

IN THE HIGH COURT OF TANZANIA

AT MTWARA

HIGH COURT CRIMINAL APPEAL NO. 80 OF 1981
Original Criminal Case No. 21 of 1981 of the
District Court of Lindi District At Lindi
Before E.J. Nyamasagara, Esq., R. Magistrate

JONES NDUNGURU APPELLANT

Versus

THE REPUBLIC RESPONDENT

J U D G M E N T

SAMATTA, J.

On January 29, 1981, the appellant was charged before the district court of Lindi district with obtaining money by false pretences, contrary to s. 302 of the Penal Code. The particulars of offence were couched in the following language:

"... Jones Ndunguru ... on the 21st day of January, 1981, at Gapex Mtama, within the District and Region of Lindi, with intent to defraud ... obtained from Betrisia Nongolo shs.2,542/50 by falsely pretending that he went on official journey to Dar es Salaam and thus he was claiming (sic) Night Allowance, while the journey was not official."

The particulars were, with respect, not a model of elegance or accuracy. Be that as it may, the prosecutor should have used the words 'entitled to' instead of the word 'claiming'. I do not think, however, that the error - for that is what it was - materially prejudiced the appellant in his defence. It is an error which, therefore, is curable under s. 346 of the Criminal Procedure Code. At the end of the trial the appellant was convicted "as charged" and was sentenced to a term of three years' imprisonment. He thinks the decision robbed him of justice; hence the appeal now at the Bar.

The evidence which was laid in the scales demonstrated, I think, the following facts. The appellant was employed by the General Agricultural Products Export Corporation, hereinafter referred to by its acronym - GAEPC, as a depot manager and was, at the material time, stationed at Mtama. On January 3, 1981,

he sent a telegram (Exh.DI) to the General Manager of the Corporation worded as follows, in Swahili:

"NAKUJA HUKO HEAD OFFICE BILA KIBALI CHA
MENEJA WA TAWI LA LINDI TUA MATATIZO YA
KIKAZI."

He received no reply to this message. Six days later he left for Dar es Salaam. After spending some days there he came back, and on January 21, he resumed duty at Mtama. Before leaving for Dar es Salaam the appellant did not obtain from his immediate boss - the Regional Manager at Lindi - any permission to make the trip. On his return - on January 21 to be more precise, the appellant claimed and was paid the sum of shs.2,542/50 being a refund of money he had used to buy a Lindi - Dar es Salaam return ticket, and for subsistence allowance. It was the case for the prosecutor that the journey the appellant made was not official and, therefore, GAPEX owed him nothing. The appellant, on the other hand, asserted that the journey was official. He claimed that while in Dar es Salaam he had official transactions with the Personnel Manager.

The learned trial magistrate, having reviewed the evidence before him, was of the settled view that the prosecutor's assertion was correct and the appellant's was unfounded. He accordingly convicted the appellant. Mr Sengwaji, counsel for the Republic, declined to support the conviction. He conceded that it was not conclusively established by the prosecution that the journey in question was not official. In this connection he drew my attention to the meaning given to the word 'official' in the CHAMBERS'S TWENTIETH CENTURY DICTIONARY (Revised Edition). There the word is defined as meaning pertaining to an office: depending on the proper office or authority: done by authority: issued or authorised by a public authority or office: recognised in the pharmacopoeia. With respect, I approve the learned state attorney's concession. It is a noble and well-established principle of law, the change of which can be effected only through legislation, that, as a general rule, in a criminal case the accused bears no burden to satisfy the court of his innocence, it being the duty of the prosecution to establish his guilt, if any. In the instant case, therefore, the appellant bore no burden to convince the learned trial magistrate

that the journey was official. It was for the prosecution to satisfy him, beyond reasonable doubt, that it was not. To discharge that task the prosecutor put in evidence - through PW2, the Regional Manager - a telegram, purporting to have been sent to him by the GAPEX headquarters, worded as follows, in Swahili:

"GAPEX MENEJIMENT DAR ES SALAAM WATHIBITISHA
SAFARI YAKE NDUNGURU /YAANI MWOMBA RUFAA
SASA/ KUJA DAR ES SALAAM NA KURUDI MTAMA
SIYO YA KIKAZI TUA HAKURUHUSIWA KUJILIPA
GHARAMA ZA SAFARI SHILINGI ELFU MBILI MIA
TANO ARUBAINI NA MBILI TUA."

With unfeigned respect to the learned trial magistrate, the reception in evidence of this telegram sinned against the Rule against Hearsay, as formulated in s. 62(1) of the Evidence Act, 1967. The telegram was hearsay - and therefore inadmissible - because it was relied on testimonially, that is to say, as establishing the truthfulness of the contents thereof. The telegram, the law says, should have been shut out of the case. An officer from the GAPEX headquarters who could state as facts the contents of it should have been called as a witness at the trial. Excluding the telegram from the case, one is left with the evidence of the Regional Manager and the appellant himself (only) on the question. It was asserted by the prosecutor, and admitted by the appellant, that the latter had not obtained the Regional Manager's permission to make the journey to Dar es Salaam. But would that by itself be sufficient to make the claim which was made by the appellant fraudulent? I think not. To prove the charge laid at the appellant's door it had to be conclusively established that, in making the claim, the appellant had the intent to defraud the GAPEX. How can it be said that he had such an intent if he honestly believed that the headquarters of the corporation had no objection to his making the journey? If the telegram the appellant produced as an exhibit at the trial was in fact never transmitted, what was the difficulty, I ask, of calling a postal official to prove, in rebuttal, that fact? The record of the case provides no answer to this not unimportant question. The prosecutor could have sought the trial court's leave under s. 207 of the Criminal Procedure Code to adduce evidence in reply. He did not do so, and this court is bound, in the circumstances,

to assume that he accepted the telegram (the appellant produced as an exhibit) as being genuine. The intent to defraud is one of the ingredients of the offence of obtaining money by false pretences, the offence which the appellant was charged with. The Penal Code, which creates the offence, does not define the term "to defraud," but the term was given what has come to be regarded as a classic definition eighty years ago by BUCKLEY, J., (later he became LORD WRENDBURY) in *Re London and Globe Finance Corporation*, [1903] 1 Ch. 728. This is what the learned judge said:

"To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."


Upon the evidence on record in the instant case, I cannot see how it can correctly be asserted that the appellant knew or believed that the journey he had made to Dar es Salaam was unofficial. There was enough (reasonable) doubt in this case to entitle the appellant to an acquittal. It was certainly not proved beyond sane doubt that the journey the appellant made did not pertain to his office. There was no admissible evidence in the scale against him which proved that, while he was in Dar es Salaam, he did nothing (substantially) official. The case against the appellant could not possibly be established without an officer from the GAPEX headquarters testifying before the court to that effect.

The appellant - according to the charge laid at his door - obtained the shs.2,542/50 by false pretences. The term 'false pretence' is given a definition in the Penal Code: s. 301, as amended by s. 13 of the Penal Code (Amendment) Act, 1980. The section reads as follows:

"Any representation made by words, writing or conduct, of a matter of fact or of intention, which representation is false and the person making it knows to be false or does not believe to be true, is false pretence."

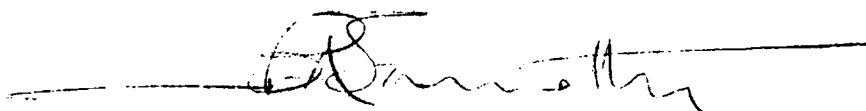
It was for the prosecutor to satisfy the trial court that the appellant knew that his journey was not official or that he did not believe that his assertion that the journey was official was true. I have no hesitation in stating, as I do, that the prosecutor failed to discharge that duty.

I have sufficiently demonstrated, I hope, why I am of the view that the great axe could not rightly be let to fall on the appellant. The appeal is allowed, the conviction is quashed and the sentence imposed thereon is set aside. Any consequential order made by the lower court which is inconsistent with the decision I have arrived in this judgment is hereby set aside. Unless his personal liberty is otherwise assailed, the appellant - if he has not already finished serving the sentence I have just set aside - be released from custody forthwith.



B.A. Samatta
Judge

Delivered in open court at Mtwara this 20th day of June, 1983, in the presence of Mr. Kaduri, Counsel for the Republic.



B.A. Samatta
Judge