KISESE MBUGHA v ZAINABU SWALEHE 1991 TLR 90 (HC)

Criminal law - Theft - Whether a spouse can steal from another spouse.

Family law - Theft - Whether a spouse can steal from another spouse.

Criminal Practice and Procedure - Sentencing - Conditional discharge - What the condition is - Section 4(1) of Primary Courts Criminal Procedure Code.

Mwalusanya, J: The respondent Zainabu d/o Swalehe is the wife of the appellant Kisese s/o Mbugha, but they are now living under separation. The respondent was convicted by the Ilongero Primary Court, in Singida District of stealing Shs. 30,000/= belonging to her husband. The trial court awarded a punishment of conditional discharge under s.4(1) of the Primary Courts Criminal Procedure Code and the said respondent was ordered to pay her husband half of the sum that she had stolen i.e. Shs. 15,000/=.

The respondent appealed to Singida District Court protesting her innocence that she had never stolen the alleged Shs. 30,000/=. The District Court quashed the conviction and sentence and also set aside the order of payment Shs. 15,000/= to the husband. The learned District Magistrate inter alia stated:

The woman took what she thought was her right. Therefore she had a defence of bona fide claim of right on her side.

That is why the conviction was quashed.

With respect, the learned District Magistrate was wrong. It is true that under s.258(1) of the Penal Code Cap. 16 anyone who take away something under an honest claim of right is not guilty of the offence of theft. In the case at hand, the respondent had at no time claimed that she had taken the Shs. 30,000/= under an honest claim of right. She simply stated that she never

had taken her husband's money. It was wrong for the learned District Magistrate to put words in the mouth of the respondent, which was not part of her defence.

Under s.264 of the Penal Code Cap. 16 a husband may be guilty of stealing from his wife or a wife from her husband. So the sole question in this case was whether the respondent had stolen the money from her husband or not, and nothing more. The trial court was unanimous that respondent had taken her husband's money and the District Court endorsed that view. That being the case, the conviction was inevitable. Any extenuating circumstances ought not to disturb the inevitable conviction, but may only affect the sentence to the imposed.

I may only observe in passing that even if the respondent had raised the defence of honest claim of right, it is unlikely that she would have succeeded in the circumstances of this case. This is because the bona fides have been dispelled by the fact that she ran away from the matrimonial home since that day, and has been living under separation since then. If she had an honest claim of right to the money, she would have at least remained at the matrimonial home to spend the money for domestic purposes. But that was not the case.

I may also point out that the husband established at the trial that the money in question was his separate property as accepted under s.58 of the Law of Marriage Act No. 5/1971. It was not joint property which was acquired by joint efforts. In fact that was common ground at the trial.

The learned District Magistrate was not happy with the order of conditional discharge that was granted by the trial court in that the condition for the discharge was that the accused should pay her husband half of the stolen money. I agree that, that was wrong. Under s.4(1) of the Primary Courts Criminal Procedure Code the conditions for a conditional discharge ought to be that: 'during a period not exceeding one year the accused shall appear

and receive sentence when called upon and in the meantime he or she shall keep the peace and be of good behaviour'. That was not done, and so the trial court went wrong.

In the event this appeal is allowed. The judgment of the District Court is set aside. The order of conviction of the respondent by the trial court is restored.

The order for conditional discharge by the trial court is restored save that it is to be accompanied by the usual conditions set out in s.4(1) of the Primary Courts Criminal Procedure Code. The order of refund of Shs. 15,000/= is set aside but that the respondent will pay her husband Shs. 30,000/= which she stole.