

DECIDED
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The first legal issue for consideration must be the framing of the 1st count and 2nd count whether they were proper. The statement of offence of the 11th count is making false document C/s 335(a), (b), (c), (d) and : 337 of P.C. The learned State Attorney has properly argued that the type of forgery alleged to have been committed Under Section 335 must be specified. In effect Section 335 creates 7 different kinds of forgeries under Section 335(a), (b), (c), (d) (i), (ii) (iii) and (iv). The accused has a right to know which of the 7 kinds of forgeries. Under Section 335 the prosecution wants him to identify himself upon. The very title of the statement of offence in the first count should have been in only word of Forgery C/s rather than the way it was framed under a title of making false document. Section 333 defines a forgery to be: "The making of a false document with intent to defraud. If the prosecutor chooses to use the many words of the definition of a forgery, instead of the one word (of forgery) then the statement of offence must be titled - "Making a false document with intent to defraud" C/s 11 Here the charge merely read "making a false 'document'" and left out the words, "with intent to defraud". Left that way makes it fatal warranting an acquittal on the technical ground that the statement of offence is necessary ingredient of "with intent" But, in this case this fault has been remedied by the particulars of offence which specifically mentioned that the falsely made document to wit a bank cheque was done with intent to defraud. Another error done on the first court's statement of offence was that Section 335 with .. all .. the 7 different kinds of forgeries were cited i.e. C/s 335(a), (b), (c), (d). This was duplicity which would normally fatally embarrass the accused's defence. This error was again remedied in the particulars of the offence in which only one kind of the forgery

falling ~.. ' ' -- Under Section 335 (a) was...cit~d which is that of makizig;~ - false document or which he believes to be untrue to ,...;_t, as per, t~he exact words of the ' particulars of offence:- ("With' intent to defraud or deceive did make a fals~e cheque No. 'k.04614989 purpo!'.ting .to show that it is a genuine cheque of NBG Mbalizi Mbeya which he knew or -had reasons to believe is~ false or untrue" ' i . The necessary corrections indicated above in the statement~.- of . . ' . . offence of the 1st count should have stated r to properly read: as to s~ I ~ I ~ 1 'Making a false document with intent to defraud C/s~ 335 (a) ~d 337 of ~the P~ C,;~' ~ These faults in the 1st count~s statement of offence did not embarrass the appellant for the reasons given above. ~It only remains.if tne evidence warranted his . conviction~.. The 2nd count~s statement of offence read, I quote:

- . . 1 ,,"Forg~ry c/~ 337 ~of the Penal 'Code ~Cap. 16 Vol.1 of the Revised Laws"~ Failure to mention at all. what type of forgery otlt of. 7 kinds Under Section 335 the prosecutor intended to co_ver and state as the offence committed was quite a -grave error being an omnibus statement of offence for.which the accused was left t~ guess about and m:-ound with uncertainly in his d~fenco. Therefore, it was 11uita embarrassing to the accused. and incurable by the particulars of offence tp.at followed thereafter. ~ In a statement of offence for forgery .both Ss. 335 arid 337 must be cited to make .it ~a: good and a -3- complete statement of offence. Leaving o:ut citation of \$.335 in a forgery charge is not ~curable~ as proposed by the learned Mr.~ Boniface ,,,, State Attorney. .. alone ~, This court falls for this technical reason /J~ • The 'Statem~nt of o;ffence fatally failed to' cit-e the sec~ion' ~f the,~ law for which the forgery alleged I - . . complaint against the appellant. Th:i.S court is qu~shed for the above reason . to ~have been~ committed upon wh:i.ch .the p~s.ec:utor, depended to open his criminal ~'~ . ,,,, ,. . . \ ~ : . with the necessary effect that his co~viction and s~ntence on a non existing statement or' offence must also be quashed and the sentence of 4 years impriso- . riment set aside at this ~ery early stage without need to go into its evidence. ~Tlie 3rd count had no problem in its framing. The appellant as supported by the State .Attorney has attacked the validity and strength of evidence. The documents which~ were merely copies have been ' . attached as havi~g ~6-~::~IBis for being admitted under 67 of th~_Evidence . . ' ! . ••' Act ~ (The learned trial Magistrat~ ~rangly cited s.34(b) as the one ~.which deals with admission of co~ies. ~f doc~ments) • But, from the c~u~t recorded the basis. for admitting copies of the documents as ~13econdary €;Vidence . was. • that the originals, were. brought ~ ~. in court together with the copies and -were examin_ed, - by the court~ and found . . correct~ Thereb! the court~ ~admitted the copies while it ret~.ned, to the Bank the originals most likely for- safe _custody. This procedure :i:s 'quite acceptable being conveniEmt and safe to the court ~d complainarit for they could be needed for the bank 1s own auditing purposes, for example. . . nti . . . ;, The~ ot:l'~.er are.a _questioned was wny~ ~an. idefication parade ~ was called despi_t the stance ~f . who ~ . ' _ / the prosecutibn,wit:p.e~s~/ said t_hey,Jrnew / ~ ~eacused. h idefication th: parade can be done f6r :t;he ~:purpos(:) of a witnesses identifying his suspect ' :.: \ , . . • , I ' .. ~ whom he ~aw and marked him b;ut does. not know)aim ,for 8.J."IY thing else except ,.. . ; . ~ .

- :-- ' t (• : for the crime which wrur doile to hime The other r~on •for an identification parade may be done 'tor tlie eake of the::l'oliee to as-certain if at al,l the t , .. complall\ant 1 s/witness's knowled~e-of the suspect is correct e.t.ce In the . first instan'c~ me~tioned above the identifying witness. is expected to look.' for . ~ . \$pec:iru. '" , marks and features of the suspect when idajtifying 'him. , , ' . In the later instance the witness will. 'look for the pers.on_ he knows if he is in. the group of ot'her persohs. -ifr~the .p~ade .by pin...pointing ,l;ii~_ 9, This is not reaJ.iy~ ict~ntify~g'himtfor the first :ti\lle .but:ratj:le~ .pin:-point~g. him out •. In order to ascertain .veT~city.,;of, a: witn~ss ~owled~e._ of. ru'f .. . accused~ the court and the prose:cutor~ may .call -uponthe witnefs to . pin-point: . . ' . .. , ~ the a~ccused even ~in court ie-e~ if there--are many ac.cuseds and even when there is~ one a'ccused~ ~some .have failed .on a numbe~ ,of occasions to do so ~ ~ I , , , : 1 , I ' . , in at identification parade or in court~l though h~.knew.him before to the . ~ ! ; , 1 . : ~ ; • : J . : t , ~ acivantag~ of:'the;~a~ccused .: In short, an ~4ep.t.i:ficca.tion. parade, .. :i,s accl;lpta~. - . • . ' . , , . . . : . . . I • • , ~ • • • ble to b~ called"even~wheri the identifying witness knew t}}.e.slli:lpect before
- ~ • • • ' ~ • • ! • • • " ? , , • • • • ' ' though it is not common to do so. lie,re Jt~was ~deal for the Polic~ to do
- • : f rotn ~ so ~tor they arrest~d }um J.ll_ .t~a: abGwnc~: of .. tlie ilJ:~ntifying witness whom
- • : , • • • : , , , • . : • I they could'd prove~his v~er~acity through an identification parade. The other , ~ : • , , , ' . . point vitIB': that 't,here was a~ possibility: of othe.r . P~Op~e)w~ving .forged and ' ' . ~ : ! = . gone to ba.nk~ the cheque. besides~ the, accl.lSe.d. . . , , rhat, p_oqs.ibility . , , , is. complet-ed . . • removed by PW4 David Alex .Kasela tl;le~ , ba_nJc t,eller/c~h,ie:r who. _actu<lly .served . '• . : ~ • . ~ • . , _ ~ . : ' the accused ahct ~sa\~Fhim with' the forg~p. chequ.e w~tch "{as presente~ t~ him , , ~ . . ' ' : . . . : f . • ~ . at his~cashier's :countet~case •. Heknew him before,a,nd_he_ identified him I ~ ' , , , . • J in the p~araae~ later on•. The truth ofi his evidence a,p_out _the a<:pus~d .. . attended • . • ' • -... • • : • • presenting the ~he:que 1 and :being :: I . , by Pw4 on t~e relev,a,nt Ldate, ,?f. :. 5/4/95 is conf:i..rmed ~by, the ac<.u.sed _himself in- nis qefence when he. admitted ' ' • , that he indeedwent:to the~ bank on that.date to (Rv.4 of course), to bank
- . ! I> • • ~ . ~ . • • • ' • ' • • • shs.3 1 500/=• fer his child 1s school us-e as _well ~ to ;draw shs.4,000/= cash froni this sanie teller on 3/4/95. • He- only 1;efuses_,to have_ b~ed the forged . ' . ti . ' . { , . . . - . ' : . cheque of"shs 0 4i,S,O0,GQ0/='. ~ But~ P\>/e4 tesfied _that, all' th~se transactions . I.. . . . : , , , , _ were clone by<-the ~accus.ed through him., l?W.4.I:}. f}~ory that he served the , : ' appellant is 'believable~ .There is .no denial frqm the app~ll~t.and the appellant" aoe~ n(t)" suggest any ct.her tel}er who seryed __p.i~.if it w~ not _ . • . , ' j , , , , • l • • • . PW.4 ... The b~--state1{1'e!t of~the. app~lla.l},t, of_, hj,s acc_o1:91t No. 6562001583 . . . - ' ... clea:Hy- shows ~that .there were 2 transactions (!Il 5/4/95 i~e~ t~e ~eposit , • • • • ' . ~ ' _ ~ I • • : • • of forged cheque for 4,900,000/= and of ~.cash shs.3.,500/= as well as the i • • • ; • • • . - : • , _ . wlthdrawi:tl . of shs-.4,000/= wl1,tch was. done 2 days ear!ier on

3/~ /95. PW.2--too, said he attended to the appellant when he went to complain to him on something and PW .2 told him that he was not a trustworthy customer. The testimonies of PW.2, PW.3 and PW.4~are so congruent that they leave no doubt that it is the appellant who went in person to ba.lc,th~ forged cheque by .;; the pay in slip also tendered as evidence. They all appear to be truthful witnesses as properly believed by the trial Resident Magistrate the learned Mr. Rumanyika (BM). The fact that the report to the Police was done 1 month later is e.xplained by PW.2 Antony Simon Njeje the Branch Manager of Mbalizi Road NBC who took administrative actions immediately after the cheque was presented by with-holding its encashment and thereafter, by checking with the Mbozi Coffee curing Co. about it e.t.c. The de~.was caused lawfully by the said Manager of NBC and other workers like PW.3 Joseph Kanak.amfumu a Bank Clerk who were following up and amassing evidence for future bank purposes as well as for presentation to the Police and the court. The fact that the appellant was found with some documents suggestive of a con man tend to lend wmight to the unmistak.en fraudulent character of the appellant. The next question is whether there was forgery. From the testimony of PW.2 PW.3 and PW.5 Elias Wigange the Sales Manager of Mbozi Coffee Curing Co. Ltd. there is no doubt .that the cheque leaf in question was forged in texture and in all its contents. This document was presented or uttered to PW.4 thereby accomplishing the offence ·of uttering a false or forged d;~ument.,. / ' E.L .. K. 'MWIPOPO - JUDGE 21/01/1997 I certify that this is a true and correct copy of the original Judgement. ·

})) ' ,.. \j',l ,-, \J_ / , DISTRICTiEGISTRAR MBEYA

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