IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CORAM: NYALALI, C.J., MAKAME, J.A., and KISANGA, J.A.

CRIMINAL APPEAL NO. 69 OF 1986

ANTHONY S/O KAIJAGE.....APPELLANT

and

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Mwanza)(Munyera, J.) dated the 9th day of October, 1986

in

Criminal Appeal Case No. 187 of 1986

JUDGEMENT OF THE COURT

NYALALI, C.J.:

This is a second appeal by one Anthony Kaijage, hereinafter called, the appellant. He was charged on two alternative counts in the District Court at Bukoba, that is, with theft by servant contrary to section 271 and 265 of the Penal Code in the first count and, in the alternative, with Obtaining Money by false pretences contrary to section 302 of the same Code in the second count. The trial court, RUSEMA, R.M. convicted the appellant on the first count but properly abstained from making a finding on the alternative second count. Appellant was sentenced to five years imprisonment. He was aggrieved by the conviction and sentence and he appealed to the High Court where however his appeal was dismissed in its entirety. He was further aggrieved by that outcome, hence this appeal to this court.

From the proceedings in this court and the two courts below, it is common ground that the appellant was at all material times the Production Manager and Acting General Manager of a firm commonly known by its acronym as BUKOP in Bukoba township.

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On the 10th May, 1986 there was a board meeting attended by the appellant and other board members. The meeting ended on the same day after lunch, which was hosted for Board members at Lake Hotel in Bukoba township. Thereafter the appellant placed an order for the purchase of eight bottles of Cinzano and Martin at that hotel and he was issued with a receipt for a sum of shillings 10,800/= being the purchase price. He did not however then pay for the bottles and he was not allowed to take any except the receipt. On Monday 12th May 1986, the appellant instructed his purchasing officer, namely LEONARD KATO (P.W.7) to prepare and issue a local purchase order (L.P.O.) for the purchase of the eight bottles as per the receipt. Subsequently appellant instructed his cashier, namely ARON LUGUMILA (P.W.4) to pay out to him the sum of shs. 10,800/= as per the L.P.O. P.W.4 was unable to effect the payment on that day due to insufficient funds at his disposal. Payment was made as instructed on the following day, that is, the 13th May. In the morning of the 14th May, 1986, the police contacted the appellant in connections with his purchase of the eight bottles of drinks. Later the appellant collected and paid for the eight bottles at Lake Hotel. It is undisputed that the bottles were delivered by the appellant's driver at appellant's residence where they were found and seized by the police that same day. It is also undisputed that it was customary and the appellant was authorized to purchase such articles as drinks and issue them as complimentaries to people like Board members of BUKOP.

Now with regard to matters in dispute, it is the prosecution case that the appellant fraudulently got paid the sum of hs. 10,800/= by falsely claiming that the money was for the payment of purchase made inconnection with the Board meeting whereas in fact the appellant used the money to purchase the eight bottles of drinks for his own personal use. The Defence case on the other

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is that the appellant decided in good faith to purchase these eight bottles for distribution as complimentaries to Board members after discovering at lunchtime on the 10th May, 1986 that the reception which he had planned to host for the board members later in the evening that day was not going to take place, as the Board members would be attending to other business. It is part of the defence case that the bottles were delivered by the driver at his home not on his own instructions but on the driver's own initiative and the police got hold of them before he could take steps to distribute them to Board members.

The main issue in this second appeal is whether there is any basis for this court to interfere with the conviction made by the trial court and upheld on first appeal by the High Court. The principles upon which this court can properly interfere in a second appeal against the concurrent findings of fact by the courts below are well established. These are that this court cannot interfere unless the relevant findings of fact are not supported by any evidence, or unless there are material misdirections or non-directions on the evidence laid before the courts below.

In the case before us, the High Court, MUNYERA, J. rejected the appellant's defence because, "What incriminated the appellant was that he bought the bottles after board members had dispersed, having informed him that they had no time for a reception. He said that he wanted to distribute them to the members as complimentaries but gave no reason why he did not do so and the bottles were found in his house four days after. One cannot resist the feeling that he bought the drinks for his home consumption under the guise of entertaining members of the board.....".

It is apparent that the learned trial judge based his rejection of the appellant's defence on three facts - firstly, the fact that appellant "bought the bottles after board members had dispersed", and secondly, the fact that appellant gave no reason why he had not distributed the bottles to Board members by the time the police intervened, and thirdly, the fact that "the bottles were found in house four day after".

We think that the learned appellate judge misdirected himself on the evidence in respect of these findings of fact. The evidence adduced at the trial and on record is to the effect that the appellant purchased the bottles of drinks on the 10th May, 1986 after the Board ended its meeting earlier that same day but when Board members were still in town attending a board meeting of another organization - that is, Karagwe Cooperative Union. Thus it cannot be said that BUKOP Board members had dispersed in the sense that they had left and each gone his way making it difficult for the appellant to distribute the complimentaries to them.

With regard to the appellant's failure to distribute the bottles before the police intervened, there is evidence to the effect that the appellant was not allowed to collect the bottles until he paid for them and that appellant could not obtain the money until the 13th May 1986, and he made the payment on the following day - that is on the very day when the police intervened. There was thus no room for him to distribute the bottles before payment. This same evidence sufficiently explains also the third fact relied upon by the learned appellate judge.

As to the learned trial resident magistrate, it is apparent from the record that he found the appellant had given "an impressive answer" to the allegations facing him. He however found the appellant had lied in one respect, that is in connection with the time when the appellant placed the order for the eight

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bottles at Lake Hotel. Consequently the learned resident magistrate asked himself, "Now the intriguing question is what is the legal position in circumstances where a witness or accused lies one (sic) particular point and in the other he seems to have an impressive explanation. Is he to be disbelieved in one point and be believed in the other?" The learned resident magistrate, apparently relying on a Court of Appeal case of MARTHA MICHAEL WEJJA v. THE ATTORNEY-GENERAL and 3 OTHERS (not yet reported) and on the Latin Maxim FALSUS IN UNO, FALSUS IN OMNIBUS, was of the view that since the appellant was found to have lied in one respect he could not be found to be telling to truth in any other respect. Whatever the significance of the Latin maxim cited by the learned trial resident magistrate, (and we must say that this was only one of many Latin maxims cited on different issues by this obviously Latin-minded magistrate), we do not think that there is anything in the judgement of WEJJA's case, which happens to have been drafted by one of the members of the present court, that can be said to support the proposition made by the learned trial magistrate in this case. It is not the law in this country that a witness or accused person cannot be found to be telling the truth in one or many respects if he is found to have told a lie in another respect. No double standard is involved at all in this approach. The double standard which the Court of Appeal decried in WEJJA's case concerned an approach by which one standard or consideration is applied to witnesses on one side of the case while a totally different standard or consideration is applied to witnesses on the opposite side. This is not the same thing as disbelieving one aspect of the evidence of a witness while believing another part of his or her evidence~~, of a witness while believing another part of his or her evidence.~~

Clearly the learned trial resident magistrate misdirected himself on the evidence and the law when he held the view that he was bound to reject the otherwise impressive explanation given by the appellant, simply because he found the appellant to have told a lie concerning the time when he purchased the eight bottles. After all the lie found by the trial court does not appear to be crucial to the case. We do not think that the learned magistrate would have convicted the appellant if he had properly directed himself on the evidence and the relevant law. Similarly, we do not think that the learned appellate judge would have upheld the conviction had he properly directed himself on the evidence on record.

It follows therefore, that we have to interfere with the findings of the two courts below by allowing the appeal, quashing the conviction, setting aside the sentence and directing that the appellant be released from jail forthwith unless detained therein for other lawful cause.

DELIVERED at MWANZA this 29th November, 1986.

F. L. NYALALI
CHIEF JUSTICE

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

J. H. MSOFFE
DEPUTY REGISTRAR