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IN THE HIGH COURT OF TANZANIA  
at DAR ES SALAAM  
MISCELLANEOUS CRIMINAL CAUSE NO. 31 OF 1985

In the matter of Criminal Case No. 30 of 1985  
in the District Court of BAGAMOYO District  
at BAGAMOYO

Republic vs. DPP

versus

ASHA ALLY

J U D G E M E N T

MNZAVAS J.K. - The respondent, Asha Ali, was jointly charged with her husband, Ali Bakari, with stealing by agent c/s 273(b) of the Penal Code.

After hearing evidence in support of the charge and accused defence the learned district magistrate came to the conclusion that the prosecution had failed to prove the charge against the accused and he found both accused persons not guilty and acquitted them.

The Republic is appealing against the acquittal of the accused person.

It was not in dispute that the complainant one, Juma Polea was a tenant in accused's house in Miono, Bagamoyo district. On 15/12/84 Juma left Miono to Chalinze and, according to his evidence in the lower court he, before he left, entrusted his sewing machine to Asha to take<sup>case</sup> of it. Also entrusted to Asha, according to complainant's evidence, were clothing materials. The evidence showed that the complainant was away for about two months. When he returned to Miono he found that the sewing machine was missing.

In his evidence the complainant told the lower court that on asking Asha the whereabouts the machine he had entrusted to her, Asha is said to have replied that she had to go to her mother's village while the

complainant was away and that she had entrusted the sewing machine to her husband - and accused. The husband denied knowing anything about the sewing machine.

Thereupon the complainant complained to the local C.C.M office which in turn referred the matter to police post and the accused were arrested and charged with stealing by agent.

In his submission before this Court Mr. Chiza, learned state attorney, argued that the learned trial magistrate erred in finding the accused not guilty. In support of his argument the learned state attorney referred the court to the evidence of the complainant, (PW1), and that of one Mfaume Salehe, (PW2).

On the evidence of the complainant and that of Salehe, (PW2), the Republic was of the view that the sewing machine was entrusted to the respondent and that she should have been found guilty of stealing by agent as charged. Before this Court the respondent, Acha, has repeated her denial that the complainant did not entrust the sewing machine to her.

From the evidence of the complainant (PW1) and that of Mfaume, (PW)2 it would appear that the respondent was entrusted with the sewing machine. Mfaume told the lower court that he was present when the complainant inquired from the respondent the whereabouts of the sewing machine and that he heard her admitting that the machine was entrusted to her but that she had handed it to her husband when she left to her mother's village.

In his judgement the learned trial magistrate disbelieved complainant's evidence that he had entrusted his sewing machine to the respondent on the ground that "no person witnessed the handing over of the sewing machine to accused no. 1".

Before this court the respondent was asked by the court whether there was any reason why the complainant would have decided to tell lies against her and she replied that there was no enmity between them. And what is more, if the evidence of Mfaume Salehe, (PW2), is anything to go by, it tends to confirm complainant's evidence that he entrusted the sewing machine to her.

The sewing machine was said to have been kept in respondent's room after the complainant had handed it to her as complainant's room had no secure door. Apparently when the house was searched by the police both main doors to the house and the door to respondent's room were found to be intact. In this case I take into account that the decision of the lower court was based on the credibility of the witnesses and that the trial court was in a better position to assess credibility but in the circumstances of this case and as it was held by this Court in JUMA SAIDIVR (1967) HCD 382 "An appellate court is in as good a position as the trial court to draw inferences from circumstantial evidence".

From what I have stated above there was ample evidence to show that the disappearance of the sewing machine was the act or contrivance of the respondent.

I tend to agree with the learned state attorney that the respondent should have been convicted of stealing by agent s/s 273(b) of the Penal Code as charged.

The record of the lower court (accompanied by certified decision of this Court) is remitted to the lower court with a direction that the respondent be convicted of the offence and sentenced accordingly.

N. S. MNZAVAS  
JAJI KIONGOZI

Dar es Salaam

13/7/87