

IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CRIMINAL APPEAL NO. 80/92

AURIDE TCHAWALA NCULUBE

VERSUS

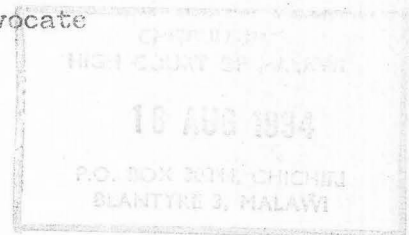
THE REPUBLIC



From the Chief Resident Magistrate's court at Mzuzu  
Criminal Case No. 80/92

CORAM: KALAILI, J.

For the State, Nyirenda, Senior State Advocate  
Appellant unrepresented  
Law Clerk, Chilongo  
Machine Operator, Mtunduwatha



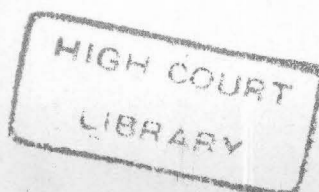
J U D G M E N T

This is an appeal by a person who is not represented by counsel. The grounds of appeal are rather lengthy but could, if drafted by counsel, be condensed to the oft used form, to wit,

"That the judgment should be set aside on the ground that it cannot be supported having regard to the evidence".

The appellant was charged and convicted with theft by servant contrary to S.278 as read with S.286(1) of the Penal Code. It is alleged that he stole the sum of K10,400 the property of Kandodo otherwise known as Import and Export Company who were his employers at the material time.

2/...



Needless to say, the evidence against the appellant is overwhelming. An auditor, one William Wandalo, testified that he was the company auditor for Kandodo which is an affiliate of the Import and Export Company. As the Company Auditor, he audited Kandodo Superette in Mzuzu, and was the leader of the audit team. In the course of the audit, they found K4,322.22 in the safe and the appellant failed to account for K10,400.05. The shop manager also testified that-

"On Monday, 16th August I reported for duties at 6.30 a.m. The accused also reported for duties at 6.30 a.m. We used the rear door of the shop. The cashier came to me with a till slip of 16th August, banking slip for Sunday so that he should go and bank. I forget the sales of Sunday. I did sign for them. He went to the bank. Then the accused returned to the shop and said he had failed to bank money because the money for Friday and for Saturday had turned into useless papers."

It is this witness' evidence that although the audit commenced before the appellant was present, the said appellant later joined the auditors as they continued with the audit.

The third prosecution witness was Robson Mwambembe. It was his evidence that in the presence of the appellant, he met a herbalist who claimed that he could convert one Kwacha notes into large denominations. This was demonstrated and a Kwacha note was converted into K15.00 which was in two bank notes, that is K10 and K5. These notes were brand new, and were produced after the herbalist said some prayers over the one Kwacha which was placed in a note book.

Mwambembe also gave evidence that on Saturday, he saw the appellant with bundles of money and this is the Saturday before the Monday when the appellant failed to make a banking of the money collected over the weekend at the Superette. The fourth prosecution witness was Sergeant Ng'oma of Mzuzu Police. He testified that he received a complaint on 17th August 1992 that K10,400.00 was stolen from the appellant by a Tanzanian by magic. Later, the appellant confessed that he had stolen that money. He tendered a confession statement which was retracted to at the trial.

The appellant chose not to call any witness in the court below. He testified at great length, and his evidence was to the effect that the money was stolen from him through the medium of magic by a Tanzanian. It is clear from the prosecution evidence that the appellant took the sales proceeds and tried to multiply

the same with the assistance of the Tanzanian herbalist. He was conned in the process and lost all the K10,400 which belonged to his employers. The appellant testified that the Tanzanian converted K1.00 into K15.00 thereby confirming the evidence of Mr Mwambembe. That is how the evidence was presented in the court below.

In his judgment, this is how the trial Magistrate analysed the evidence-

"Firstly I must point out that I am left in no doubt that the calculations made by the auditor and his team were correct. I have personally examined the relevant documents and the relevant evidence I got the impression that the figure of K10,400.00 is the correct one with respect to money not accounted for. I find as a fact that the total sum, missing is K10,400.00. This finding is based on the evidence of PW1 who checked the money and the documents after the accused had returned from the bank.

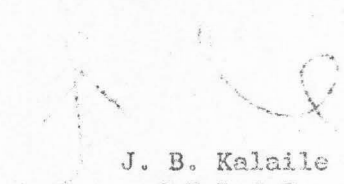
Having made this finding one needs to go further to determine whether the accused person is responsible for all this amount. In this regard the accused person accepts the figure K6,037.11 being part of the missing money. I find that the accused is responsible for this figure. The next question is whether the accused person is also responsible for the balance from the K10,400.00. It is important to note here that the accused person did not proceed to banking the money and he returned with it to the shop manager. The accused claims that he did not count at the bank. Instead he rushed back to the shop and gave the remaining money to the PW2 the shop manager. Here again there was no counting at the time of the handing over. PW2 simply got the money and kept it while the accused went to look for his suspect. The sad thing is that counting of the remaining money was done in the absence of the accused person. This is most unfortunate. The possibility arises that somebody else apart from the accused may have taken the money from the already depleted amount, for now there was every opportunity for doing so especially on the part of PW2 the shop manager. It may well have been a trick on the part of the accused to handover the remaining money to PW2 without counting it but there is no evidence to support that. If it was a trick then PW2 was foolish to have - fallen into that trap. It was foolish of PW2 to take charge of uncounted cash particularly when there was already an allegation of theft pertaining to it. That conduct of PW2 certainly seriously damages the case of the prosecution in respect of the balance referred to above. Worse still counting was done in the absence of the accused person. It is difficult to pin the accused down on this one because the accused cannot confirm the accuracy of such counting.



I am therefore unable to find the accused responsible for the disappearance of the whole K10,400.05."

The trial court accordingly sentenced the appellant to 4 years imprisonment with hard labour for theft of K6,037.11. The appellant cannot now be heard to argue that he does not understand how the figure of K10,400.05 was reduced to K6,037.11 by the trial Magistrate. Furthermore, it is of no avail to the appellant to argue that Mwambembe was an accomplice witness and the trial Magistrate based the conviction principally on the evidence of that witness. The last argument presented by the appellant is that his employers dismissed him after his conviction was entered by the trial court and this court should consider the dismissal as a "double blow". Double blow or not I know of no convict in legal history who retained his job after being sentenced to imprisonment for the offence of theft by servant. The appeals against conviction and sentence are hereby dismissed.

PRONOUNCED in open court this 7th day of March 1994 at Lilongwe.

  
J. B. Kalaila  
J U D G E