

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: Nyalali, C.J., Makame, J.A. and Kisanga, J.A.)

CRIMINAL APPEAL NO. 3 OF 1980

B E T W E E N

LIBERATI MTENDE : : : : : APPELLANT

A N D

THE REPUBLIC : : : : : RESPONDENT

(Appeal from the Judgment of the High
Court of Tanzania at Tabora)(Mapigano, J.)
dated the 24th day of December, 1975,

IN

Criminal Appeal No. 28 of 1975

JUDGMENT OF THE COURT

MAKAME, J.A.:

This is a second appeal. The appellant was a Rural Dispensary Assistant at Kabungu Government Dispensary in Mpanda District when he was picked and charged with Stealing by a person in the public service some medicines entrusted to him for dispensing out to patients. He was convicted and sentenced to imprisonment for three years and his appeal to the High Court, Tabora, was not successful.

The prosecution relied on the evidence of P.W.1 the District Medical Officer Mpanda; P.W.2 ATHUMANI KAPAMA a Stores Officer at the District Hospital; and the police officer P.W.3 who investigated the case. The trial court found it established that the appellant had not dispensed some of the drugs and that he had stolen them. The High Court on first appeal agreed with the trial court and after reading the record and hearing Mr. Loomu-Ojare, learned State Attorney, we agree that the conviction was sound and cannot be faulted.

A physical check of the medicines revealed that there was in stock less medicine than was reflected in the Ledger Book, Exhibit ... The evidence was that the appellant knew that it was important for him to maintain Exhibit A as well as Exhibit C, the Out Patient Register. He had been keeping both records before. Exhibit C, which reflected

what was actually given to patients, would have facilitated a cross check of the medicines issued but he told P.W.1 that he did not have such a book. A few days later the appellant took to the Police Exhibit C, the book he had said he did not have. Some attempts had been made to bring the record up to date but they were inadequate, obviously because the appellant did not have Exhibit A to guide him to complete the fabrication as it had by then already been taken away from him. He agreed in answer to the learned trial magistrate that "The Out Patient register should answer any question concerning the amount of medicine used." Obviously he did not at first wish such a question answered, that was why he would not produce Exhibit C.

The appellant's explanation was that he had dispensed the drugs but he had failed to record the issues because he was too busy. Admittedly such lapse, if true, does not constitute theft and the evidence in support of the charge was only circumstantial. However, it would be terrible if every time a person found himself in a position like the appellant's and pleaded mere failure to record because of pressure of work he got away with it. It would defeat the whole aim of maintaining records for accountable stores. The particular circumstances of each case must be looked into and inferences drawn. In this particular case the appellant's conduct vitiated the claim of innocence. The trial court went into the appellant's explanation and was satisfied that the shortage was actual and that the medicines had been stolen. The appellant cannot be allowed to be a privileged and sole commentator on his own conduct. The trial court was competent to analyse the appellant's conduct and draw inferences. The complaint Mr. Matemba now makes, that other persons might have taken the medicines, is novel and speculative. The contention that the medicines could have been given to patients referred to the dispensary does not merit serious consideration. The appeal against conviction is dismissed.

The first appellate court remarked that the appellant failed to produce the 'Separate Sheets' on which he recorded some of the requisite particulars and Mr. Loomu-Ojare also referred to the alleged sheets when he appeared before us. We have carefully searched the record but have failed to see where the appellant made such assertion. To the contrary, P.W.3 said that the appellant told him that he kept no other record. We think the learned judge misread what the appellant said in cross-examination, that "The doctor wants another system. That those receiving injections should be recorded in a separate sheet Normally we have a record of daily attendants in a daily sheet. In that sheet the name of the patient and the medicine and doese (sic) I was too busy that I was not recording the medicine properly". With great respect, we do not from this collect the same meaning as did the learned judge.

We desire to mention three other matters before we end. The first is, we are not convinced that there was really a point of law to merit a certificate to this Court. The learned judge who admitted the appeal to hearing remarked:

"It seems to me that an important point of law is involved whether failure to keep record of the medicine supplied to patients and subsequent failure to account for the same constituted a criminal offence, in which conviction could be based.

This application is allowed and appeal admitted."

With respect, this missed the point. Neither court below found that "failure to keep record of the medicine supplied to patients and subsequent failure to account for the same constituted a criminal offence." The brief, and to us obvious, point is that that defence was considered and rejected: theft was found proved. We are anxious not to be flooded with unnecessary appeals.

The second point is that the value of the stolen medicines given in the charge sheet as shs. 137/50 was not proved. Some evidence should have been adduced on the point. The sum is paltry

and close to the 'ceiling' of s.s. 100/- and if evidence had been adduced it might well have turned out that the appellant need not have been sentenced to the statutory minimum. As it is now, however, the point is aridly academic as we are given to understand that the appellant has already been released.

Lastly, we note that the person who led the prosecution evidence is one Sgt. Major Hungu. Unless he was specifically appointed, and we have nothing on record to show that he was, Sgt. Major Hungu was not a public prosecutor because a sergeant major is below the rank of a sub-inspector. We do not however think that the irregularity was fatal in the particular circumstances. We think it is curable under section 346 of the Criminal Procedure Code.

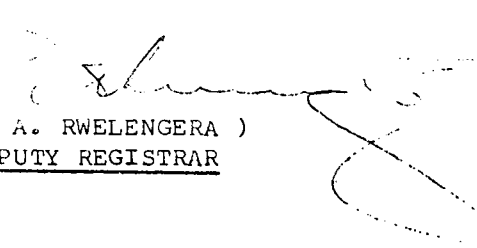
DATED at MWANZA this 2nd day of April, 1980.

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.


(G. A. RWELEGERA)
DEPUTY REGISTRAR