IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KNELLER JA, CHESONI & NYARANGI AG JJ A)

CRIMINAL APPEAL NO 98 OF 1983

BETWEEN

HORACE KITI MAKUPE..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from a Judgment of the High Court at Mombasa, Aragon J, dated 5th August 1983, in Criminal Appeal No 312 of 1983)

July 18, 1984, the following Judgment of the Court was delivered.

Horace Kiti Makupe of Mlaleo, Kisauni, the appellant, was convicted on May 10 1983 of obtaining by false pretences contrary to section 313 of the Penal Code and sentenced to 2 years' imprisonment by one of Mombasa's Senior Resident Magistrates.

He appealed to the High Court there and Mr. Justice Aragon allowed the appeal but ordered a retrial. The reason for this was that the charge was duplex which was a fundamental error and not normally curable under section 382 Criminal Procedure Code.

Mr. Kitonga for the appellant has come to this court now to have the order for a retrial set aside and one releasing the appellant forthwith substituted because, in brief, the duplicity of the charge is incurable and so fundamental a mistake that a retrial cannot be ordered.

The appellant met Noor Shariff Osman in hospital at Shimo-la-Tewa on August 21, 1982 to September 6, 1982 because that is where the appellant was employed and Osman became a patient in it while serving a sentence of 18 months for an offence against the Exchange Control Act.

On May 7, 1982 a fellow prisoner called Robert wrote out a letter for Osman to his advocate in Mombasa which Osman signed with his name and folded. Osman asked the appellant to take it to Mrs. Osman and the appellant did that and then went with Mrs Osman to the advocate's office. This letter was not produced to the magistrate or the judge. On various dates thereafter between September 29 and October 20 1982 the appellant brought eight or nine letters purporting to be signed by the appellant asking her to entrust to the appellant various sums of cash and the other things she thought Osman wanted her to send. She may have believed they would persuade the officer in charge to release him on October 20,1982. The letters included two other important matters. First, Mrs. Osman was not to visit him in the gaol. Secondly,

successive letters acknowledged receipt of the cash, radio and watch (the spectacles and the spoon drop out of the story early on) and Mrs. Osman kept this letters.

Osman did not emerge from gaol on October 20 1982 so Mrs. Osman went to see him and Osman was very vexed with her for not visiting him until then and she reminded him that in his letters he told her not to go and see him and he denied writing any and she said he did and asked if he had not said in them he received the cash and radio and watch? And then the hoax was revealed. She took the letters to the C.I.D. in Mombasa on October 26 and Senior Sergeant Kadzo arrested the appellant in his room and there he found one more letter to Mrs. Osman from Osman on the table and he collected it.

He collected specimen signatures from Osman and sent them with the letters stored up by Mrs. Osman and the one found on the table in the appellant's place and Mr. Wamalwa, the C.I.D. document examiner, checked the signatures on them and was of the opinion that those on the letters and these that he knew belonged to Osman, because he made them for the Senior Sergeant, did not agree. These witnesses speak of a 'known' signature but whose it was is not clear and this one, in the expert's opinion, did not come from the same hand that made the signatures on the letters. The writing of the letters Mrs Osman received and on the one on the table in the appellant's room were, in his view, all by one and the same hand. He was not supplied with any signature or handwriting of the appellant, probably because no-one thought of asking him to write anything. Osman is illiterate so he was not asked to write anything.

The appellant said it was not like this at all. It was another prisoner, Joseph Ekai, who brought him those letters from Mrs. Osman, or the radio or the watch from Mrs. Osman, which the appellant handed to the prisoner Osman and, then, when a fellow prisoner wrote another for Osman, Joseph Ekai handed it to the appellant for Mrs. Osman.

The learned magistrate believed the witnesses for the Republic and he did not believe the appellant. The learned judge did not review the evidence against and for the appellant again as he did say that he found the evidence overwhelming and that could mean he made the same findings as to the credibility or otherwise of these people.

Mrs. Osman was quite specific about the fact that the appellant told her not to seal the cash in anything but to leave it between some folded paper on which she had written to Osman to comply with prison regulations and so she did.

The magistrate realising, no doubt, that there was no evidence that the appellant wrote and signed the letters from Osman declared that the fact that the signatures were different from Osman's own went

> "to support the conclusion perhaps that the accused knew about the source of these letters and the writer if it wasn't him."

This falls short of the proper standard of proof required of any important fact in a criminal trial.

Obtaining by false pretences contrary to section 313 Penal code includes an obtaining with intent to defraud by a false pretence and a model of such a charge and its particulars is provided in the Second Schedule to the Criminal Procedure Code.

It is not one of the offences for which it is sufficient to specify the gross amount of property in respect of which the offence is alleged to have been committed or the dates between which the offence is alleged to have been committed without specifying particular times or exact dates – section 137 (j) Criminal Procedure Code.

So the learned judge was correct when he said this charge which the appellant faced was duplex. The various sums of cash and the watch, radio, spectacles and spoon should have been in separate counts. The appellant might have wished to plead guilty or not guilty to everything lumped together in one count.

There are some reported decisions of the former Court of Appeal for Eastern Africa on the effect of a

duplex charge. The first was *R v. Sowedi Kauta Tanywamugwabi* (1933), 15 KLR 105 (CA-U) which declared that a charge with one count of murdering two persons was bad in law. It was next said to be a defect that was curable *R. v. Odda Tore and another* (1934) 1 EACA 114 (CA-K). But in the same year there was one charge which included six victims and the Court of Appeal, though acknowledge which included six victims and the count, held that if the accused had not been embarrassed or prejudiced in fact when making his defence then his conviction ought to stand. *R. v. Mongella Ngui* (1934), EACA 152 (CAK). (Two acts led to 2 deaths in *Odda Tore* but one act, wilfully setting fire to a house with six people asleep in it, led to 6 deaths in *Mongella Ngui*). And that was repeated in *R. v. Ngidipe bin Kapirama and others* (1939), 6 EACA 118. (CA-T).

There is one from the mid-fifties in which two or more different offences were charged in the alternative in the one count which was declared to be a defect that was not merely formal but substantial. *Cherere Gakuli v. R*, (1955), 22 EACA 478 (CA-K).

The earlier decisions such as *Kamunan Bulegeya v. Rex* (1935), 2 EACA 122 (CA-U), *Dossani v. Rex* (1946) 14 EACA 150, *Kija Sagida v. Rex* (1947), 124 EACA 118, *Suke Samwel v. Rex* (1947) EACA 134 and *Dinu v. Rex* (1947), 14 EACA 136 were considered and summarised in *Ahmed ali Dharamshi Sumar v. R* [1964] E.A. 481 (CA-T) and the principles set in *Fatehali Manji v. R.* [1966] E.A. 343 CCA-T) in this form.

Section 345(3) (i) of the Criminal Procedure Code, under which the learned judge must have made the order for a retrial, appears to give the High Court in its appellate jurisdiction an unlimited discretion as to what is and what is not a proper exercise of this discretion. *Salim Muhsin v. Salim Bin Mohamed and Others v. R.* (1950), 17 EACA 128.

In general, a retrial will be ordered when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of the insufficiency of the evidence or for the purpose of enabling the prosecution to fill up gaps in the evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the appellant (or accused).

Here, in this matter, it cannot be gainsaid that the charge was duplex. The trial, itself, was not illegal nor was it defective. It might in its particular circumstances have been in the interests of justice right to order a retrial but on its particular facts that would be likely to cause an injustice.

The Republic did not prove beyond any reasonable doubt the handwriting of the appellant was the same as that in the letters Mrs. Osman received or the one found on the table in the appellant's place or that his was the hand that forged Osman's signature so convincingly. No samples of his handwriting or his attempts at Osman's signature were taken by the C.I.D.

None of the letters was included in our records for this appeal and nor was the exculpatory statement the appellant made in answer to a charge and caution spelt out to him by IP Tobias Miseda because we have been told they have been mislaid. That will be some handicap to whoever has to prosecute the appellant in the retrial.

It means, also, that we cannot make out what it was that made Mrs. Osman hand over her husband's cash and radio and watch and spoon and buy the spectacles for the cook. The choice might lie between the letters written for Osman, or purporting to be written for him, with the appellant as the innocent carrier of these letters, as he maintains, or the very words the appellant uttered to her each time. She was not asked what it was that made her hand him all this cash and other things and would she have done so if she had known her husband never asked for them?

And if she did all this because she thought the Officer-in-Charge of the Prison would release Osman on October 20, then the pretence was related to some event that might possibly happen in the future and

section 312 of the Penal Code which defines a false pretence does not embrace such a representation.

It is not, alas, clear to us if the appellant mentioned Joseph Ekai in his statement to I.P. Miseda but if he did then there seems to have been no attempt by the Republic to find him and take a statement from him or call him as a witness.

If he is not referred to in this statement, then the appellant trots out his name for the first time in his unsworn defence statement at the trial. That being so, the Republic did not foresee this and could not do so by the exercise of reasonable diligence and the prosecutor should have asked for leave to adduce evidence in reply, see section 212 of the Criminal Procedure Code. His evidence was essential to a just decision of the case so the magistrate had a duty to summon him and examine him – section 150 (ibid).

Had the magistrate taken into account these factors, or some of them, he would, in all probability, have acquitted the accused (appellant) or, if not, the judge, too, if he had weighed them in the balance, would probably not have ordered a retrial.

If the order is allowed to stand the Republic will be able to lead evidence which it had not led at the trial to remedy the paucity of the evidence and to fill up the gaps. And none of these weaknesses was the fault of the appellant, it should be recalled. It would be contrary to authority and unfair to the appellant to require him to stand trial again.

So, with respect, the learned judge did not exercise his judicial discretion according to law.

Therefore, we set aside the order for a retrial and substitute one of acquittal. The appellant was released on bail pending the hearing of this appeal so there is no further order that we need make.

July 18, 1984

KNELLER JA, CHESONI & NYARANGI Ag JJ A