



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 1573 OF 1984

MULUMBA KASONGO KALEMBAKANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the District Magistrate's Court at Kibera, Miss N Nyaanga)

JUDGMENT

Mulumba Kasongo Kalembakana appeals against his conviction by a learned Acting Resident Magistrate sitting at Kibera, Nairobi, on a charge of obtaining money by false pretences, contrary to section 313 of the Penal Code.

The complainant was (PW 1) Jackson Theuri Nguni, who is a businessman in Busia. He testified that in the morning of September 5, 1984, he was introduced to the appellant by a friend, (PW 2) Doctor Jood Mofokang. They spent the day together and the appellant led the complainant to believe he is a wealthy man with property abroad. The appellant mentioned that he had bought a bottle of mercury which had been bought from him for Shs 100,000.

The next day at around 9.00 am, the appellant approached the complainant and said that the mercury had arrived. He said that he had Shs 176,000, but needed a further Shs 24,000 to make up the purchase price of Shs 200,000. On a promise by the appellant to return the Shs 24,000 together with a further Shs 50,000, the complainant gave the appellant Shs 24,000. The appellant went to Doctor Joods's house, retrieved the mercury and they set out for Nairobi. At Nairobi they went to the Iraqi Embassy. The appellant went inside, but came back 10 minutes later and said the boss had gone home. They went to Dandora to the appellant's house and the complainant met the appellant over breakfast next morning. They then went again to Iraqi Embassy, met some men there and had coffee and the appellant went into an inner room. He came out to tell the complainant that the boss was sick, that they would wait until Monday and that he left behind the mercury which was worth over Shs 12 million. By this time the complainant was becoming suspicious.

They drove back to Busia and the next day the appellant told the complainant that whereas he had intended to buy some diamonds he had bought mercury and asked for Shs 3,000 which the complainant gave him. They took a bus to Nairobi and slept overnight at the appellant's house. They went back to the Embassy the next day, that would be the September 8, and the appellant came out and said the "cheque" (presumably in payment for the mercury) needed 3 signatures.

The next Friday the complainant met Doctor Jood who told him that the bottle did not contain mercury and so on September 11, 1984, the complainant referred the matter to the police. Police officers recovered a bottle of red paint from the house of the one of the appellant's neighbours, (PW 4) Bonifae Musisi. The evidence of Musisi's wife, (PW 3) Harriet Nasubuga, was that the bottle had been left at her house by the appellant. The bottle recovered was identified by the complainant as the bottle of 'red mercury', but the Government analyst's report showed it to be red paint.

Doctor Jood Mofokang (PW 2) said he met the appellant when they were imprisoned for political reasons in Uganda. The appellant arrived at his medical surgery on September 4, 1984, and said he had just come from Nairobi. He appeared very anxious and asked Doctor Jood if he knew how to examine red mercury. The doctor told him there was no such thing, but the appellant laughed and walked out of his office. Later the appellant showed him a bottle of "red Mercury" and Doctor Jood told him it was red paint. On September 5, he saw the appellant and the complainant together and in the evening of that day they walked together to the Uganda border. The next day he saw the appellant and he had a suspicion about the bottle and found it to be missing from the house. On 7th the complainant and the appellant returned from Nairobi and had a conversation with Doctor Jood in which both of them told him that the "red mercury" was not red paint.

Doctor Jood later saw the two in Nairobi and he told the complainant to return to Busia otherwise he would lose money, but the complainant laughed at him. Later still, he learned that the appellant was in Police custody.

The appellant, unsworn, said he was a political refugee from Zaire and Secretary-General of the Congolese National Liberation Front. He went to Busia and found a lorry coming over the border with a letter from the Front's Chairman who had sent him some gold and 4 bottles of mercury. He took over the gold and mercury but had a transport problem and made an agreement with the complainant to use the complainant's vehicle to transport them to Nairobi. There were cash transactions which from the record are somewhat confused in their nature, but the appellant denies taking money from the complainant and told the court that he is the one who should be complaining. They drove to Nairobi and he went to the Iraqi Embassy to collect a message. The appellant denied obtaining money by false pretences.

After setting out the prosecution evidence the learned magistrate recited the appellant's evidence as follows:

"When put to his defence the accused gave unsworn statement and called no witness. He claims to be a guerilla who dejected (sic) from Mobutu's reign and the he is involved in counter revolutionary acts as a demonstration to the Mobutu regime. He claims that he is involved in the smuggling of gold and diamonds and has 2 youths working for him whom he had gone to meet at the Busia border. He also adds he has travelled to Arab countries and is friendly to the Arab Embassy personnel in Kenya."

That is not an accurate or fair reflection of what the appellant told the court. The learned magistrate went on to say:

"There is not dispute that he got Shs 24,000 from the complainant".

It is clear from the appellant's evidence that he denies taking any money from the complainant. After reciting the evidence the learned magistrate immediately proceeds with the following sentence:

"To me all the accused's activities are top crimes and he does not deserve a place in Kenya."

With respect the learned magistrate would have better proceeded to a dispassionate analysis of the evidence.

It was proved that the substance which the appellant was dealing in was not red mercury, but was red paint. It was proved that the appellant presented the substance to the complainant as red mercury. But was it proved that the appellant knew that the substance was not red mercury"

To find an answer to that question we would best review the evidence of Doctor Jood. When the appellant first saw doctor Jood on September 4, 1984, he did not try to pass the substance off as red mercury, but posed an anxious question to the Doctor of whether he knew how to examine red mercury. Doctor Jood then told the appellant that there was nothing like red mercury and the appellant's reaction was to scoff at him. Later still Doctor Jood had a similar conversation with both the appellant and the complainant together, and this time both appellant and complainant scoffed at him.

There is no suggestion that at that stage the complainant did not genuinely believe the substance was red mercury. Could it not be that the appellant was equally fooled"

The court had reason to believe that the appellant may well have genuinely, but mistakenly, believed the substance to be red mercury. I am not satisfied that the learned magistrate gave proper consideration to the evidence of doctor Jood. If she had there may well have been doubt in her mind as to whether the appellant intended to defraud the complainant. Nor did she address her mind to the possibility that we are here dealing with a case of, not thieves, but smugglers, falling out. The conviction is unsafe and will be quashed.

The sentence will, of course, be set aside, but I would point out to the learned magistrate that maximum for this offence is 3 years imprisonment and the sentence of 4 years imprisonment was unlawful.

The appellant may be released unless held for any other lawful cause.

Dated and delivered at Nairobi this 7th August , 1985.

D. SCHOFIELD

JUDGE



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