



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GACHUHI, KWACH JJ A & Cockar Ag JA

CRIMINAL APPEAL NO 131 OF 1989

CHRISTOPHER OMUFIRA AKWABI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

There were five grounds of appeal against conviction. During the hearing Mr Khaminwa for the appellant confined his submissions to the particulars given in the charge sheet which he contended did not contain all the ingredients of the offence nor, he submitted, were the omissions covered in the statement made to the court by the prosecutor. On account of these omissions Mr Khaminwa contended the plea was not unequivocal. To Mr Chunga's objection that the charge being defective was not a ground of appeal Mr Khaminwa drew attention to the 2nd and 4th grounds of appeal which read as follows:-

2. That the learned judges erred in law in holding that all the ingredients of the offence were urged understood and admitted.

4. That the learned judges erred in holding that the appellant's plea in the lower court was of the clearest unequivocal nature.

The court with some reluctance allowed Mr Khaminwa to continue to make submissions in respect of the inadequacy of the particulars in the charge.

The appellant was convicted on his own plea by the chief magistrate of the offence of giving false information to a person employed in the public service contrary to section 129(a) of the Penal Code (cap. 63) Laws of Kenya.

The particulars of the offence were give as follows:-

“Christopher Omufira Akwabi: On the 24th day of May, 1989 at the Nairobi City Hall in Nairobi within the Nairobi area, gave false information to one Wilson Mugasiali Shigoli, a person employed in the public service as the Special Director of Civic Operations in the Nairobi City Commission to the effect that some prominent personalities, had given money to a Nairobi City Commission official in order to induce the said official and other workers of the Commission to undermine the smooth running and operations of the Nairobi City Commission which Christopher Omufira Akwabi knew to be false and likely to cause the said Wilson Mugasiali Shigoli to do an act which he would otherwise not do if the true state of facts

respecting the said information was known to him.”

Mr Khaminwa pointed out which, in his view, were the essential missing ingredients. He said that in order to complete the offence it was essential to show that the informer (the appellant) knew that the information he was giving was false intending thereby to cause the person employed in the public service to take certain steps etc. In the charge sheet the words

“intending thereby to cause” were missing. Omission of this intention of the informer, submitted Mr Khaminwa was a fatal defect.

We are not impressed by this submission. Mr Chunga very promptly and rightly, referred to the following part of section 129 of the Penal Code in which we have underlined the relevant portion:

“.. he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause such person...”

We agree with Mr Chunga that the section has provided the draftsman with an option to choose one of the two alternatives provided being either,

“intending thereby to cause”, or “knowing it to be likely that he will thereby cause”. In this case the prosecution decided on the second alternative as one of the ingredients of the offence. In our view the prosecution was entitled so to do. Non-insertion of the other alternative “intending thereby to cause” was not necessary and does not constitute any omission at all in the charge as framed. We reject this ground.

The other defect, claimed Mr Khaminwa, was the omission of the names of the prominent personalities and the official of the Nairobi City Commission whose alleged misconduct formed the false information given to Brigadier Shigoli. Mr Khaminwa urged that it was a fatal omission. Mr Chunga’s response was that mention of names was not an essential ingredient. Mentioning of names was a mere ancillary information and not the essence. Particulars of this offence as given in the charge-sheet were enough to identify the false information to the accused person. The essence was the person to whom the false information was given.

In answer to court Mr Chunga conceded that if the appellant had not pleaded guilty then the “prominent personalities” and the “official” would have been called as witnesses to give evidence. In our view they, as witnesses, must be distinguished from ordinary witnesses to an event. In this offence they are not witnesses to an event but are alleged to be the actual participants in the event and their alleged actions constituted the vital ingredients in the false statement. On account of the role they are alleged to have played in the false statement a fullest possible identification of these persons was essential. In our view it was imperative for the

“prominent personalities” and the “official” to have been identified by names in the particulars of this charge as without the names or without the actual identifying information alleged to have been given by the appellant, the false statement alleged to have been given to Brigadier Shigoli was incomplete. The charge as framed is deficient to that extent

and a plea of guilty to it is not quite unequivocal. The deficiency would have been cured if the personalities involved in the false statement had been properly identified during the proceedings that followed. That was not done.

We would also point out that at the time the plea was taken the appellant was unrepresented and, being a layman, was not equipped with capability to observe such a defect in the charge sheet. A plea to a defective charge cannot stand. The conviction must be and is now quashed and the sentence is set aside. The appellant is ordered to be set free forthwith unless otherwise lawfully held.

A matter for concern is the fact that the appellant was arrested on 25.5.89 but was not brought to court until 8.6.89. We would like to observe that we view with disfavour and suspicion the tendency by the

police to hold suspects in custody, virtually incommunicado, for long periods without taking them to court.

Dated and Delivered at Nairobi this 10th May, 1990

J.M. GACHUHI

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL

A.M. COCKAR

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Ag JUDGE OF APPEAL