IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., RAMADHANI, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 67 OF 1999

BETWEEN

ILUMINATUS MKOKA. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

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

(Bubeshi, J.)

dated the 2nd day of July, 1999

in

H.C. Economic Crime Case No. 3 of 1997

REASONS FOR JUDGMENT

KISANGA, J.A.:

The appellant was convicted by the High Court (Bubeshi, J.) of occasioning loss to a specified authority contrary to paragraph 11 (1) of the First Schedule to, and section 59 of, the Economic and Organized Crime Control Act, 1984, and was sentenced to 10 years' imprisonment with an order to compensate the specified authority for the loss. He appealed to this Court against both conviction and sentence. At the hearing of the appeal he was advocated for by Mr. Luguwa, advocate, while the respondent Republic was represented by Miss Mkwizu, Senior State Attorney. Counsel for both sides did not seek to support the conviction and as we were inclined to the same view we allow the appeal after hearing counsel submissions, quashed the conviction and set aside the sentence, reserving our reasons for doing so. We now give our reasons.

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The appellant was a branch manager of the defunct National Bank of Commerce at Mlimani Branch in the City of Dar es Salaam. Acting in that capacity he authorised cash payments, on various cheques, to one Abdalaah Mohamed Dalidali, a fellow branch manager of the said defunct Bank at Mlandizi, Kibaya in the Coast Region, who operated two accounts at his own branch under the names of Abdallah Mohamed Dalidali and Madaila Abdallah Mohamed respectively. While the two accounts were maintained at the Mlandizi branch, the appellant authorised payment of the cheques in question at his Mlimani branch. The proceeds of the cheques for which payment was so authorised totalled TShs. 127,000,000/= paid out frequently at short intervals and extending only between January and July 1995. It turned out that the accounts of this customer lacked funds to meet such payments, but at the time of discovering this, the said Mohamed Abdallah Dalidali alias Madaila Abdallah Mohamed had absconded and has not been traced to date, and the cheques against which the payments totalling TShs. 127,000,000/= were made had also disappeared. The prosecution, therefore charged the appellant for recklessly authorising payments without ascertaining that the payee's accounts at the Mlandizi branch had funds to meet the payments.

In his defence the appellant asserted that he did ascertain the availability of funds after seeing the endorsement by the Mlandizi branch manager of such words as "Good Customer" or "Good for Funds" on the reverse side of the cheques in question. However, the trial judge rejected the defence and proceeded to convict and sentence the appellant as above stated, hence this appeal.

The crucial question both at the trial and in this appeal was whether it was proved that the appellant did not ascertain on the availability of funds before authorising the payments in question. The burden was on the prosecution to prove this but the task was obviously made difficult by the

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disappearance of the cheques in question. In an attempt to discharge that burden the prosecution led secondary evidence consisting of copies of the said cheques. However, that attempt hit a snag when it turned out that the copies so tendered did not show the back side of the cheques; only the front side was shown. Whereupon the prosecution sought leave of the court to tender in evidence microfilms of the missing cheques in order to reproduce or print therefrom copies showing the back side of the cheques, and thereby to demonstrate that there was no endorsement at the back of the cheques confirming the availability of funds, as asserted by the appellant.

Microfilm was described as a technique for the purposes of keeping and retaining bank documents or records in a more permanent form less susceptible to destruction or loss. A document, or a cheque in this case, is passed through a microfilm machine which automatically photographs it both sides. The document is then developed and retained in cartridge form until when it is required in which case copies may then be printed or reproduced from it.

The defence objected to the admissibility of the microfilms in evidence saying that the copies which it was intended to print from them belatedly showing the back side of the missing cheques should have been put in evidence at the time the copies showing only the front side of the cheques were tendered in evidence. To admit such evidence at this stage amounted to re-opening investigation and making out a new case against the appellant. In any case, it was further contended. such evidence was suspect and of no probative value. However, the objection was overruled, the microfilms were received in evidence and copies showing the back side of the missing cheques were reproduced or printed out of them by order of the court. The copies so reproduced bore no endorsement on the back side

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of the cheques as to availability of funds as was asserted by the appellant. That was the basis for the trial judge rejecting the appellant's defence.

The issue in this appeal turned largely on the authrnticity and reliability of the microfilm evidence which, as pointed out, was the basis for the trial court rejecting the appellant's defence. The appellant contended that before authorising payment he saw on the back of the missing cheques endorsement by the Mlandizi branch manager to the effect that the cheques were good for payment. But the copies reproduced or printed from the microfilms of the cheques show no such endorsement on the back side. A number of serious questions have been raised concerning the microfilms and the copies printed from them only belatedly, upon court order, showing no endorsement on the reverse side. The identity of the person or persons who photographed the missing cheques for the purpose of preserving them in the microfilms was not established. The prosecution put forward PW9, Christine Malamba, as the person who photographed the missing cheques and processed the microfilms or as the person who supervised the clerks to do so. But the witness was not photographing the cheques and processing the microfilms all the time. She did that job only when the clerks were not there, otherwise she used to supervise the clerks to do it. The said clerks, however, did not give evidence, nor were they identified. Furthermore PW9 could not recognise any of the microfilm copies as being those of the missing cheques which she photographed and processed or supervised the clerks to do so. She said she could not identify or recognize any of the cheques because she used to deal with so many cheques. To make matters worse, she said that when processing the cheques she used to look at the front side only. And lastly, the microfilms were not produced from PW9's custody. They were retrieved from what was described as "Dar es Salaam Zonal Office - Metro Office" but no one from that office was called to

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testify on how the microfilms were received and preserved there.

There is, therefore, no cogent evidence to prove whether or not the back side of the cheques was microfilmed and if so whether the microfilms thereof were kept intact and not tampered with. In the circumstances, therefore, the authenticity of the microfilmed copies of the missing cheques printed out only belatedly upon the order of the court was, to say the least, questionable. Counsel for both sides submitted that the microfilm copies relating to the back side of the missing cheques were wrongly admitted in evidence in non-compliance with provisions of sections 78 and 79 of the Evidence Act, especially as the copies were not at any stage examined with the back side of the original cheques. That criticism is quite justified, and that part of the evidence ought to have been held inadmissible.

The other piece of evidence relied on by the trial court to convict the appellant was that the appellant, in authorising payment of the cheques, acted recklessly and in total disregard of the normal banking practice or procedure. This finding was allegedly based on the evidence of PW2, Fatuma Mkangara, who, it is alleged said that the normal banking procedure required the appellant, before authorising the payment, to send a tested message to the responding Mlandizi branch for confirmation as to the existence of the customer's account there and the availability of funds, and that when the witness asked the appellant if he had taken such precautions the appellant replied that he knew what he was doing and that the cheques would not be dishonoured. But even assuming that this pointed to the appellant's guilt, the point is that this statement is nowhere to be found in PW2's evidence in court. It is to be found in the final submission by the prosecuting attorney who attributed it to PW2 but, as already said, there is nothing like it in PW2's evidence in court. With due

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respect to the learned trial judge, she wrongly acted on the statement to the appellant's detriment without being satisfied that the statement did, in fact, form part of the recorded evidence of PW2.

Once the evidence of microfilms and the said statement wrongly attributed to PW2 are discounted, there is nothing to support the appellant's conviction. The trial judge in her judgement lamented that the investigation and the prosecution of this case in certain aspects left a lot to be desired. Indeed she should have gone further and found that the evidence as adduced, although it cast a lot of suspicion on the appellant, fell far short of the requisite standard of proof of a criminal charge. As already intimated, Miss Mkwizu, learned Senior State Attorney for the respondent Republic, did not seek to support the appellant's conviction, and for the reasons briefly set out herein above, we are satisfied that she took the right decision. It is for these reasons that we allowed the appeal and set aside the conviction and sentence with an order for the appellant's immediate release from prison unless he was otherwise lawfully detained there.

DATED at DAR ES SALAAM this 30th day of July, 2001.

R.H. KISANGA
JUSTICE OF APPEAL

A.S.L.RAMADHANI
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

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

(F.L.K. MANDALI)
DEPUTY REGISTRAR