

TANZANIA / JUDGMENT

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H IN THE HIGH COURT OF TANZANIA AT Mwanza. APPEAL (Mwanza Registry) - CRIMINAL APPEAL NO 434 OF 1972. ORIGINAL CASE NO. 848 OF 1971 OF THE DISTRICT COURT OF BUKOBA DISTRICT AT BUKOBA - BEFORE: V.R. HPLAHBA ESQI, RESIDENT MAGISTRATE. EMILIAN TJEL KAE LAMA .. ORIGINAL ACCUSED. VERSUS: THE REPUBLIC ORIGINAL PROSECUTOR.

- CHARGE: 1st Count: Issuing false document c/s 335(d) of the Penal Code Cap. 16 of the laws. 2nd Count: Uttering false document c/s 342 and 337 of the Penal Code Cap 16 of the laws. 3rd Count: Attempt to obtain goods by false pretences c/s 302 and 380 of the Penal Code Cap 16 of the laws. JUDGE ISENT. ED—INDY, J. MUE1 /o Kahema was charged with and convicted of making false document, uttering false document, and attempt to obtain goods by false pretences-contrary to sections 335(d), 34, 337 and 302 of the Penal Code Cap. 16 on the first, second and third counts respectively. He was sentenced to concurrent terms of imprisonment of nine months on each count. He appealed against convictions and sentences. The learned State Attorney, Mr. Ibilinyi, appeared for the respondent Republic. The appellant was absent, at the hearing of his appeal, as he indicated in the petition for appeal, that he did not wish to attend, but his grounds for appeal were taken into account. The appellant was employed, as a Senior Laboratory Supervisor, by the) Tganyika Instant Coffee Company Limited, Bukoba, - hereinafter referred to as TANICA - at the time of the alleged commission of these offences. Although his work was confined to laboratory analysis of quality of coffee, the appellant could go to the general office, where the storekeeper worked, as the general office was accessible to anybody although instructions were issued to the effect that employees of TANICA, not concerned with the general office work should not go there. Mr. Clerk (P15) of the Manager of TANICA said that these instructions were often disobeyed.
- The appellant employed Ernest Kanyankole (PV4) as a house servant.
- It appears that the appellant worked in two sessions: the first, one lasting to 12.30 p.m. and the second one from 2 p.m. to 4.30 p.m., and the appellant usually returned home for lunch. On the 15th day of December, 1971, the appellant returned for lunch as usual. Besides his servant, one Simon Francis (PW7) was at his house. Francis claimed that the appellant was his brother. Soon after lunch the appellant returned to work and after his work,

Kanyankole proceed to-the centre of the town to buy some items specified in the order, Lch. B. He*ènt with i. Francis (P;77). They called at the shop of Gulamali (P73) and Kanyankole presented Eadi. B to Gulamali for delivery of the goods specified therein. The order is dated the 15th of December', 1971, and it is addressed to "Hussein.'urniture Mart" which is the business name of the shop, of C-ulamsj,i, The order directed that the addressed should supply:- 2 trousers crimpleno(roaciy 'made); 2 expensive long sleeved siit I Vorio mattress"

- And the order purportc1 to show that it vja8 signed by Upactory Manager" of TANICA. The order is numbered 001073', Upon presentation of the order, G-ulam&.i. asked Kanyankole the size width) of the mattress he wanted, and hereplied that hc.wanted one of wçth of 7 feetAsrnatesses of such sizes are not made, Gulaali becae suspicious. Kanyankole admitted that when he was asked about the size of mattress, he. could. not tell because he was not told of what size it should be; However he said that he asked Bulamali to ask Francis, who was outsIde, or he should be allowed to ask Prncis the size s but Gulamali did not allow him to go out of his shop. Guismali admitted that.that Kanyankole wanted to do so, but he would not allow him to go out, as he was suspicious already. He knew that TAITICA ordered goods frou his shop, on .uch. orders, but this was the first time he was receiving order for clothes and mattresses. Anyhow, Kanyankole remained in the shop while Glamali-telephone Mr. Clerk, and made inquiries about the alleged order. -Mr Clerk cross checked with his head storekeeper, Munyagira (}w2), whose duty it was to prepare such ordera for his siature The order book itself was exined, and it was found that the alleged order had beenpulled out of the book wll in advance of other pages. The book (th. c) had been used upto order number 001018, and the pages between 101018 and 001072 had not been used'- The duplicate of page 001073 was without the orinal and it,was blank The rest of the pages of the book were unused. This book was kept on the desk of the storekeeper (Pi72) on the 15th of December, 1971, and since his (PTT2 1 s) desk was in the general office, the book could be reachi by anybody who wanted to ndsuse it'. It was also ven in evidence that 5 clerks (not clear whether the number included PW2 as well) worked in that office. And it was admitted that, during that days Munyagira wont to the bank and he was. away for a long time and that, during his absence, the order book (&h'. a) was on his desk. It was, therefore, clear that whoever removed the original order, 001073 1 could have done so during the absence of. Mimyagira or even during his presence if he was not particularly watching. 0 Therefore, following what was discovered at the office Llunyara proceeded to the police station, on instructions of his general-manager, whore he reported the incident. In the meantime, Gulamali was talephoned d asked to keep the, presenter of the order in his shop until- they arrived, and he did so. 1-lunyagira and 'police constable Masawe (F7l) .th,,:rived at the shop, and found Kanyankole and Francis there; -- At first, :viher asked, - Kynicolc told the police officer that he had picked the order &h.-, ' * . . *1 _) but I • •/ 3 m 'a later chngcd and said that it was given to him by the appellant who instructed him to collect the goods from the said- Hussein Purniture Mart ks aT result, Kanyankole and Prancis were arrested. And, acting on information received, police constable Masawe, who was accompanied by the two suspects and Munyagira, proceeded to the house of the appellant for tlio 'purposes of conducting a

search'. They were armed with a search

- oraer, ('Thth. A) and -the appellant was present when the search was conducted. The said police officers recovered 10 torn pieces of papers (&h. D)'. The torn pieces of papers were found on the outside sill of the window of the room of the appellant and/or on the ground immediately below the said window, The examination of these pieces showed that someone had been practicing to sign in similar manner as the signature on Exh. B y against the words Factory Manager. Two letters addressed or copied to the appellant, and a sick sheet, issued in the name of the appellant y were recovered from the box of the appellant. Those contained a genuine signature of Mr. Clerk, And Mr. Clerk, subsequently, handed over letters (Exh. E1 - E5),
- to the police officers after he had received them from the appellant. There was evidence to show that the letters were addressed, written and signed by the appellant after he had been arrested: for then changes. The appellant was living for financial assistance following his 'Suspension' from duty, and pending the determination of the criminal case which was then pending in the District Court of Bukoba,
- In his judgement, the learned trial magistrate found that (i) the appellant was the one who wrote and signed on Exh. B without the authority of Mr. Clerk thereby committing the offence of making a false document contrary to section 335 (d) of the Penal Code, (b) the appellant, through his domestic servant, uttered Exh. B to Gulamali, -thereby committing an offence contrary to section 342 and 337 of the Penal and (c) the appellant, in presenting the document in the manner he did, attempted to obtain goods by a false representation. The trial court found that it was of no legal importance that the appellant was not physically, the one who presented the document to Gulamali for the sole purpose of obtaining goods specified therein. In other words, the appellant was found guilty on all the three counts. The circumstances of this case demand that I should begin considering this. appeal by the examination of the handwriting evidence led in this case. That the appellant made issue of this, and it's still making an issue of it, is beyond shadow of doubt although he was not specific in his language. And the main point was the, alleged Exh. B itself. On this document there are at least two names: which fall for consideration: one the writing in biro pen - in the body itself and 1 two, the signature following the words 'Factory Manager' appearing at the bottom of the document. And 'the question was whether there was any proof' that there were written and/or signed by the appellant. On this point, Mr. Clerk said that although the signature appeared to be similar to his, it was in fact not his signature, and that he did not sign it. This is conclusive proof that it was not signed by Mr. Clerk, who is the one authorised to •
- ••, ' ' ... ' - - r sign orders on behalf of TANICA, and since he had not authorised such document, whoever made it, did so without his authority. Mr. Clerk said that he did not know who signed the said order. As for the handwriting in the body of the letter, he said that he was not certain if the appellant

- was the one who wrote it. On the other hand, inter alia, Munyagira. said that the handwriting' on Exh. B was similar to that of the appellant • It was obvious to me that the evidence of Hunyagira ought to have been taken with great care because he admitted that he had not been in good terms with 'the appellant although he claimed that this did not affect his impartiality in his evidence. This may be, so . , but a court of law cannot be certain of this. A human mind is capable of strange feats. Unlike the learned trial magistrate, I would need corroboration before I could accept his word on his mere assurance that he was being fair nevertheless. I find this corroboration in the letters which were admitted in court and which were accepted as having been written by the appellant after he had been suspended from duty following the allegations of this case. The 5 letters showed that the handwriting on them is so similar with the handwriting in the body of Exh. B so as to make the said handwriting indistinguishable. This confirms the evidence of Munyagira when he said that the handwriting on Exh. B is similar to that of the appellant. He was familiar with appellant as he had seen him write on several occasions during the two years period they had worked in the same company. Kanyankole too said that the handwriting on Exh. B was that of the appellant although he had worked for the appellant for a short period of six months only. I find,
- therefore, that in the circumstances, the trial court was entitled to hold that it was the appellant who wrote the order Exh. B. As to the signature, Kanyankole, like other witnesses, was not able to tell who signed it, but he testified that one day, prior to the date of the arrest of the appellant, he had seen the appellant practicing signing on pieces
- of paper which he tore, thereafter, threw them out of the window and he identified those pieces as Exh. D which were recovered by police constable Macawe. This evidence showed that the appellant had been practicing how to sign as a Clerk would, and this would not have been without a purpose. It goes to add to the evidence led by the prosecution. Kanyankole was the one who was found in possession of Exh. B and who was the one who presented it to the shopkeeper (P73). The learned trial magistrate took this matter into account when weighing the evidence of Kanyankole - as there was every possibility that Kanyankole could have been a person with his own interest to serve. Nevertheless I agree with the learned trial magistrate that Kanyankole was a truthful witness and his evidence ought to be accepted and even if one felt that he could have his own interest to serve, there was sufficient corroboration on his
- evidence in the form of handwriting evidence, he said that the document • was given to him, by the appellant, already written and signed as he presented it to Gulatmali, with instructions that he should collect the goods from the said shop. He said 'that Francis (P7) was with Jsinu, but Francis denied this. However, the trial court found that Francis was a
- hostile witness and therefore rejected his evidence. Having regard to the cross examination of Francis, it was clear that Francis was being hostile because of his relationship with the appellant. In my view, the trial court had no option but to reject such

evidence. The trial court found that the appellant was the one who handed over the document to Kanyankole, at lunch break on the 15th day of December, 1971, with instructions that he should collect the said goods from the shop'. On the evidence, the finding is justified, and I see no reason to disturb this on the appellant's argument. In the circumstances, the appellant would not have acted, as he did, if he had not been the one who wrote and signed the document (h. B) well knowing that it was false as it was not written with the authority of the manager of TAHICA. And it could not be done with intent to commit criminal offences. The interest was clear: to obtain goods under the false pretence that they were required by WTICA when in fact they were required for his own personal use'. The fact that the document was uttered by Kanyankole and that he was the one to fetch the alleged goods is irrelevant. Kanyankole was a mere conduit of his criminal offences. It seems to me that the appellant was taking advantage of the honest trust of his servant who had no cause to think that what he was being asked to do was or were criminal offences. Before that he had fetched goods, on behalf of the appellant, on orders given to him, in writing. The fact that Kanyankole said one thing and then changed to the other can be explained by the fact that he was shocked by the arrest he suffered and, probably, his immediate reaction, which is not unnatural, is to be confused as to what to say. Therefore, having regard to the evidence on record, I find that the convictions are sound and are accordingly upheld. The learned State Attorney argued as to the accuracy of the charge on the first count. I reserved my views on this point. I do not think, in the circumstances of this case, it was a necessary issue to resolve. The appellant was not prejudiced at all as to the charge. I am grateful to his views on this point, but I hope he will not take this non-resolution as any indication of contempt for his able argument. The sentences imposed were reasonable although the appellant was a first offender and his age was 20 years. The three offences are sophisticated. It is not a case where one could say that the appellant slipped into commission of criminal offences by temptation. The offences called for thinking and planning and this is rather serious for a young man like the appellant, who was just beginning to earn his living after coming out of school. This point cannot be ignored, and weighed heavily in the mind of the learned trial magistrate. He was, therefore, entitled to reject the submission of the Probation Officer who appeared to plead on behalf of the appellant and who pleaded that he fell into a trap. As a result, this appeal is dismissed in toto. Delivered in Court, at Mwanza on the 20th day of July, 1973 N.A. Ntabaye - S.A. for Republic. (ZTD) Appellant - absent. Judge. 20/7/73. 4..

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