IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: Nyalali, C.J., Makame, J.A. and Kisanga, J.A.)

CRIMINAL APPEAL NO. 41 OF 1979

B E T W E E N

MATHIAS CHARLE VITALIS . . . . . APPELLANT

A N D

THE REPUBLIC . . . . . RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza) (Sisya, J.) dated the 20th day of July, 1979,
IN

CRIMINAL APPEAL NO. 59 OF 1978

JUDGMENT OF THE COURT

NYALALI, C.J.:

The appellant Mathias Charle Vitalis was jointly charged with one Yona Mremi in the court of the Resident Magistrate for Mwanza Region in a charge sheet containing seventy-one counts of which sixty concern both accused persons, one concerns the appellant and the remaining ten concern the other accused. At the trial in the court of the Resident Magistrate the appellant appeared as the second accused whereas the other person, namely, Yona Mremi, appeared as the first accused. The trial court convicted the first accused on all seventy-one counts instead of convicting him on seventy counts which concern him; and the appellant, who was the second accused, was convicted on counts 36 and 37 in respect of charges facing him, but acquitted on counts 1 to 35 and counts 38 to 41, including the counts on which the appellant was not charged, that is, counts 61 to 71. The appellant was sentenced by the trial court to three years' imprisonment on the two counts on which he was convicted and the sentences were directed to run concurrently. He was aggrieved by the convictions and the sentences and he appealed to the High Court at Mwanza which allowed the appeal on count 37 but dismissed the appeal on count 36. The appellant was still aggrieved and hence this

...../2

second appeal to this Court. In this appeal he was represented by Mr. Rugarabamu, learned advocate, whereas Mr. Alimwike, learned State Attorney, appeared for the Republic.

According to the proceedings in the two courts below and in this Court it would appear that the following primary facts are not in dispute between the parties: that is, that the appellant was at all material times employed by the Railways Corporation as a third class ticket clerk and was stationed at Mwanza; that the other person with whom he was jointly charged at the trial was at all material times employed as a clerk by the Ministry of Education and was posted at Bwiru Girls' Secondary School, at Mwanza; that on divers dates in March that other clerk employed by the Ministry of Education issued Government Travel Warrants which were tendered at the trial as Exhibit 'A', apparently for students travelling from Mwanza to Dar es Salaam by train - and that these travel warrants are the subject of the charges in counts 1 to 5; that on other divers dates in April and May the same clerk issued another batch of Government Travel Warrants which were tendered at the trial as Exhibit 'N', apparently for students travelling on sporting activities - and that these travel warrants are the subject of counts 6 to 14; that again on divers dates in March and June that same clerk issued another batch of Government Travel Warrants which were tendered at the trial as Exhibit 'O', apparently for students going on holidays - and that these travel warrants are the subject of counts 15 to 19; furthermore, that on different dates in July the same clerk issued a number of Government Travel Warrants which were tendered at the trial as Exhibit 'P', apparently for students going on holidays - and that these travel warrants are the subject of counts 20 to 27.

There is also no dispute that on divers dates in August the Ministry of Education clerk issued another batch of Government Travel Warrants which were tendered at the trial as Exhibit 'Q',

...../3

apparently for students travelling to Dar es Salaam in connection with sporting activities - and that these travel warrants are the subject of counts 28 to 37; and that on other different dates in September the same clerk issued another batch of Government Travel Warrants which were tendered at the trial as Exhibit 'R', apparently for another group of students travelling to Dar es-Salaam - and that these travel warrants are the subject of counts 38 to 46; furthermore, that in the following month of October the same clerk issued a number of Government Travel Warrants which were tendered at the trial as Exhibit 'S', apparently also to enable students to travel by train - and that these travel warrants are the subject of counts 47 to 50; and finally in the month of November the same clerk issued a number of Government Travel Warrants which were tendered at the trial as Exhibit 'T' in connection with students travelling by train - and that these travel warrants are the subject of the charges in counts 51 to 60.

There is no dispute that the appellant did receive a Government Travel Warrant No. 085223 which was tendered at the trial as part of Exhibit 'Q' and did make endorsement on it to the effect that tickets numbers 5835 to 5849 had been issued by him to passengers. Four of these tickets, that is, tickets numbers 5837 to 5840 were sold to P.W.7 on the 31st August, 1975, for a total sum of shs. 194/80. There is also no dispute that P.W.7, a man employed as a motor supervisor of a transport firm in Mwanza, was not a student of Bwiru Girls' Secondary School. Furthermore, there is no dispute that in the course of business the Railways Corporation billed the Ministry of National Education in respect of these four tickets plus others and the Ministry paid the bill to the Railways Corporation. The sum of shs. 194/80 paid by P.W.7 in respect of the four tickets is not accounted for.

From the proceedings in the two courts below and in this Court the only dispute between the parties in respect of count 36

..../4

on which the appellant remains convicted, concerns the allegation by the prosecution that the appellant fraudulently issued the four tickets to P.W.7 for his own benefit and thereby induced the Ministry of Education to pay the Railways Corporation a sum of money which it was not supposed to do.

The appellant's case is that he acted entirely innocently and had no reason to know that the Government Warrant in respect of which the appellant issued the four tickets was forged. The point arises, therefore, whether or not the appellant was acting fraudulently in issuing the four tickets to P.W.7. Before considering this matter we have to consider some irregularities which are apparent on the record.

The appellant and his co-accused were apparently charged and they pleaded omnibusly to all seventy-one counts. The record f the trial court on the 8th August, 1977, reads as follows:

"Date: 8-8-77

CORAM: F. A. Munyera, S.R.M.
Pros: Mr. Pinda
Accused: Both present.

(Sgd) F.A. Munyera
S.R.M.

Accused No.1: I deny all counts.
Accused No.2: I deny all counts.

Plea of Not Guilty.

(Sgd) F. A. Munyera
S.R.M.".

It would appear that the charges were freshly put to the appellant and his co-accused after some amendments had been made on the 9th August, 1977, and the record reads:

"Date: 9/8/77
Court as before.
Mr. Pinda for prosecution.
Both accused present.

(Sgd) F.A. Munyera
S.R.M.

..../5

(Sgd) F.A. Munyera
S.R.M.

Charge read over to both accused who state:

Accused No.1: I deny all counts.
Accused No.2: I deny all counts.

Plea of Not Guilty.

(Sgd) F.A. Munyera
S.R.M.".

The second irregularity is apparent in the judgment of the learned trial Senior Resident Magistrate where he acquitted the appellant even on charges which were not facing him. These irregularities appear not to have been noticed by the learned judge on the first appeal in the High Court. Mr. Rugarabamu, learned advocate, has submitted in effect that bearing in mind the complexity of this case as seen in the number of counts contained in the charge sheet, the appellant must have been confused and therefore the irregularities are incurable and the proceedings must be quashed. We are aware that irregularities in a trial of a case which later comes up on appeal are governed by section 346 of the Criminal Procedure Code. Under that section no irregularity is fatal to the proceedings unless the court is satisfied that it resulted in a failure of justice. We have carefully examined the record of the trial and we are satisfied that, in spite of the learned trial Senior Resident Magistrate's failure to appreciate that the appellant was not charged on all the seventy-one counts, the appellant himself was fully aware of the true charges facing him. His cross-examination of the witnesses of the prosecution and his own defence were directed only to the charges facing him. He defended himself accordingly. That being the position, we are satisfied that

..../6

the appellant was not confused and the irregularities in this case did not occasion any failure of justice. They are thus curable under section 346 of the Criminal Procedure Code.

We must now revert to the point raised earlier on concerning the conduct of the appellant in issuing the four tickets to P.W.7. The prosecution proved that Exhibit 'Q' were false documents. There was evidence adduced at the trial, and which was not dispute, to the effect that the procedure required the appellant to write or stamp the letters "G.W." on every ticket issued in respect of a government warrant. The appellant did not stamp or write these significant letters on the four tickets issued to P.W.7. Moreover, P.W.7 did not give to the appellant any Government warrant at the time he was issued with the four tickets. He paid cash. There was thus evidence to support the conclusion that the appellant must have been acting fraudulently at the material time. The conviction on count 36 can, therefore, be sustained.

As to the sentence of three years' imprisonment, it is the minimum prescribed under the Minimum Sentences Act, 1972.

This means that the appeal cannot succeed and we hereby dismiss it in its entirety.

DATED at MWANZA this 3rd day of October 1980.

F. L. NYALALI
CHIEF JUSTICE

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

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

(G. A. RWELENGERA)
DEPUTY REGISTRAR