IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., MROSO J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 286 OF 2005

ISMAIL ADEN RAGE ..... APPELLANT

VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court Of Tanzania at Dar es Salaam)

(Mihayo, J.)

dated the 2nd day of September, 2005

in

HC. CRIMINAL APPEAL No. 37 of 2005

JUDGMENT OF THE COURT

20 February & 27 March, 2008

MROSO, J.A.:

The appellant was the second accused person out of four accused persons in the trial Court of Resident Magistrate, at Kisutu, Dar es Salaam. Those

four original accused persons faced a total of thirteen counts. In a lengthy 98 page judgment the appellant was the only one found guilty. He was convicted on six counts, four of them of stealing, one of uttering a false document and one of obtaining money by false pretences. He was sentenced to three years imprisonment on each count, the sentences to run concurrently. He was also ordered to *"restore all the money (sic) to the government and (the) government"* would give the money to the rightful owner or distress in default. The appellant felt he had been wrongly convicted and sentenced. He decided to appeal to the High Court where, he believed, his innocence would be vindicated.

The High Court, Mihayo, J, dismissed the appeal in its entirety on three counts, all of which were of stealing. Those were the first, third and thirteenth counts. The appeal was allowed on the remaining three, counts. The appellant considered that he had not been fully vindicated and resorted to this Court by way of a further appeal. He was ably represented at the hearing of the appeal by Mr. Ishengoma, learned counsel, who also represented him before the High Court. The respondent Republic was represented by the able and resourceful Mr. Boniface, Principal State Attorney.

The advocates for the appellant, Jurisconsults Law Chambers, filed seven grounds of appeal but, subsequently, by a supplementary memorandum of appeal, added another three grounds of appeal. At the hearing he divided those ten grounds into four clusters in canvassing them. Thus, ground 7 of the original memorandum of appeal was argued together with grounds 1 and 2 of the supplementary grounds of appeal. Then he argued together the 1st and 2nd grounds in the original memorandum of appeal, and grounds 3 and 4 of the original memorandum of appeal together with the 3rd ground in the supplementary grounds. Finally, he argued together the 5th and 6th grounds in the original memorandum of appeal.

In his reply to the grounds of appeal, Mr. Boniface resisted the appeal in respect of the conviction of the appellant on the third count in the charge sheet which was before the trial court, but conceded the appeal against conviction, sentence and compensation order in respect of the remaining

two counts. We intend, therefore, to confine our discussion of the appeal to the evidence and the applicable law as they relate to the third count in the charge sheet.

The third count in the charge sheet was on stealing, contrary to section 265 of the Penal Code. The particulars of offence on that count are that the appellant on or between the 24th of February, 1999 and the 8th of March, 1999 when he was the Secretary General of the Football Association of Tanzania (FAT), stole 50 footballs worth Tshs. 500,000/=, the property of the said Football Association of Tanzania.

The grounds of appeal which are directly relevant to the conviction of the appellant on the third count appear to be grounds 5 and 7 of the original memorandum of appeal and grounds 1 and 2 of the supplementary memorandum of appeal.

The substance of the complaints in all these grounds of appeal is, first, that there was no sufficient evidence that the appellant stole 50 footballs; that there was no sufficient proof that the footballs belonged to the Football Association of Tanzania, and, that at any rate, the Association was not in law capable of owning property, such as footballs. We think we should now give a brief background to the charge on the third count and the conviction of the appellant on that charge.

The appellant was the Secretary General of a sports organization known as the Football Association of Tanzania, popularly known by its acronym, FAT, between 1996 and 1999 and also apparently, between 1999 to 2002.

In about February, 1999 12 boxes believed to contain 50 footballs each were received in Dar es Salaam from Dubai The footballs had been imported by a company known as Inammulla Holdings Ltd. Apparently, these boxes were air freighted to Dar es Salaam airport and the appellant was there to collect them. The twelve (12) boxes were supposed to contain a total of 600 footballs. The appellant, however, said that 30 footballs were stolen at the airport. The presumption then was that he collected 570 footballs from the airport.

By some sponsorship arrangement between the Tanzania Breweries Limited (TBL) and the Football Association of Tanzania (FAT) TBL bought 550 of those footballs and they were duly delivered to it. According to PW10 – Helena Stanslaus Sweya, a Marketing Manager with TBL, FAT were paid a total of 5.5 million Tshs. for the footballs.

The trial court found as a fact that since 600 footballs had been received by the appellant but PW11, Stephania Kubumba, the FAT Storekeeper, received from him only 550 footballs, the appellant must have stolen the 50 footballs which were the difference between 600 footballs in 12 boxes and the 550 footballs which he handed over to Kubumba (PW11). The trial court proceeded to convict the appellant for the theft of the 50 footballs. The finding of fact and the convictions were sustained by the first appellate court, the High Court.

Mr. Ishengoma has stoutly argued that there was no proof that the appellant had in fact received 600 footballs at the airport. He said the evidence was that 12 boxes were received at the airport with the assumption that each box contained 50 footballs. But since none of the boxes were opened to verify the number of footballs in each box, it remained uncertain if, in fact, the appellant took possession of 600 footballs, and not the 550 footballs which were taken on charge by PW10 - Stephania Kubumba.

Mr. Boniface conceded that there was no proof in fact that each of the 12 boxes contained 50 footballs. Even so, he contended that the appellant himself said that of the 600 footballs in the boxes, 30 had been stolen. If that was so, he must have taken possession of 570 footballs but only 550 footballs were accounted for.

The appellant had not given explanation regarding the balance of 20 footballs. In the absence of an account for those 20 footballs, the inevitable inference was that he stole them.

During his defence, the appellant said of the supposed 600 footballs as follows:-

Supplier imported 600 footballs. Ministry Of Education made subside (sic). At the airport, some were stolen, balance was 570, ***After checking out there were 550 balls (sic),*** *which TBL paid and were in accordance with the contract." (Our underlining for emphasis).*

We have underscored the words ***"After checking out...."*** because we think they are significant. It is unfortunate that neither the advocate for the appellant nor the prosecuting State Attorney or even the trial court asked the appellant to explain the meaning of those words. Did ***"Checking out"*** mean leaving the airport? Or did those words imply that the boxes were subsequently opened to check on the number of footballs in each box and it was found out there was a total of 550 footballs only?

We think that the appellant may have been attempting an explanation on 50 footballs which were presumed missing from the boxes. The exact meaning of that explanation is not available because the appellant was not asked by any one to clarify what he meant by those words. The Court cannot assume that those words were meaningless. In such circumstances, the doubt has to be resolved in favour of the appellant. It cannot be said, therefore, that the appellant did not give any explanation regarding the 50 footballs which were assumed to be missing.

We have persistently used the term ***"assumed"*** advisedly. As already mentioned in this judgment, there is no proof that the 12 boxes were checked at the airport to ascertain the number of footballs in them. PW2 - Julian O. Kuliyurara - said in his evidence - ***"I know each carton contained 50 footballs because that is the standard packaging"***. Clearly, therefore, PW2 had merely assumed that since standard packaging is 50 footballs per carton, then there must have been 50 footballs in each package. That is a far cry from proof that in fact each package contained 50 footballs. It is not unknown that there can be accidental or deliberate short packaging. Furthermore, to hammer the point home that the packages were not opened at the airport, PW2 said –

"We were not supposed to open the cartons".

We are of the opinion, therefore, that in the absence of proof that 600 footballs had been received by the appellant, the appellant could not be convicted of the theft of either 50 or 20 footballs. We believe, too, that had the two courts below analyzed the evidence in the manner we have attempted to do, they would have found that the prosecution had not proved the theft beyond a reasonable doubt and would have acquitted the appellant on the third count.

Having reached the above conclusion on the 5th ground of appeal, it is now unnecessary to consider the other grounds of appeal which related to the third count in the charge sheet. We, therefore, wish to make very brief, passing remarks regarding the seventh ground of appeal in the original memorandum of appeal and the first and second grounds of appeal of the supplementary grounds of appeal.

Can the Football Association of Tanzania own property such as footballs which can be stolen? The question boils down to a more basic question whether the FAT is a ***"person"*** within the meaning of the relevant law? Section 258 (1) of the Penal Code, Cap. 16 of the Revised Edition, 2002 defines theft as under:

"258(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing".

This definition of theft must be read in conjunction with the preceding section 257 of the Penal Code which says-

"257. Every inanimate thing whatever which is the property of any person, and which is movable, is capable of being stolen."

A thing is capable of being stolen, therefore, if, among other attributes, it belongs to a person.

One of the arguments by the counsel for the appellant in this appeal is that FAT was not a person and it could not own property which could be stolen.

We are of the considered opinion that FAT is a person within the meaning of section 257 of the penal Code.

The term ***"person"*** as well as ***"owner"*** are defined in section 5 of the Penal Code to "include corporations of all kinds and any other association of persons capable of owning property……"

The more relevant definition of ***"person"*** can be found in section 4 of the Interpretation of Laws Act, Cap. 1 of the Revised Edition, 2002. Therein ***"person"*** is defined as

"……..any word or expression descriptive of a person (and) includes a public body, company or association or body of persons, corporate or unincorporated".

It follows, therefore, that whether FAT is or is not incorporated, it is a person, and, as a person, it can own property capable of being stolen, as per sections 257 and 258 of the Penal Code which means FAT could have owned footballs which are capable of being stolen. In this appeal we have, of course, found that there was no proof that the 50 or even 20 footballs which the appellant was alleged to have stolen actually existed**.**

Mr. Ishengoma asked the question, when did the alleged stolen footballs become the property of the FAT? We can answer this question quite quickly and briefly.

Had it been proved that the appellant expropriated the 50 footballs between the time the 12 boxes were received at the airport and when he handed the 550 footballs to PW11 - Kubumba, he would be said to have stolen them from the special owner of the footballs, FAT. But all this is now academic.

We allow the appeal by quashing the conviction on the third count and we set aside the sentence of three years imprisonment and the compensation order. Since the appellant is not in custody, we make no order for his being set free.

DATED at DAR ES SALAAM this 19th day of March, 2008.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR