

## R. v. PENESI JONAS.

## A CRIMINAL REVIEW CASE OF 1935.

---

*Forgery—person unable to write—impression of thumb print upon in lieu of signing document—no evidence regarding intention with which person in question impressed thumb print—impression of thumb print under such circumstances not “signature”—forgery postulates intention to defraud.*

A person who is unable to write (e.g., an illiterate native) cannot be said to “sign” a document merely because such person impresses his thumb print thereon; it is necessary to show that such person at the time of impressing his thumb print knew what such impression was intended to effect or signify; it is necessary also for the impression to be accompanied by some description identifying the person who made it.

Moreover, to support a conviction for forgery it is not sufficient to prove that the accused person “signed” the document in question; it must also be proved that the document was signed “with intent to defraud”.

The definition of forgery as contained in section 308 Cap. 6 was amended by Ordinance 26 of 1940. It is now “the making of a false document with intent to defraud or to deceive”. See *Welham v. D.P.P.* 1960 1 A.E.R. 805 for consideration of the expressions “intent to defraud” and “intent to deceive”.

Francis, J.: This case has been referred under Criminal Procedure Code, section 196,<sup>1</sup> for the determination of a question of law which has arisen during the course of the proceedings before the Court below.

The question sought to be determined appears in the sixth paragraph of the Court's judgment and is put in these words “whether the affixing of a finger print in these circumstances can be regarded as a forgery”.

The circumstances of the case briefly are as follows:

Under Cap. 62<sup>2</sup> section 70 (1) an employer is, subject to such exemptions as are therein provided, liable to a penalty if he pays the wages due to any native employed by him to any person other than such native. Accordingly the Rhokana Corporation, owning or working a mine at Nkana, and the employer in the case, has evolved, partly perhaps to secure itself in this regard, a system of check and control in connection with the payment of wages to its native employees.

It would appear from the evidence that when a native is taken on for work he is engaged before the compound manager and his thumb print impressed on an engagement card retained by that official. A type of

---

<sup>1</sup> Now repealed.—*Editor*.

<sup>2</sup> The Employment of Natives Ordinance (now Cap. 171).—*Editor*.

this card is not in evidence and there is therefore nothing to indicate its nature or to show why a thumb print thereon is required. It can be assumed however that it plays some part in the process of the identification of an illiterate employee.

The employee having been taken on, he is then issued with a monthly pay voucher, renewable apparently at the beginning of each "ticket". On this voucher are entered the employee's name and several particulars concerning his employment. It bears a number which corresponds with that on his "ticket book" (produced as "Exhibit B") and the numbered plate carried on a wristlet badge ("Exhibit C"). The native is required to put his left thumb mark on the right hand side of the back of the voucher, which is then withdrawn and sent to the Native Time Office. This voucher was listed as "Exhibit A" and from its printing and entries (including the thumb print referred to) there is every indication that the form is used as part of the machinery of accounting and check. It does not constitute a "contract in writing", and there are no words to show that it is intended, when completed, to be a receipt given by the employee to the Corporation for the money expressed therein to have been earned by him.

The employee having "completed a ticket" (or in other words, completed thirty days' work) and wanting his pay, goes to a clerk and presents his wrist badge and "ticket book" the numbers borne on which are then checked; the corresponding pay voucher is handed to the employee, who is required again to impress his left thumb mark, but on the second square on the back thereof.

If these two imprints are identical, the employee receives the pay noted on the voucher as owing to him.

In this case the employee requested and authorised his brother (the accused person) to go and draw his pay, and for that purpose gave him his wrist badge and "ticket book". The accused appeared at the first counter and presented the badge and book, and was thereupon given the pay voucher of his brother upon which he was ordered to place his thumb mark. Up to this moment he had said nothing about calling for the pay of another, nor does he appear to have been questioned on the matter. However, directly it became apparent, through the thumb print check, that the accused was not the person with whom the Corporation thought they were dealing, he was taxed with the matter and admitted his agency.

Upon subsequent confirmatory check, the accused was arrested and charged with—

*Firstly* did forge a document to wit: one "Nkana Mine Native's monthly Pay Voucher" purporting to have been signed by one Kasensa *alias* Yosamu, *con.* section 312 of the Penal Code.

*Secondly* did knowingly and fraudulently utter a false document, to wit: one "Nkana Native's Pay Voucher" purporting to have been signed by one Kasensa *alias* Yosamu, *con.* section 316 of the Penal Code.

*Thirdly* did with intent to defraud attempt to obtain one pound four shillings and six pence from the Rhokana Corporation, being wages due to Kasensa *alias* Yosamu, by falsely pretending that he was the said Kasensa *alias* Yosamu, *con.* section 278 as read with section 352 of the Penal Code.

Penal Code section 308 defines forgery as "the making of a false document with intent to defraud".<sup>1</sup>

Section 310 defines what making a false document amounts to, and as paragraphs (a), (b) and (c) thereof do not apply, the relevant part of the section contained in paragraph (d) must be examined.

The question arises at once did the accused "sign a document"? For if he did not, the primary constituent of the offence is absent.

Under Cap. 1, section 3 (47)<sup>2</sup> an illiterate may sign by putting his mark to an instrument (and a thumb print among African illiterates is a very usual mode of making a mark) but no such signature would in law be held to be valid unless there were some description of the person making the mark, and positive evidence, that the instrument purporting to have been signed had been explained to him.

On the pay voucher there is no such description; neither is there any evidence before the Court to show what was intended by the accused when he impressed his thumb mark. In the absence of this evidence I am unable to find that the accused "signed" a document. Contrariwise, in the light of the evidence describing the system of check there is no doubt that the thumb impress was required and placed on the card solely for this purpose.

When presenting the voucher the accused appears merely to have contravened the rules of the Corporation, an irregularity which might very well be likened to the offence provided for under Cap. 59,<sup>3</sup> section 10 (1) "making use of an identity certificate belonging to another Native".

The offence in its primary constituent not having been proved, the Court below is directed to find the first charge not proved.

This being so the Court is not further concerned, but it may be of assistance to observe that for forgery to constitute an offence, there must be an intent to defraud.

There is no evidence of such intent, neither in respect of the employee or employer. As to the former the accused was requested to go and obtain payment of his brother's money and for that purpose was given the necessary means. From the Corporation all he sought was payment to him as authorised agent of his brother.

For the same reasons the Court below is directed to find the second and third charges not proven.

<sup>1</sup> See Editorial note.

<sup>2</sup> Now section 3 (51) Cap. 1.—*Editor*.

<sup>3</sup> Native Registration Ordinance (now Cap. 169).—*Editor*.