

TANZANIA / JUDGMENT

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- (In the District Registry.) T JtNZL. ppcliatc Jurisdiction 4 CRIMINAL LFPLL NO.462 OF 1970 Original Criminal Case 140.13 of 1970 of the District Court of Mpanda District at Ilpanda Before AoM.Sanga, D.M. PHILLIPO IEJGGO. , .APPELLNT (Original Lccusooj Vs. THE REPUBLIC4. RLSPONDENT(Orig. Prosecutor.) CHiRGE: Giving false information to a person employed in Public Service c/s 122(a) of the Penal Code.

JUDGMENT.

KISANG, ig'J. The appellant Philipo Mbogo was convicted of giving false information to a person employed in the public service c/s 122(a) of the Penal Code and sontoncod to six months imprisonment 0 He now appeals. The particulars of the charge alleged that:- Philipo Mbogo during the month of June, 1969 within flpanda Minor Settlement in Tabora Legion, did give false information to one I.L.Makolo of the N.D.C. DtSalaam, by writing a letter to llim that people at lipanda had formed a society knovrn as Consumers Society and that he made the said Iei.Makolo write a letter to the General ii anage r , Nyanza Salt hines asking the said manager to sell the salt to the Consumers Society which in fact ho knew or believed was false" The facts wore that some time in Juno, 1969 the appellant approached one Mr. ako10 at his office in the National Devoopment Corporation s Dar es Saleam and informed him that there was a shortage of salt in Mpanda. ho individual traders in Mpanda were taking advantage of this shortage and were selling the commodity at a very high price. Consequently the residents of Mpanda had formed a Consumers Society and therefore the appellant requested Mr, rIakolo to give authority to the said consumers society to buy salt direct from the Uvinza Salt Mince. liereupon Mr. Makolo wrote a letter to the mines manager at Uvinza directing him to sell salt to the appellant so that the said consumers society could sell it to the residents of Mpanda. The mines manager at Uvinza duly sold salt to the appellant but later it was discoverod that there was no consumers society in Mpanda, whereupon the appellant was cbargcdiith this offence. Section 122(a) under which the appellantchârged provides;— Whocver gives to any parson emloycdtha public service any informatio: which ho knows or believes to be false, intending thereby to. causo or knowing it to be likely that he will 'thereby cause such person to do or omit anything which' such person ought'not to do or omit if the true state of facts respocting-which such information is given wore' known to him'hail be guilty of a misdumoanour!' sw - - -. •. .:. - • -. P It is at once apparont that the

charge was bad in that it makes no averment that the appellant gave the information to Mr. Makolo intending thereby to cause, or knowing it to be likely that he would thereby cause Mr. Makolo to give authority which he ought not to have given had he known that there existed no Consumers Society in Mpanda. Such intent or knowledge is an essential ingredient to the offence charged and the failure to plead it in the charge clearly constituted a serious defect, again, a glance through the record shows that the particulars of the charge and the evidence adduced were at variance. The particulars allege that the appellant gave false information to Mr. Makolo in writing. The evidence, however, shows that the said information was only given verbally. This discrepancy came to light at a very early stage in the trial when the first prosecution witness was giving evidence. This witness in his cross-examination by the appellant, however, assured the appellant that the letter containing the said information would be produced by a subsequent witness. But when that subsequent witness was called he said that the information was only given verbally, and even at that stage and throughout the whole trial no steps were taken to put this situation right. Once such a discrepancy came to light there was a duty to amend the charge to accord with the evidence. This was so especially after the appellant had specifically sought to know exactly whether he was being accused of giving the information verbally or in writing, and to my mind failure to amend the charge in these circumstances did prejudice the appellant in his defence. There is one last point and that is whether Mr. Makolo was a person employed in the public service. The learned trial magistrate so held that this was but it would appear that this was not so. Mr. Makolo in his evidence said that he was employed by the manager of the National Development Corporation. Section 5 of the Penal Code gives the definition of a person employed in the public service. That section assigns various meanings to this expression but I propose to consider only those which appear to come close and to be relevant to the facts of the present case. Thus a person employed in the public service means - "any person holding any of the following offices or performing the duty thereof whether as deputy or otherwise -

- (i) any civil office including the office of resident and, any office the power of appointing a person to which or of removing from which is vested in the President or in a commission or board to which the President has delegated his functions, or which is established by written law for the purpose of, making appointments to any office; or any office to which a person is appointed or nominated by Ordinance or Statute; or any civil office, the power of appointing to which or removing from which is vested in any
- , , -3- person or persons, holding an office of any kind included in either of the two last preceding paragraphs of this section. Paragraph 20(1) of the Schedule to the National Development Corporation Act 1 of 1962 provides that the Corporation shall appoint a General Manager, and paragraph 1 of the same Schedule as amended by the National Development Corporation (Amendment) Act No. 69 of 1964 provides that the Corporation shall consist of the Minister of State nominated by the President, five other Ministers (of specified Ministries) and four other persons appointed by the President. Thus Mr. Makolo would not come within paragraph (i) of section 5 of the Penal Code as set out above because since he says he was employed by the manager, then it is clear that the power of appointment to his office was not vested in the President or in a commission or board to which the President has

delegated his functions of, or which is established by written law for the purpose of, making appointments to any office. Flo does not seem to come under paragraph (ii) of the said section either, because his office is not one to which he was nominated or appointed by Ordinance or Statute. Nor does he seem to come under paragraph (iii) of the said section. For, if he was employed by the Manager or General Manager then he could not be said to be appointed to his office by a person holding office under paragraph (i) because the General Manager is appointed by the Corporation and not by the President or by a commission or board to which the President has delegated his functions of, or which is established by written law for the purpose of, making appointments to any office. Nor could he be said to be appointed to his office by a person holding office under paragraph (ii) of the said section because the General Manager who employed him was not appointed or nominated to his office by Ordinance or Statute. For these reasons, -therefore, I was of the view that Ylre Makolo was not a person employed in the public service within the meaning of section 5 of the Penal Code. The learned advocate for the Republic did not seek to support the conviction and I am in full agreement with him. Accordingly the appeal is allowed, the conviction and sentence are set aside and the appellant is to be released unless otherwise lawfully held in custody. I delivered in Court the 18th day of November, 1970 - (i.H. I(S!NCth.) Let it in g

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