**Republic v Jaffer**

**Division:** High Court of Tanzania at Dar Es Salaam

**Date of judgment:** 13 March 1974

**Case Number:** 8/1973 (108/74)

**Before:** Mwakasendo J

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*[1] Exchange Control – Payment to non-resident – Permission – Goods over-invoiced – No permission*

*– Exchange Control Ordinance* (*Cap.* 294)*, s.* 5 (9) *and* 5*th Sch., Pt. II para.* 1 (1) (*T.*)*.*

**JUDGMENT**

**Mwakasendo J:** The accused in this case stands charged upon information with one count of making a payment to or for the credit of a person resident outside the scheduled territory contrary to s. 5 (*a*) and para. 1 (1) of Part II of the Fifth Schedule to the Exchange Control Ordinance (Cap. 294). The particulars of offence as set out in the amended information read as follows: “Hassanali Ladhu Jaffer, being a director of the Tanzania National Constructors (1970) Ltd. and a person resident in the United Republic, on or about 1 January 1972 in the city of Dar es Salaam, unlawfully made a payment of £12,295.64 Sterling to Messrs Frank Truman Ltd. of the United Kingdom, a person resident outside the scheduled territory, being a payment as consideration for three reconditioned Caterpillars imported into the United Republic, the said amount being more than the fair and reasonable value of the said goods.” This case is without doubt the first case of its kind to be brought under s. 5 (*a*) and para. 1 (1) of Part II of the Fifth Schedule to the Exchange Control Ordinance as amended by the Financial Laws (Miscellaneous Amendments) Act 1972. The law under which the present charge has been brought is by no means easy to comprehend. This fact perhaps explains why the particulars set out are couched in a hesitant and repetitive style which is quite out of keeping with the style one customarily expects from the Principal State Attorney. Be that as it may, the relevant portion of s. 5 of the Exchange Control Ordinance provides:

“5. Except with the permission of the Treasury, no person shall do any of the following things in the territory, that is to say–

(*a*) m ake any payment to or for the credit of a person resident outside the Scheduled territories.” This provision, be it noted, does no more than restrict residents from making payments to or for the credit of persons resident outside the scheduled territories without the permission of the Bank of Tanzania – to which the powers of the Treasury under the section have been delegated by the order of the Minister for Finance. Further, be it also noted that evasions or contraventions of s. 5 are not made offences under that section but are so declared by the provisions of Part II of the Fifth Schedule to the Ordinance which contains a full code for the enforcement of all contraventions under the Ordinance including those under s. 5. Para. 1 (1) of Part II of the Fifth Schedule to the Ordinance reads: “1(1) Any person who contravenes any of the provisions of this Ordinance or who fails to comply with any direction, order, requirement or notice issued, made or given under any of the provisions of this Ordinance shall be liable on conviction to a fine not exceeding one hundred thousand shillings or to a term of imprisonment not exceeding fourteen years or to both such fine and imprisonment.” [The judge considered the facts and continued.] Although it is plain enough from this outline that the accused’s role in this caterpillar saga is quite infinitesimal, the prosecution have, however, contended that he is nonetheless criminally implicated, presumably because he is the one who signed the application for making a payment abroad form and the declaration – the payment for imports form, on the strength of which documents the National Bank of Commerce made the payment of £12,295.64 Sterling, the subject matter of the charge, to Messrs. Frank Truman Ltd. of London. The accused has, in answer to the charge, claimed that he signed the documents in question without knowing their true nature or knowing that in so appending his signature to them he was facilitating the perpetration of a serious foreign exchange fraud on this country. With all due respect to Mr. Lakha, for the accused, I find myself unable to accept the contention advanced by the accused on this point because I do not believe that the accused, a man who has been a businessman throughout his life, is the kind of man who would sign the type of documents, which he in fact signed in this case, without first inquiring about the nature of such documents and being satisfied that they were in order before signing them. Accordingly, on this point I hold that the accused signed the form and the declaration with full knowledge of their true nature. But this finding, it must be conceded, is a far cry from finding the accused guilty of any wrong-doing under the Exchange Control Ordinance. That is a matter which depends on other factors to the consideration of which we must now turn. As Mr. Tampi pointed out in the course of the trial, what the accused did in the instant case was until 12 May 1972, a perfectly legal transaction. Until then his conduct on the matter could give rise to no criminal liability under the Exchange Control Ordinance since, as readily conceded by the learned counsel for the Republic, the payment in question had been duly authorised by the Bank of Tanzania through its agents – the National Bank of Commerce. On 12 May 1972, however, the law was changed and made retrospectively operative to cover foreign currency transactions which took place before that date. While the object of the Legislature in changing the law was a very laudable one, to facilitate the investigation and prosecution of offences under the Exchange Control Ordinance and seemingly, to raise the penalties prescribed for such offences, there appears to be no apparent sound reason for making the operation of the law retrospective, unless of course, one considers the present case to have been the cause. Be that as it may, the regulations relevant to this case are para. 1 (2) and para. 3 of Part II of the Fifth Schedule to the Ordinance which for ease of reference are set out below: Para. 1 (2): “(2) In any proceedings under Section 5 of the Ordinance if the Court is satisfied that any payment to which that section applies was made as consideration for any goods imported into the United Republic and the fair and reasonable value of such goods is less than the sum of money so paid, the payment shall, notwithstanding that it was made with the permission of the Treasury or the Bank, be deemed to have been made without such permission and the person who made such payment shall be guilty of contravening the provisions of the said section 5 unless he proves to the satisfaction of the court that– ( *a*) h e took all reasonable steps which a prudent man of business would have taken to ensure that the sum of money so paid was not more than the fair and reasonable value of such goods and that upon discovering that the goods imported did not conform to the description of the goods which he had contracted to import, he took all such reasonable steps which a prudent man of business would have taken to minimise loss to himself.” And para. 3 provides: “3 (1) Where an offence under this Ordinance is committed by a body corporate then, as well as the body corporate, any person who, at the time of the commission of the offence, was concerned, as a director or an officer, with the management of the affairs of such body corporate, shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly unless he proves to the satisfaction of the court that he had no knowledge, and could not by the exercise of reasonable diligence have had knowledge, of the commission of the offence.” Now, on the evidence adduced in this case there can, I think, be no dispute that the two caterpillars under consideration were invoiced at more than their cost. The court had an opportunity to make a visual examination of the two caterpillars and also to hear evidence from two caterpillar service engineers, Messrs. Peter Busk and Ake Thorstensson. Mr. Busk is the general manager of the Construction Equipment Division of the United Africa Company while Ake Thorstensson is a Caterpillar service engineer with the same company. These two witnesses carried out an examination of the two caterpillar machines and following such examination formed the view that the machines in question were so unserviceable as to be only fit for cannibalisation and the scrap market. The two witnesses put the maximum value of the two machines at Shs. 20,000/-. Having regard to the deplorable condition of the two machines, which this court had occasion to see at the port area, I do not think the valuation of the two machines given by the two expert witnesses can be said to be over-generous. And the conclusion to be derived from these facts is, as it seems to me, crystal clear – that is, that these two caterpillar machines were grossly over-invoiced by the supplier firm. In view of this finding, I have no hesitation in concurring wholly with the opinion of the two assessors that the price paid for the two caterpillars under discussion was grossly disproportionate to what one would consider to be the fair and reasonable value for them. Accordingly, I must hold, as the two assessors have correctly done, that in terms of the provisions of sub-para. (2) of para. 1 of Part II of the Fifth Schedule to the Exchange Control Ordinance, the payment of £12,295.64 Sterling made in consideration for the purported importation of the two caterpillars by the Tanzania National Constructors (1970) Ltd. was done without the requisite permission of the Bank of Tanzania and therefore illegal. This, however, is not the end of the matter. It is not enough for the purpose of determining accused’s culpability in the matter merely to find that the payment in question was made without the requisite permission of the bank and rest the conviction at that. That is not so. The court has, before it can convict, to be satisfied: (*a*) that the accused person in the dock is the person who made the payment under investigation; and (*b*) that he made this payment in his capacity as director of the Tanzania National Constructors (1970) Ltd.; and (*c*) that at the time he made the payment he was concerned with the management of the affairs of the company; and only when the court is satisfied on all these grounds can the court call upon the accused to defend himself and satisfy it on a balance of probability that when he made the payment in issue, in his capacity as director, he had no knowledge and could not by the exercise of reasonable diligence have had knowledge of the commission of the offence complained of. Only if the court is not satisfied with accused’s explanation on the matter should it convict, otherwise if his explanation raises any real doubt in the case he is entitled to an acquittal. The two assessors in giving their opinions on this case were clearly unanimous in their view that neither the Tanzania National Constructors (1970) Ltd. nor the accused as director of that company, had anything to do with the importation of the two caterpillars under consideration in the instant case. They were of the further considered view that the accused, though undoubtedly a director of the Tanzania National Constructors (1970) Ltd. at the material time, was not, as such director, concerned with the management of the affairs of the company. They accordingly came to the conclusion that the accused, Hassanali Ladhu Jaffer, is not guilty of the offence charged. I have not the slightest doubt in my mind that the assessors came to a proper and correct conclusion about the matter, with which I entirely and unreservedly concur. But for the sake of argument and completeness of this record, even if one were to assume that I and the assessors are mistaken in the view that the accused in this case was not at the material time concerned with the management of the affairs of the Tanzania National Constructors (1970) Ltd. and he was in fact so concerned, I do not think in my judgment, that this fact would have made the result of the case any different, as there clearly is more than sufficient evidence on record which this court accepts, indicating beyond any shadow of doubt that the accused at the material time had no knowledge and could not by the exercise of reasonable diligence have had knowledge of the commission of the present offence. In conclusion, therefore, and for the reasons fully set out in this judgment, I find that the prosecution have not proved their case against the accused person beyond any reasonable doubt and I so hold. I accordingly find the accused, Hassanali Ladhu Jaffer, not guilty of the offence charged and acquit him. He is to be released from prison forthwith unless he is being lawfully detained there on some other matter. It is so ordered.

*Accused acquitted.*

For the Republic:

*KRK Tampi* (Principal State Attorney)

For the accused:

*MA Lakha* (instructed by *Lakha & Co*, Dar es Salaam)