant included checking on the credentials of would be transporters who came to check whether they could be assigned to transport the company's good to various upcountry depot. That he did exactly that and interrogated and checked the documents of the person who presented himself. That the appellant was satisfied that the transporter was genuine and after being instructed by PW 1 Narendra Solanky, the appellant granted him the job. What Mr. Chamriho is saying is that the appellant complied with the procedural requirement obtaining at the Company. Further counsel has submitted that as the goods were taken out of the company's warehouse with the express authorization of the employer and all the requisite documents properly tendered, then the charge of stealing levelled at the appellants door could not stand when the appellant did not claim ownership or a convert them to his own use. That there was no mens rea formed to deprive the appellants employer of the goods.

On grounds two and four which were argued together, Mr. Chamriho has submitted that the trial magistrate's finding that the appellant was guilty of negligence and conspiracy was not supported by evidence on record. That on the contrary the appellant acted with due diligence in accordance with the instructions of his supervisor and within the prevailing business practice obtaining at the company. Mr. Chamriho has submitted that there is no evidence on record suggestive of any conspiracy between the appellant and one Christopher whom counsel has described as a person. That on evidence there were no overt acts and neither was the intention to defraud proved. Further Mr. Chamriho complained that the trial magistrate got carried away with speculations and conjectures much to the disadvantage of the appellant. That the trial magistrate relied on uncorroborated and far fetched circumstantial evidences.

Mr. Chamriho has submitted that had the trial magistrate evaluated the evidence properly, he would have come to the conclusion that it was common for persons looking for transportation job to tender photocopies of their documents, that it was not the appellant who went to look for the transporter, that the appellant a mere subordinate to PW 1 was authorised by PW 1 to give the job to the transporter who turned out to be fake, that the appellant was not negligent as he processed all the documentation and finally the transporter was

allowed to load the goods in presence of everyone. He has submitted that there was neither negligence nor conspiracy to defraud.

On ground 3 they submit that the prosecution had failed to prove that the company Africargo Investment never existed. That the trial magistrate did not properly evaluate the evidence hence coming to erroneous conclusions. That on evidence on record the case was not proved beyond reasonable doubt as required in criminal cases.

For the Republic, State Attorney Mkwizu resisted the appeal. She submitted on grounds along the following lines: that on evidence on record the appellant can be said to have acted fraudulently and without claim of right, taken 60 tons of ironsheet and 30 tons of metal pipes, the property of his employer Aluminium Africa Ltd, by permanently depriving the same employer. She contended that according to PW 1 Mahendra Solanki, the appellant was charged with the task of looking for transport to ferry consignment to upcountry depots. That it is the appellant who introduced the transporter to PW 1 and that appellant informed PW 1 on 22/11/95 that the consignments have been ferried to Mwanza. The learned State Counsel submitted that the evidence of PW 1 was corroborated by PW2 Anandumi Mbise, who testified that it was the appellant who had instructed him to write an invoice and gave him photocopies of the motor vehicles registration card and driving licences. That it is the appellant who was left to deal with the purported owner of the company called Africargo. Mrs. Mkwizu has submitted that the appellant was charged with checking the whereabouts of the Africargo Offices and the authenticity of the documents; that the appellant did not do so. And that that omission amounted to gross negligence. Learned State Counsel submitted that this case be decided on the basis of circumstantial evidence which according to counsel only pointed to the appellants guilty. That an agreement between the the appellant and the transporter Africargo can be inferred from the chain of events ^{which} raise the presumption of a common plan amounting to agreement. That the appellants overtly intentional omission to verify the said documents did constitute the requisite ~~actus reus~~ ^{actus reus}.

It is not in dispute that the appellant by then incharge of office instead of (PW3) Lucas Mkonya who had gone on leave, was charged with the duty of looking for transporters fit for ferrying the company goods to upcountry depots. It is also not disputed that the appellant on 28/11/95 introduced to PW 1 one Christopher a representative of Africargo Company ~~who~~ ^{was} vying for the job to ferry the goods intended for Mwanza and Shinyanga Depots. It is also not in dispute that the appellant

after checking the documents handed to him by this Christopher, as required by the Company procedure, confirmed that the purported transporter was fit for the job. Further it is not in dispute that the representative of Africargo loaded the goods after the relevant order forms and LPO³ had been passed - Exh. P1. That usage of photocopy documents in form of registration card for vehicles and driving licence was a common feature. As it turned out the consignments which were loaded onto Africargo vehicles and under the authority of PW 4 never reached their intended destination. There is no dispute as to what items were loaded - documentation verifying the corrugated iron sheets and pipes of various dimensions were tendered in court as Ex. P2, (collectively) Ex. P3 and Ex. P4. These documents were confirmed by PW4, Ramadhani s/o Tarishi.

So far it is in evidence that no company procedure regarding ferrying of consignments from ALAF head office to various destinations was flouted. It is not worthy to observe that, not only did the appellant do what he was required to do, a part from checking the company premises, but his colleagues PW 2 Anandumi s/o Mbise, PW 4 Ramadhani s/o Tarishi, PW 6 Matilda Mwendi as well as PW 7 and PW 9 participated in their own way to facilitate the intended ferrying of the consignment to upcountry depot of Mwanza and Shinyanga. It was not a one man's job.

After what appeared to be a normal routine exercise, the goods have not to date arrived at their intended destination. They have vanished into thin air after leaving the Alaf Head Office.

Now the question for determination is whether the prosecution has succeeded, with the degree required for criminal cases, to prove the charge against the appellant. The trial court came to the conclusion that the prosecution has discharged that burden. In coming to that decision the trial court based its decision on.

(a) what the appellant did by introducing one Christopher of Africargo, But then this was part of his normal routine duties,

- that he tendered photocopy documents, but this again was quite normal PW 2 evidence supports it,

- that he did not check the physical existence of the Africargo Offices. On this the appellant has conceded that he did not do. Now the immediate question, is whether such an omission alone can sufficiently prove the charge of theft. At most that act of omission amounted to gross negligence but the appellant is not charged with occasioning loss through negligence. He is charged with the offence of stealing.

The learned state attorney has submitted that the appellants act of omission to ~~merely~~ verify the records of a transporter points to the appellants guilt. With respect, if I may pose the question to which offence? The issue here is whether the prosecution has established the offence of stealing beyond reasonable doubt.

The evidence tendered would indicate that the appellant conspired with persons - possibly Africargo and Christopher in particular to commit the offence of stealing. And yet the appellant was merely charged with stealing, and not conspiracy to steal which charge, in any considered view would tend to be in tandem with the evidence on record.

The learned State Attorney has sought to rely on the case of R V GOLKALDAS KANJI KHANIA (1949) 16 TACA 115 to prove that there was, on evidence a common plan amounting to agreement. That the appellants omission to conduct a proper verification of the transporters documentation and the said transporters subsequent theft of the company's goods, sufficiently raised the presumption of a common plan. That the said overt act of omission to verify the documents constitute the requisite *animus furandi*.

I have had time to study the authority cited to me by Mrs. ~~Mwiza~~, I hesteen to say that in that cited case the appellants had been charged with the offence of conspiracy to transport diamonds. In the case at hand the appellant was not facing a conspiracy charge but plain theft. The two situations are not similar.

In my considered view, the appellants acts of commission and omission exhibited in this case would tend to point a strong suspicion^{ions} on the part of the appellant that the Africargo company was a non existent. But as this court has time and again held, suspicion^{ions} however strong, cannot sustain the test of proving a case beyond reasonable doubt.

I must confess, this appeal has exercised my mind quite considerably. But I have come to the conclusion that as the appellant was facing a wrong charge when compared to evidence on record, this Court has no alternative but to allow the appeal. The order of compensation is also set aside. The appellant is to be released forthwith unless otherwise legally held.

A. G. Bubeshi
A. G. BUBESHI

JUDGE
16/3/98

Delivered before
Chamriko for the Appellant
Miss Kadehe for the Republic.