

TANZANIA / JUDGMENT

republic vs noel so mkanga luposa 1975 tzhc 6 16 april 1975

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16 April 1975

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IN THE HIGH COURT OF TANZANIA AT MTWARA REVISIONAL JURISDICTION .^{*7} 'A HIGH COURT CRIMINAL REVISION NO.35 OF 1974 < - ^ J\jVV37 S. (ORIGINAL CRIMINAL CASE NO.347 OF 1972 OF THE DISTRICT ^ COURT OF SONGEA DISTRICT AT SONGEA BEFORE : B.W. MAGABE Esq., DISTRICT MAGISTRATE THE REPUBLIC PROSECUTOR versus NOEL s/o MKANGA LUPOSA ACCUSED REVISION ORDER. Kisanga, J. The accused was charged on a total of 10 counts ranging from forgery, uttering a false document, stealing a postal matter to obtaining money by false pretences. He was convicted on all the counts and was sentenced to varying terms of imprisonment resulting in a substantive term of 5 years* and was further placed under police supervision for 5 years after serving the prison term. The facts of the cases were as follows!*- One Method Milinga (P.W.4) worked for the Ministry of Agriculture and retired from service in 1969. It would appear that while in service he was a contributor to the National Provident Fund Scheme so that upon his retirement the office of the National Provident Fund made out a cheque in his favour for shs.688/80 in respect of his benefits from the Fund. The cheque was drawn in his name, crossed, post-dated to 29.11.72 and was posted to him under a register cover. It would appear that his local post office duly advised him to collect the register but he did not receive such advice slip. He did, however, receive a reminder but on presenting It to the post office he was informed that the register in question was already collected. He was shown an advice slip against which the register was given out and the said advice slip was duly endorsed by a TANU official and had on it TANU official rubber stamp. In the meantime the accused approached one Christopher Miller (P.W.1) on two occasions and obtained from him loans totaling shs.150/-. He introduced himself to the said Christopher Miller as Method Milinga end borrowed the money under that name. On each occasion Christopher Miller gave the loan against a receipt which the accused signed in the name of Method Milinga. The accused further produced to Christopher Miller the complainant*s cheque and, claiming that it was his, pledged it with Christopher as security for the loans he had received on both occasions; the understanding being that the cheque would be cashed on the due date and Christopher would then recover his loans from the proceeds thereof leaving the balance to the accused. Very briefly that was the set of facts leading to the charges against the accused. During the trial the accused was released on bail but at some stage he jumped bail and when, after a number of adjournments, he failed to appear the court proceeded to dispose of the matter in accordance with the provisions of section 202A of the

Criminal Procedure Code, but before doing so the trial magistrate admitted in evidence the written opinion of a handwriting expert as to the handwriting of the accused. In admitting such written opinion in evidence the court purported to act under the provisions of section 49 of the Evidence Act* There are two., criticisms here respecting the manner in which this matter was handled, and the first one relates to the disposal of the case under section 202A of the Criminal Procedure Code as amended by Act No.23 of 1973, That section provides, "202A. Where in any case to which section 202 does not apply, an accused being tried by a subordinate court fails to appear on the date fixed for the continuation of the hearing after the close of the prosecution case or on the date fixed for the passing of a sentence, the court may, if it is satisfied that the accused*s attendance can not be secured without undue delay or expense, proceed to dispose of the case in accordance with the provisions of section 210 as if the accused, being present, has failed to make any statement or adduce any evidence, or as the case may be, make any further statement or adduce any further evidence, in relation to any sentence which the court may pass s" There is a proviso to the section which, however is not relevant to i the facts of the present case. A glance through these provisions would make it quite clear that this section can be invoked only where the accused jumps bail after the close of the prosecution case but not where he jumps bail before the close of the prosecution case. That is to say that the section may be applied only if the accused jumps bail at a stage when the prosecution has finished adducing all the evidence they intended to adduce in support of the charge and the only thing remaining before judgement and or sentence was to hear what defences, if any, the accused person wishes to rely upon. In the present case the question that arose was whether the trial magistrate invoked the section upon the accused jumping bail after the close of the prosecution case. The relevant portion of the proceedings before the trial court reads as follows !tPros: The efforts to trace Accused have failed. In view of this, and for the reasons that the prosecution had almost brought all the .. case, evidence required, in this ask to close the prosecution case under section 202A C.P.C. as recently amended. This is however, the hand- writing experts report regarding the documentary exhibits which were tendered in this case. I tender them under the provisions of section 49 of Evidence Act/67." It would seem obvious that the section was not invoked upon the accused jumping bail after the close of the prosecution case because the written opinion of the handwriting expert which the prosecution sought to adduce in support of tie charge was introduced and admitted only after the accused had failed to appear. This was clearly wrong, and it was in contravention of the provisions of section 191 of the Criminal Procedure Code. That section says:- "191. Except as otherwise expressly provided, all evidence taken during trial under this Code shall be taken in the presence of the accused, or when his personal attendance has been dispensed with, in the presence of his advocate, if any," The case did not fall within any of the exceptions under the law whereby evidence in support of the charge might be admitted in the absence of the accused person. Yet in my opinion the rule requiring all evidence to be taken in the presence of the accused is a fundamental one. This is so because the accused must know clearly what is the case against him and must be afforded every opportunity to hear the evidence being adduced against him so that he may challenge it if he so wishes* To my mind, therefore the course adopted by the trial magistrate did constitute a fundamental breach in as much as it sought to enable the prosecution to prove their case in the absence of the accused. This is so particularly because in

convicting the accused the magistrate did take into account the opinion of the handwriting expert which, as has been seen, was received in the absence of the accused, and the accused * had no opportunity at all of challenging it. The trial magistrate tried strenuously in his judgement to justify the course he took. He set out the provisions of section 202A of the Criminal Procedure Code as reproduced above and then proceeded to argue as follows:— M The above quoted section must be interpreted according to the mischief rule of interpretation. Expressio uniusest exclusio alterius - where in a given context there two possible interpretation of a word the other must supersede the other. Mischief rule is there to carry out the object of the statute and the intention of the legislature. In passing the above quoted section, the legislature had intended to have cases which remain pending as a result of offenders jumping bail, to get finalised in their absence. The same interpretation or intent must apply in this instant case, which has remained pending for a period of about 2 solid years now* Having that in mind and S.328(1) of Cap.20 as amended by Act 23/73 I endorsed the prosecution*s request to have this case dealt with in accordance with section 202A Cap.20 as amended by Act 23/73." With great respect to the learned trial magistrate, I am unable to share his views here. To start with, his statement of the mischief rule is not, unfortunately, couched in very clear language. However, bearing in mind his reason for quoting the mischief rule, he would appear to suggest that section 202A under review is capable of more than one meaning or interpretation, and I think this was wrong. A glance through section 202A shows clearly that the provisions of that section are capable of only one meaning, namely, that the section shall be invoked only if the accused jumps bail after the close of the prosecution case. The section is neither ambiguous nor incomplete. In those circumstances the words of the section must be given their plain and natural meaning and the question of interpretation does not arise* The plain and natural meaning of the words of this section is simply this that the section may be invoked only where the accused fails to appear after / 4 the prosecution have finished adducing what evidence they intended to adduce in support of the charge, and quite clearly evidence here includes not only oral evidence but also evidence in the form of exhibits of various kinds such as the written report of the handwriting expert in this case. The trial magistrate is right in saying that the Legislature in enacting section 202A intended that cases which remain pending because the accused jumped bail may be finalized in the absence of the accused. But it must be emphasized that it was not the intention of the Legislature to enable the prosecution to prove part of their case in the absence of the accused where the latter jumps bail. The Legislature only intended to enable the courts to dispose of cases where the prosecution had no further evidence to offer and the only thing remaining was to hear what defences, if any, the accused wished to rely on before judgement and or sentence, but in the meantime the accused jumps bail and disappears. In the extract quoted from the judgement of the lower court, the trial magistrate has also made reference to section 328 of the Criminal Procedure Code* That section merely requires magistrates to report delays of cases to the Minister. Quite clearly the section had no relevance to the present case which was not being reported to the Minister, and why the trial magistrate should refer to it is far from clear but I Can only guess that he did so in his desperate endeavour to justify the course he took in the matter* All in all I am satisfied that the trial magistrate wrongly invoked the provisions of section 202A of the Criminal Procedure Code at a time when the prosecution had not in fact closed their case. At that stage it was open to the

magistrate to do either of the two things. If he considered that the opinion of the handwriting expert was essential to prove the charge then he might grant a further adjournment in the hope that the accused would be traced or turn up. Alternatively if he thought that such opinion was not so necessary then he could exclude it, in which case the prosecution case would be deemed to have been closed, and then proceed to dispose of the case as he did. The next criticism relates to the admission as such in evidence of the report of the handwriting expert. As was indicated earlier, the court purported to admit the report in evidence under section 49 of the Evidence Act* That section provides, "49.-(1) When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

- (2) For the purpose of subsection (1), a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him." The meaning of this section appears to be that a witness who may give opinion in pursuance of it is a person who is acquainted with the handwriting of the accused by reason that (a) he has seen the accused writing, or
- (b) he has received documents purporting to be written by the accused in answer to documents written by the witness himself or under his authority and addressed to the accused or (c) documents purporting to be written by the accused have been habitually submitted to him in the ordinary course of business. Now, the handwriting expert was not any such witness. He was not a person acquainted with the handwriting of the accused on account of any of the three reasons set out above. His knowledge about the handwriting of the accused was limited only to the specimen writings which were submitted to him by police for analysis, but this does not satisfy any of the three ways by which a witness is said to be acquainted with the handwriting of the accused under the section. I am therefore of the view that section 49 of the Evidence Act is not the proper section for admitting in evidence the opinion of a handwriting expert and accordingly I hold that the opinion of the handwriting expert in this case was wrongly admitted in pursuance of the said section. Had the trial been before a resident magistrate the report would be admissible under the provisions of section 154C of the Criminal Procedure Code provided that the report was in the form as required by the section, but in this case the trial was before a district magistrate and therefore the provisions of that section were inapplicable. Coming now to consider the case on its merits, I must point out at the very outset that the prosecution of the case was very poorly handled* Some charges were so badly drafted that the reading of them makes no sense. Some charges appear to be properly drafted but no evidence was adduced in support of them. In some cases the charges were completely misconceived while in others a charge or charges should have been preferred but none was preferred. To make these points clear it is necessary to set out the charges as laid and to examine each count individually. "STATEMENT OF OFFENCE -

SECTION AND LAW FIRST COUNT Forgery c/s 333 335(a) and 337 of the Penal Code. PARTICULARS OF OFFENCE; Noel s/o Mkanga charged on the 10th day of November, 1972, at Songea Township within the District of Songea Ruvuma Region, with intent to defraud or deceive forged and signed a false written document purporting to show that the aforesaid document was written from the office of Umoja wa Vijana wa TANU MAKAO MAKUU YA WILAYA S.L.P. 48 SONGEA, authorised their Tarishi to collect Dar es Salaam Registered letter No. 3868 from Post Office Songea in the name of Method Milinga of P.O. Box 62 Songea whereas in fact it was not true. 2ND COUNT; Uttering false document c/s 342 of the Penal Code. PARTICULARS OF OFFENCE: Noel s/o Mkanga Luposa charged on the 10th day of November, 1972, at Post Office Songea Township within the District of Songea Ruvuma Region, did knowingly and fraudulently utter a false written document to Msham s/o Njanga a Post Office Mail clerk, and obtained one Dar es Salaam Registered letter No.3868 of 24/10/72 in the name of Method Milinga from Post Office Songea, 3RD COUNT: Forgery c/s 333; 335(a) and 337 of the Penal Code. PARTICULARS OF OFFENCE: Noel Mkanga Liposa charged on the 10th day of November, 1972, at Songea Township within the District of Songea RuVuma Region, with intent to defraud or deceive, did sign Spngea Post Delivery No.12046 of 31/10/72, in respect of Dar es Salaam Registered letter No*3868 of 24/10/72+ purporting to show that his name was Method Milinga whereas in fact it was not true* FOURTH COUNT: Stealing Postal Matter c/s 267 and 265 of the Penal Code* PARTICULARS OF OFFENCE: Noel Mkanga Luposa charged on the 10th day of November, 1972, at Post Office Songea Township within the District of Songea Ruvuma Region, did sign one Dar es Salaam Registered letter No.3868 of 24/10/72, containing one cheque No.132342 of 23rd October, 19 72j in respect of shs.688/80 cents the property of East African Posts and Telecommunications in Tanzania. FIFTH COUNT: Forgery c/s 333 335(a) and 337 of the Penal Code. PARTICULARS OF OFFENCE: Noel s/o Mkanga Luposa charged on the 14th day of November, 19 72, at Songea Township within the District of Songea Ruvuma Region, with intent to defraud or deceive forged Sungura Duplicate receipt Book No.1 purporting to read that his true name was M. Milinga whereas in fact it was not true. SIXTH COUNT: Uttering False document c/s 342 of the Penal Code. PARTICULARS OF OFFENCE: Noel s/o Mkanga Luposa charged on the 14th day of November, 1972, at Songea Township within the District of Songea, Ruvuma Region, with intent to defraud or deceive knowingly and fraudulently uttered a false cheque No*132342 of 23/10/72, to Mr. Christopher Miller and told him to cash it, and his name was Method Milinga whereas in fact it was not true* In that the accused knew that the aforesaid cheque was not his* SEVENTH COUNT: Obtaining money by false Pretence c/s 302 and 301 of the Penal Code. PARTICULARS OF OFFENCE: Noel Mkanga Luposa charged on the 14th day of November, 19 72, at Songea, Township within the District of Songea Ruvuma Region, with intent to defraud cash shs.100/- from Mr. Christopher Miller by falsely Pretending that Mr. Christopher Miller will get his shs.100/- back from the accused Noel on 29th November, 1972 after having cashed out cheque No*132342 whereas in fact it was not true. In that the above — named accused knew that the aforesaid cheque was not his. EIGHTH COUNT: Forgery c/s 333 335(a) and 337 of the Penal Code. PARTICULARS OF OFFENCE: Noel Mkanga Luposa charged on the 17th day of November, 1972, at Songea

Township within the District of Songea Ruvuma Region, with intent to defraud or deceive forged Sungura Duplicate Receipt Book No.2 purporting to read his true name was Method Milinga whereas in fact it was not true. NINTH COUNT. Obtaining money by false pretences c/s 301 and 302 of the Penal Code* PARTICULARS OF OFFENCE: Noel Mkanga Luposa charged on the 17th day of November, 1972, at Songea Township within the District of Songea Ruvuma Region, with intent to defraud or deceive obtained cash shs.50/- from Mr. Christopher Miller by falsely pretence pretending that Mr. Christopher Miller, will get back his shs.50/- from the accused on 29th after having cashed out the aforesaid cheque which the accused knew that the said cheque was not his. TENTH COUNT: Forgery c/s 333, 335(a) and 337 of the Penal Code. PARTICULARS OF OFFENCE: Noel Mkanga Luposa charged on the 20th day of November, 1972, at Songea Township within the District of Songea Ruvuma Region, with intent to defraud or deceive made a false document and addressed to Mr. Christopher Miller, Anglican Church Songea, asked for a loan of shs.100/- from the said Christopher, and signed the said false document in the name of Method Milinga whereas in fact it was not his true name," 'll \c. •' - On the first count there was not a shred of evidence adduced to indicate that there was any document from the TANU Youth League office Songea authorising collection of any registered letter from the post office. In the absence of any such evidence it is clear that the charge could not stick, and consequently the purported conviction on it was bad and it is accordingly quashed. The second count suffers from the same defect. There is no clue whatsoever as to which document was uttered, and the post office clerk to whom the unknown document is alleged to have been uttered was not called. This was most hopeless and once again the purported conviction on that count is set aside. The same is true also as regards count three. The postal delivery No,1J>046 which the accused is alleged to have forged was not put in evidence, and there is no indication whatsoever as to who presented it to the post office and took delivery of the registered letter against it. In such circumstances I can find nothing in support of the charge and therefore the purported conviction on that count was bad and it is set aside. The fourth count was very badly drafted. The statement of the offence alleges stealing postal matter but the particulars do not disclose the offence of stealing or any other-'Offence' This Was essentially the fault of the prosecutor whose primary duty is to ensure that the charges he prefers are correctly prepared# By the presiding Judge also has a duty to peruse the charges and to satisfy himself that they are correctly laid, and if this were done in this case the *3 ■ t'c: . 'v>*' - positioLoh 'cbi^Id easily have been put right by requiring the prosecutor to amend i^e"particulars to accord with the statement Of offence. I have given thought to the question whether this error was y JJr/T curable but I have come to the conclusion that even if I were to hold that it was curable, there was no evidence to sustain a conviction on that count* Because the only evidence on this count was that the accused was found in possession of a cheque issued by the office of i e.* Ujt. ■ f :-■■■<>:- the National Provident Fund in the name of Method Milinga# But no one was called from the office of National Provident Fund to come and say that 'the cheque in' question' was dispatched to Method Milinga by J *— t; T' C •j/— i.. registered post/" for^H It is p b % s i M ' e that the cheque could have been ^gt61roi from the office of the National Provident Fund before it was, ^in ^ c t v dispatched 7to=

Hetho[^].Miiingai - Even assuming that this cheque

- w ^&l in f a c t .senfe to .Method Miling[^] by registered post, there is yet another, sneigji/
 ®here is no indication whatsoever as to who collected the said register from the post office and, to make matters worse, m A w* * office clejrlc i[^]o ^oli-vojpod feho «aid aregieter was not called. In those circumstances the charge of stealing the alleged register* containir>g the cheque in question cannot stick because the register may well have been stolen by someone else and the accused may only have got the cheque it «ontai[^]|j3 from such a person. It looks most obvious to me that the proper charge here was to charge the accused with either stealing the cheque or receiving stolen cheque but for reasons which are not apparent no such charge was preferred. The purported conviction for stealing on this count was therefore untenable and it is accordingly set aside. I shall skip count five for the moment and proceed to deal with count six# That count was misconceived because there was nothing false about the Cheque in question* A false document is one which tells lies about itself# But it was the prosecution's case that the cheque in question was drawn by the office of the National Provident Fund in favour of Method Milinga, and this is exactly what the cheque purports to be. The accused, therefore cannot be said to have uttered a false cheque because the cheque did not, in fact, contain any falsehood. Count seven appears, to be equally misconceived. Upon Reading the particulars of that count it becomes fairly apparent that the conduct of the accused amounted to a .future promise to repay the loan to Christopher Mi)lep£ But it is settled law that a future promise does not constitute a false pretence for purposes of section 302 of the Penal Code. To constitute a false pretence, the - pretence must relate to some fact past or present. The C'iWiction on that count therefore cannot stand and it is accordingly q u a s h e ^ The same observation applies in relation to count nine, and the purported conviction on that count also is set aside. I now go back to count five. The accused, in obtaining the loan from Christopher Miller, assumed the name of Method Milinga and signed the receipt as such. This was fraudulent because considering that the accused intended to fraudulently pledge Method's cheque as security for the loan he knew tha^{fc} he would get the loan only if he signed the name of Method and concealed his own identity. As a result of this act of the accused Christopher has been deprived of his money to the extent of the loan. I am therefore of the view that conviction on that count was justified on the evidence and I see no reason to interfere. The same argument shall apply in relation to counts eight and ten involving similar circumstances# In considering the guilty of the accused on count ten the trial magistrate took into account the opinion of the handwriting expert which, as has been said earlier, was wrongly admitted in evidence. However, I am satisfied that the error was harmless because had the trial magistrate properly directed himself and excluded that • opinion, there was other evidence on which he would necessarily have convicted the accused as he did. The conviction on counts eight and ten, therefore is upheld. In the result the convictions on counts 1, 2, 3, 4, 6, 7, and 9 are quashed wad sentences set aside. The convictions on counts 5, 8 and 10 are upheld and the concurrent prison sentences of 12 months', 6 months' and o../9 12 months* respectively are not disturbed. The police supervision order was made on the strength of an allegation by

the prosecution that the accused had 3 previous convictions. Where it is alleged that the prisoner has previous convictions, such previous convictions must either be admitted by the prisoner himself or be proved against him. In this case the question of admitting them was impracticable because the accused was absent, and so there was need to prove them. The police purported to prove them merely by producing before the court a copy of a record of convictions made on PF 18C. But this was not enough, and the trial magistrate should have required proof of such convictions in accordance with the provisions of section 143 of the Criminal Procedure Code* Once the previous convictions were not proved, then there was no basis for making the police supervision order. That order is accordingly Judge 16.iv.75 Mr. W. H. Sekule for the Republic Accused absent, unrepresented*

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Prepared on 24 October 2026 · Esheria