

IN THE COURT OF APPEAL OF TANZANIA

AT M W A N Z A

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

CRIMINAL APPEAL NO. 42 OF 1979

B E T W E E N

MOHAMED KONINGO APPELLANT

A N D

THE REPUBLIC RESPONDENT

(Appeal from the conviction of the High Court
of Tanzania at Mwanza) (Lugakingira, J.)
dated the 2nd day of March, 1979,

IN
APPEAL

CRIMINAL ~~REVISION~~ CASE NO. 20 OF 1978

JUDGMENT OF THE COURT

KISANGA, J.A.:

The appellant was charged with three counts of forgery, uttering a forged document and stealing, all being offences under the Penal Code. He was acquitted on the count of forgery but was convicted as charged on the second count, and a substituted conviction for obtaining goods by false pretences was entered on the third count. He was sentenced to three years' imprisonment on the second count and to three years' imprisonment on the third count, the sentences to run concurrently. He appealed to the High Court but his appeal was summarily rejected. Subsequently he applied to that same court for leave to appeal to this Court out of time and as a pauper and the application was granted on the grounds which will be apparent later on in this judgment.

The facts as found by both courts below were short and simple and may be briefly stated as follows:- The appellant was employed by TANESCO as a driver. In the morning of the day of the incident he took out a requisition voucher No. 190522 for 45 litres of petrol for his motor vehicle, which requisition voucher was issued by one Mary Wambura, a duly authorised agent

for TANESCO. The appellant presented the requisition voucher at a petrol station owned by Caltex and accordingly received the 45 litres of petrol. In the afternoon of the same day he presented again at the same petrol station another requisition voucher No. 190523 for a further 45 litres of petrol and received the petrol. The latter requisition voucher, however, bore a forged signature of Mary Wambura. These findings of fact were amply supported by the evidence.

As mentioned earlier the appellant was acquitted on the count of forgery but was convicted on the count of uttering a false document. The learned judge of the High Court, however, granted leave to appeal on the ground that it was not clear which offence was charged in this particular count. The charge as laid reads as follows:

"2nd Count:

Uttering c/s 335(b) 337 of the Penal Code
Cap. 16 Vol.1 of the Laws.

Particulars of the Offence:

The same person charged on 14th day of September, 1976, at Blue Star petrol station with intent to deceive did alter a false document which the alteration brought the effect of the document to wit he received 45 litres of Petrol valued at shs. 152/10 which in fact he was not."

Quite clearly the charge is both confused and confusing. In the statement of offence it purports to charge the offence of uttering a false document. But that offence is not created under sections 335(b) and 337 of the Penal Code as the charge alleges. The offence of uttering a false document is created under section 342 of the Penal Code. Yet to make matters worse, the particulars of the offence as set out did not disclose or even suggest the offence of uttering a false document. Indeed the wording of the particulars is so hopelessly clumsy that it is not at all apparent what offence it was intended to charge. Now, the crucial question that arises is, what offence was the appellant charged with?

Certainly it cannot be that of uttering a false document because as already noted, although the statement of offence sets out that offence, the particulars do not disclose or suggest it. And as indicated above it is not apparent from the wording of the particulars what offence it was intended to charge. But the matter is further complicated by the fact that the evidence as adduced disclosed the offence of uttering a false document. And the question is whether the appellant could properly be convicted of this latter offence. As stated earlier, although the offence was set out in the statement of offence, it was not disclosed in the particulars. So that the appellant cannot have known clearly or at all that he was being charged with that offence. Thus to convict him of that offence offended against the basic principle of our criminal practice that the accused person must know clearly what the charge against him is so that he can prepare his defence accordingly. Therefore the purported conviction for uttering false document was untenable and indeed the learned State Attorney appearing for the Republic rightly conceded to this view. That conviction is accordingly quashed and the sentence imposed in respect of it is set aside.

It seems desirable to make one general observation here before leaving this matter. It is obvious that this unfortunate consequence of having to upset the conviction has arisen from the fact that the charge was defective. The defect was so fundamental that it was incurable under section 346 of the Criminal Procedure Code. It should be pointed out that while it is the duty of the prosecution to file the charges correctly, those presiding over criminal trials should, at the commencement of the hearing, make it a habit of perusing the charge as a matter of routine to satisfy themselves that the charge is laid correctly, and if it is not to require that it be amended accordingly. This is a simple process which does not

it may produce undesirable results. In this particular case there was a failure of justice in that the appellant has had to be acquitted and hence escape punishment while there was ample evidence to support his conviction for uttering a false document. In other words it resulted in acquitting the guilty which is not proper or just because the guilty ought to be punished.

Coming now to the conviction for obtaining goods by false pretences. As stated before, this was a substituted conviction upon the original charge of stealing which read as follows:-

"3rd Count:

Stealing c/s 265 of the Penal Code Cap.16 of the Laws.

Particulars of the Offence:

The same person, at the same date and place after false alteration did steal 45 litres of petrol valued at shs. 152/10 from Blue Star Petrol Station property of M/S TANESCO."

The learned judge granted leave to appeal on the ground that the offence of obtaining goods by false pretences was wrongly substituted for that of stealing. This is what he said in his Ruling when dealing with this point:-

"Last in Count 3 the applicant was charged with Stealing 45 litres of Petrol contrary to section 265 of the Penal Code. But the trial Magistrate convicted him of the substituted offence of obtaining goods by false pretences contrary to section 302 of the Penal Code using no doubt the provisions of Section 187(1) of the Criminal Procedure Code although he did not say so. But in my view the charge of theft was the correct one for the victim of the offence were his employers TANESCO to whom he never delivered the 45 litres of petrol he allegedly collected on their behalf from the Petrol Station. He did not intend to defraud the Petrol Station but his employers TANESCO whom he wanted to pay for goods they did not receive."

It is clear from the evidence that the requisition voucher No. 190523 on the strength of which the appellant received 45 litres of petrol was forged. The first question that arises is, who has the property in the petrol obtained on the strength of this

forged requisition voucher? If the property passed to TANESCO then the learned judge would be correct in taking the view that the appellant stole the petrol from TANESCO, his employers. If property in the petrol did not pass, however, then it seems that the petrol could not be said to have been stolen from TANESCO because TANESCO did not have any property in it. For it seems that a person can steal from another only if that other has the property in the thing stolen. In the context of this case, if property did not pass then the petrol could not be stolen from TANESCO which did not own or have it.

It is fairly apparent that the attendant at the ~~Mx~~Caltex Petrol Station parted with the 45 litres of petrol in question only because of the representation that the signature appearing on the requisition voucher was that of Mary Wambura which representation was in fact false. If the attendant knew that Mary's purported signature was in fact forged, he would not have parted with the petrol. In those circumstances it seems that although the document purports to be a requisition for petrol by TANESCO the property in the petrol did not pass to TANESCO because the misrepresentation operated to negative any intention to supply the petrol. Thus, for instance, if, upon detecting the misrepresentation, Caltex were to sue for the petrol in question, the claim could not be resisted by TANESCO. The property would still be in Caltex and if at the time of such suit the appellant had not disposed of the petrol, the court could properly order that the petrol be restored to Caltex but not to TANESCO.

In the light of the foregoing it seems that the appellant cannot have stolen the petrol from TANESCO as the learned judge would appear to think for the simple reason that TANESCO did not at any time have any property in the petrol in question. It seems also that where a person obtains goods on the strength of a forged

document the offence committed is not theft but one of obtaining goods by false pretences. In the case of theft the owner of the property does not consent to the thief taking the goods. But in the case of obtaining goods by false pretences the owner voluntarily parts with the goods because of a fraudulent inducement offered to him by the offender. Where the offender obtains goods on the strength of a forged document within the meaning of section 333 of the Penal Code, he necessarily does so by fraudulently inducing the owner into believing that some fact or facts as appearing on the document in question are true while in fact they are not. In those circumstances it seems that the proper charge to be preferred is one of obtaining goods by false pretences.

In the final analysis there seems to be no ground for interfering with the alternative conviction for obtaining goods by false pretences as entered by the trial magistrate. In law such alternative conviction was sanctioned under the provisions of section 187(1) of the Criminal Procedure Code, and there was ample evidence to support such conviction. That conviction is therefore affirmed and the appeal on that count is accordingly dismissed.

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