



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 246 OF 2019

JOSHUA KIPROP KISORIOAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. J. Gandani CM delivered on 20th November 2019 in Kibera CM CR. Case No. 2374 of 2009)

JUDGMENT

The Appellant, Joshua Kiprop Kisorio *alias* George Jack Tobias, was charged alongside another in Count I with the offence of **conspiracy to defraud** contrary to **Section 317** of the **Penal Code**. The particulars of the offence were that on 28th February 2009, at CFC Stanbic Bank Chiromo Road Branch, Nairobi within Nairobi County, the Appellant jointly with others not before court, conspired to defraud CFC Stanbic Bank of Ksh.13,700,000, the property of the said bank.

The Appellant was charged in Count II, III, IV and V with the offence of **making a document without authority** contrary to **Section 357(a)** of the **Penal Code**. The particulars of the offence were that on or before the 11th February 2009, at an unknown place within the Republic of Kenya, the Appellant jointly with others not before court, with intent to defraud and without lawful authority or excuse, made certain documents namely certificate of title No. IR 67825 (L.R. No.7785/679) purporting it to be a genuine and valid document issued by Registrar of Titles; a National Identity Card No.22479478 in the names of George Jack Tobias purporting it to be a genuine and valid document issued by the Director of National Registration Bureau; and payslips for the month of November and December 2008 and January 2009 in the names of George J. Tobias purporting them to be genuine and valid payslips issued by Livingstone Registrars Ltd.

The Appellant was further charged in count VI with the offence of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on 6th March 2009 at CFC Stanbic Bank Chiromo Branch within Nairobi County, the Appellant jointly with others not before court, with intent to defraud, obtained from CFC Stanbic Bank Limited a loan of Ksh.13,700,000, by falsely pretending that certificate of title no.IR 67875 (L.R. No.7785/679) which he surrendered to the said bank as security, was a genuine and valid document, a fact which he knew to be false.

When the Appellant was arraigned before the trial magistrate’s court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged in all six counts. He was sentenced to serve three (3) years imprisonment in Count I, seven (7) years imprisonment each in Count II, III, IV and V and three (3) years imprisonment in Count VI. The sentences were ordered to run concurrently. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by his conviction, stating that the prosecution failed to establish its case against him to the required standard of proof beyond any reasonable doubt. He was of the view that the prosecution failed to establish the elements of the offences in the charges against him. He faulted the trial court for misinterpreting and distorting material evidence on record, and thus occasioning him a miscarriage of justice. In the premises therefore, he urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant filed written submission in support of his appeal. This court also heard oral submission from the Appellant and Mr. Mutuma for the State. The Appellant stated that the gist of the prosecution’s case was that a loan facility of Ksh.13.7 million was fraudulently obtained from CFC Stanbic Bank Ltd using a forged certificate of title L.R. No.7785/679 as collateral. The Appellant averred that the said title was not presented by him, but by someone who identified himself as George Jack Tobias. He asserted that some of the prosecution witnesses misidentified him as the loan applicant with a view of shielding the real perpetrators. He stated DW1, Leah Kiguatha, was an advocate of the High Court of Kenya practicing as such at Musyimi & Company Advocates. She told the court that she witnessed the execution of the charge document, and that the Appellant was not the person who signed the said charge document.

The Appellant further submitted that DW1's evidence was corroborated by that of the document examiner (PW3), who stated that the signature on alleged forged documents did not match the Appellant's specimen signature. He maintained that he was not the loan applicant and did not sign any of the documents in question. He was of the view that the evidence by the prosecution witnesses was inconsistent and full of contradictions. He averred that reasonable doubt had been established in the case against him, and the same ought to be resolved in his favour. In the premises, he urged this court to allow his appeal.

Mr. Mutuma for the State opposed the appeal. He asserted that there was a conspiracy between the two accused persons to defraud CFC Stanbic Bank Ltd. He stated that the 2nd Accused person introduced the Appellant to the said bank. He averred that the evidence by PW18 and PW19 established that the communication between the Appellant and the bank was through the 2nd Accused Person before the trial court. Learned State Counsel stated that the 2nd Accused Person overstepped his mandate and assisted the Appellant succeed in his fraudulent scheme. The Appellant promised to pay the 2nd Accused Person Ksh.100,000/= for his assistance. He stated that the account opening documents were established to be forgeries. The said documents were used by the Appellant to open a bank account No.014008328501 at CFC Stanbic Bank Ltd. He averred that the evidence of PW2 established that the Appellant was the person who presented a cheque No.000007 at the bank for withdrawal of Ksh.2 million. The Appellant received the money in cash.

Learned State Counsel further submitted that the evidence of the forensic document examiner established that the Appellant's specimen signature matched the signature in the presented cheques, receipts, copy of the applicant's identity card as well as the account opening documents. He stated that the Appellant used a forged certificate of title to obtain the loan. He averred that PW4, PW5 and PW6 who were officers at the Land Registry confirmed that the said certificate of title was not genuine. PW7, who was a property valuer, told the court that the Appellant approached him to value the property with regard to the said title.

Mr. Mutuma submitted that prosecution witnesses from the firm of Njoroge Regeru and Company Advocates told the court that the Appellant informed the law firm that he was the registered owner of the property. He also applied for a search of the property, and gave the law firm a banker's cheque for purposes of payment of stamp duty for the charge document in respect of the fraudulent title. The said witnesses confirmed that the Appellant visited the offices of the said law firm. The Appellant signed the charge documents in the presence of PW9. He also personally went to the Land Registry to register the charge. He averred that the evidence by the prosecution witnesses was overwhelming and that the case against the Appellant was established to the required standard of proof beyond any reasonable doubt. He therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Abel Samora Mongate, was a Customer Care Consultant at Home Loan Fulfillment Centre at CFC Stanbic Bank Ltd. He stated that on 12th February 2009, he received a call from Monica Makena who was stationed at the Mortgage Department. She informed him that a home loan application for a client by the name George Jack Tobias had been approved. She instructed him to call the said client for purposes of opening an account with the bank to facilitate disbursement of the loan amount. PW1 reached out to George Jack Tobias and asked him to visit the bank to open the account. The said client came in at about 11.00 am with the requisite account opening documents except for his KRA Pin Certificate as well as his bank statements.

PW1 identified the Appellant as the said George Jack Tobias. He stated that he helped the Appellant fill the account opening application documents for bank account number 0140083258501. Later in the day, at about 3.00 pm, the Appellant called him and informed him that he had acquired the PIN certificate and bank statements. PW1 had already left the office. He however met the Appellant at Jevanjee Gardens where the Appellant gave him the said documents. He later forwarded the application to the Account Opening Department. PW1 identified the account opening documents that the Appellant presented to him in court.

PW2, David Kitemu, was a teller at CFC Stanbic Bank Ltd, Westgate Branch. He was on duty on 6th March 2009, when the Appellant visited the bank. The Appellant identified himself as George Jack Tobias. The Appellant presented a cheque No.000007 of Ksh.2 million for payment. After getting approval for payment from his supervisor, PW2 paid out the stated amount to the Appellant. The Appellant signed at the back of the cheque to acknowledge payment. PW2 stated that he had previously seen the Appellant at the Home Loan Department.

PW3, John Monda, was a Forensic Document Examiner based at DCI Headquarters in Nairobi. On 7th December 2009, he received various exhibits from Sgt. Samba based at the Banking Fraud Investigation Unit in Nairobi. The exhibits included three cheques, a receipt, home loan application forms and account opening forms from CFC Stanbic Bank Ltd, a copy of an identity card No.22479478, a certificate of title, the Appellant's specimen signature, and specimen signatures belonging to Fredrick Idoho, J.W. Kamuyu and Betty Atieno.

His instructions were to ascertain whether the signatures on the cheques, home loan application forms and account opening application form were made by the same hand, and whether the same matched the Appellant's specimen signature. After examination, PW3 stated that the signatures on the cheques, account opening application form and the home loan application form were made by the same hand. He further stated that the signatures on the cheques, account opening application form and home loan application form did not match the Appellant's specimen signature.

PW3 also compared the signature on certificate of title with the specimen signature of Fredrick Libillala (PW5) and concluded that the same were not made by the same hand. He analyzed the signature on certificate of title against the specimen signature of J.W. Kamuyu (PW4) and concluded that the signatures were not made by the same author. PW3 compared the stamp impressions on the copy of the certificate of title with the specimen stamp impressions of PW4 and PW6 and concluded that they were not made by the same machine. He produced a report of his findings into evidence.

PW4, Joseph Wangombe, PW5, Fredrick Libillala, and PW6, Betty Atieno were Land Registrars at the Ministry of Land in Nairobi. On 15th July 2009, they received a visit from a police officer from the Banking Fraud Investigation Unit. The police officer was in possession of a certificate of title IR 67825 for Land Registration No.7785/679, which was purported to have been signed by the three witnesses. PW4, PW5 and PW6 stated that they did not append their signatures on the certificate of title and that the signatures bearing their names that appeared on the title were forgeries. They testified that they did not know any of the accused persons.

PW7, David Wafula Luwigi, worked as a Property Valuer at Tysons Ltd. On 12th February 2009, the Appellant came to his office seeking valuation services. The Appellant introduced himself as George. The Appellant gave him a copy of a certificate of title IR 67825 and instructed him to value the said property and prepare a report addressed to CFC Stanbic Bank Ltd. PW7 instructed a clerk (PW8) to conduct a search of the property at the Land Registry. He also conducted a site visit of the property located in Runda along Faith Drive. He prepared a valuation report and attached the search results from the Lands Registry. He valued the property at Ksh.13 million. He produced the said report into evidence.

PW8, Boniface Kavoi Ndolo, was a clerk working at Tysons Ltd. He worked with PW7. On 13th February 2009, he received instructions from PW7 to carry out a search for a property at the Land Registry. He was given a copy of the certificate of title for the said property *i.e.* Land Reference No.7785/679 IR No.67825. He went to the Land Registry and made an application to search the said property. On his way back to the office, he received a call from someone who identified himself as the owner of the said property. He asked him whether he had lodged the application to search the property which he answered in the affirmative. After about ten days, he went back to the Land Registry and collected the search results and gave the same to PW7. PW8 identified the search application as well as the copy of the certificate of title in court.

PW9, Eva Muthoni, was a secretary at Njoroge Regeru and Company Advocates. She testified that on 16th February 2009, she received a call from James Saita (2nd Accused Person). She knew him as an employee of CFC Stanbic Bank Ltd. He asked her to send him a quotation for legal fees for a client who was seeking a loan from the bank. She did as she was requested. She later received an email from the 2nd Accused Person (*prosecution exhibit 16*) containing documents required to draft a charge for the said loan of Ksh.13.7 million. The charge was drafted. She was instructed to contact the borrower for purposes of execution of the charge. The borrower visited the law firm.

Since the firm was acting for the bank, PW9 took the borrower to a neighbouring law firm, Musyimi and Company Advocates, so that a different advocate could witness the execution. The advocate, Leah Kiguatha, explained to the borrower the contents of the charge. The borrower signed the charge in the advocate's presence. She witnessed the same. The borrower then gave PW9 a banker's cheque for payment of stamp duty fees. The charge document was registered. PW9 stated that the borrower was known as George Jack Tobias. She told the court that the Appellant, who introduced himself as George Jack Tobias, was the person who came to the law firm to execute the charge document.

PW10, Sam Mutinda, worked as a conveyance clerk at the firm of Njoroge Regeru and Company Advocates. On 25th February 2009, he received charge documents from the secretary, PW9, with instructions to take them to the Land Registry for the purposes of registration. He was also given a banker's cheque for the stamp duty payment. He went to the Land Registry and applied for registration of the charge document. He also paid the stamp duty at the bank. He later got a call from PW9 who informed him that the borrower wanted a copy of the application and bank payment slips. The said borrower was the Appellant who introduced himself as Jack Tobias. PW10 gave the Appellant a copy of the registration application form and bank payment slips. The Appellant inquired whether the registration of the charge could be fast tracked. The following day, the Appellant accompanied him to the Land Registry for further registration processes. On 4th March 2009, PW10 got a call from the Appellant who informed him that the charge document had been registered and was ready for collection. PW10 went to the Land Registry and picked up the same. He handed over the documents to PW9.

PW11, Monica Makena, was at the material time the Relationship Officer at Home Loan Department at CFC Stanbic Bank Ltd. She stated that she prepared the offer letter for a loan applicant, George Jack Tobias, dated 18th February 2009. The applicant had presented all the requisite documents including a copy of his national identity card, KRA Pin Certificate, copies of bank statements for a period of 12 months, an introduction letter from his employer and a duly filled application form. She produced the letter of offer into evidence. She further stated that she went for a meeting at Njoroge Regeru and Company Advocates which was one of the bank's external advocates. This was after the charge had been registered. While at the firm, she was informed that the 2nd Accused Person had picked the registered charge documents on behalf of the bank.

PW12, Ngare Mugo, was the Administration Manager at Livingstone Registrars Ltd. On 24th August 2009, two officers from the Banking Fraud Investigation Unit paid him a visit. They had in their possession a letter and two payslips that were purported to have originated from Livingstone Registrars Ltd. He stated that the said letter did not originate from the company since the letter head was different from the one they usually used. The two payslips were for an employee named George Jack Tobias. He checked the system but did not find an employee by the said name. He informed the officers that the letter and the payslips were not genuine and did not originate from the said company. He gave the officers a sample of the company's letter head as well as a sample payslip. He produced the same into evidence. He told the court that the Appellant was unknown to him.

PW13, Anthony Yano, was at the material time a teller at CFC Stanbic Bank Ltd. He stated that the Appellant came to the bank on 7th March 2009. He introduced himself as George Jack Tobias. He presented a cheque No.000008 for withdrawal of Kshs.6,445,000/= dated 7th March 2009. He also presented his national identity card in the name of George Jack Tobias. After verifying that all the details were in order, he referred the cheque to his manager who authorized the same for payment. The Appellant acknowledged payment by signing at the back of the cheque. PW13 produced the said cheque into evidence.

PW14, Fredrick Mwangi, was an advocate of the High Court of Kenya practicing as such at the firm of Njoroge Regeru and Company Advocates. On 26th February 2009, he received instructions from CFC Stanbic Bank Ltd via a letter dated 24th February 2009. The bank instructed him to create a charge securing the sum of Ksh.13.7 million against a property L.R. No.7785/679. The borrower was George Jack Tobias. The certificate of title was in the borrower's name. He prepared the charge and instructed the secretary (PW9) to get in touch with George Jack Tobias (borrower) and invite him to the office to execute the charge document. The borrower came to the office and executed the charge document which was witnessed by an advocate known as Leah Kiguatha.

PW14 later had a meeting with the said borrower. He told the court that the Appellant, who introduced himself as George Jack Tobias, was the borrower. At the meeting, the Appellant paid part of the legal fees and promised to avail a banker's cheque for the stamp duty fees. He also requested that the charge documents be registered as quickly as possible. After the charge documents were executed, PW14 gave the same to PW10 and instructed him to take the documents to the Land Registry for registration purposes. The charge was registered on 4th

March 2009. PW14 forwarded the registered charge document as well as the borrower's certificate of title to CFC Stanbic Bank Ltd. The Appellant also paid the balance of the legal fees.

PW15, Evans Oyori, worked at the Department of Registration of Persons in Nairobi. On 22nd July 2009, he received a letter from the Banking Fraud Investigation Unit, requesting him to provide details of two national identity card numbers. The first identity card No. 22587104 was registered and issued to Joshua Kiprop Kisorio. The 2nd identity card No.22479478 which bore serial number 218467817 was registered and issued to Ganyere Gure Teche, and not George Jack Tobias. The serial number No.249155666 used in the fake identity card purported to be issued to George Jack Tobias, was the same serial number indicated in an identity card registered and issued to Alice Ajikomi Akeino. He produced extracts from the register as well as his report in evidence.

PW16, John Ombewa, was the Regional Head of Financial Crime Control at CFC Stanbic Bank Ltd. His duties included investigating fraud cases at the bank. On 8th April 2009, he received a complaint from someone known as George Jack Tobias. George stated that the bank had sent him a letter regarding a home loan facility. George said that he had neither applied for any loan facility from CFC Stanbic Bank Ltd, nor was he a client of bank. PW16 initiated internal investigations regarding the matter. He discovered that the bank had a client known as George Jack Tobias who operated a current account No.0140083258501 domiciled at their Kimathi Street Branch. He retrieved account opening documents for the said bank account. The account was opened under the name George Jack Tobias who was allegedly an employee of Livingstone Registrars Ltd.

Attached to account opening document were several documents belonging to the applicant, George Jack Tobias, including his photo, a copy his national identity card, his KRA Pin Certificate, previous bank statements from Standard Chartered Bank Ltd, a tenancy agreement which indicated that he resided at Nyayo Estate in Embakasi, payslips from Livingstone Registrars Ltd and a letter from his employer which indicated that he was employed as an operations manager. PW16 also retrieved the applicant's home loan application file. The details in the said file matched those in the account opening documents. The loan facility had been approved and a charge had been created against the applicant's property L.R. No.7785/679. He got in touch with the bank's advocate who drafted the charge. The advocate informed him that a search conducted at the Land Registry indicated that property L.R. No.7785/679 was registered under George Jack Tobias.

PW16 further testified that the loan amount was advanced to George Jack Tobias via his bank account No.0140083258501. On 6th March 2009, the said George made a withdrawal via cheque No.7 of Ksh.2 million at the Westgate Branch. He made further withdrawals on 7th, 9th and 15th March 2009 for amounts Ksh.6.455 million, Ksh.3 million and Ksh.1 million respectively. PW16 interviewed staff at the bank to determine how the loan application was made. He also met with the real George Jack Tobias whose passport indicated that he was a Tanzanian national working at Erickson Ltd. Further investigations established that the national identity card No.22479478 in the name George Jack Tobias provided to the bank by the applicant was not genuine.

PW16 and the investigating officer (PW17) visited the residential property in Nyayo Estate, Nairobi Block 14036/4 House No.4, where the applicant allegedly resided. The estate's management informed them that there was no such house in the said estate. They also visited the property in Runda L.R. No.7785/679 which was allegedly owned by the applicant and against which a charge had been registered as security for the loan facility. The certificate of title provided by the applicant indicated that the said property was owned by George Jack Tobias. They however discovered that the property was owned by Mr. Hirji Rabadia. They visited the Land Registry and confirmed that Hirji Rabadia was the registered owner of the property in Runda.

PW16 reported the matter to the Banking Fraud Investigation Unit. When the 2nd Accused Person was interrogated, he told them that the Appellant had promised to give him Ksh.100,000 to submit the home loan application form on his behalf. When the Appellant was arrested, they discovered that he matched the photo on the current account opening documents as well as national identity card presented to the bank in the name of George Jack Tobias.

PW17, I.P. Hadick Jumba, from the Banking Fraud Investigation Unit investigated this case. He was assigned the case on 16th April 2009. The case involved a fraudulent loan application that occurred at CFC Stanbic Bank Ltd. The name of the applicant was George Jack Tobias. PW17 visited the said bank where he met with PW16. He retrieved the account opening documents as well as the home loan application documents of the said applicant. He discovered that a loan of Ksh.13.7 million had been advanced to the applicant by the bank. He interrogated the witnesses and recorded their statements. During his investigation, he discovered that James Saita (2nd Accused Person) assisted the applicant to apply for the loan facility at the said bank. He also retrieved cheques, withdrawal slips and bank statements which established that the applicant had withdrawn the said funds from his account.

PW17 visited the property in Runda which was allegedly owned by the applicant. He however discovered that the said property was owned by Hirji Rabadia who denied ever having applied for any loan facility at CFC Stanbic Bank Ltd. He also visited Njoroge Regeru and Company Advocates which acted for the bank and had prepared the charge documents. He recovered payment receipts from the Land Registry for application for registration of the charge. PW17 stated that he discovered that the Appellant had posed as George Jack Tobias and fraudulently received Ksh.13.7 million from CFC Stanbic Bank Ltd. He received information that the Appellant frequented Nyayo Stadium with his family. He was able to arrest the Appellant and charge him with the present offences.

PW17 forwarded the Appellants national identity card number as well as that of the applicant, George Jack Tobias, to the National Registration Bureau. He was informed that the national identity card presented to the bank by the Appellant in the name of George Jack Tobias was not genuine. He also visited the Land Registry where he discovered that the certificate of title presented to the bank by the Appellant was fraudulent. He forwarded the specimen signatures of the Land Registrars who were alleged to have signed the said certificate of title to the document examiner. The document examiner established that the signatures on the certificate of title were forged.

PW17 interrogated the 2nd Accused Person who informed him that the Appellant had promised to give him Ksh.100,000/= if the loan was approved by the bank. After his investigation, PW17 preferred the present charges against the Appellant. Upon cross examination, PW17 stated that the Appellant matched the photo on the account opening documents as well as on the fraudulent national identity card indicating the name George Jack Tobias. He stated that the Appellant presented the forged documents to the bank and withdrew the loan amount after it

was credited to his account by the bank.

PW18, Shelmith Kimeth, worked as a customer care consultant at Home Loan Department at CFC Stanbic Bank Ltd. She stated that she received all new home loan applications. On 17th February 2009, she received a home loan application form from the 2nd Accused Person, for an applicant by the name George Jack Tobias. It was dated 11th February 2009. The applicant was applying for a loan facility of Ksh.13.7 million to buy a house. The security for the said loan was a property that he owned that was located in Runda. She went through all the documents and confirmed that all the information required from the applicant was provided. A letter from the applicant's employer indicated that he worked at Livingstone Registrars Ltd. PW18 called the contacts provided for the said employer who confirmed that the said George Jack Tobias was their employee.

The applicant had also attached two payslips dated November and December 2009, as well as his bank statements from Standard Chartered Bank for February 2008 up to January 2009. After confirming that all the documents were in order, she forwarded the applicant's file to the credit team for approval. The credit team approved the loan and the money was deposited in applicant's bank account. PW18 wrote a letter to the said applicant, George Jack Tobias, on 17th March 2009, informing him that the money had been deposited in his account. She told the court that she did not meet the applicant in person.

PW19, Patience Muthoni Nyaga, handled home loans and asset financing at CFC Stanbic Bank Ltd. She was the team leader and supervised various loan processors who worked under her, including James Saita (2nd Accused person). PW19 stated that the 2nd Accused Person personally took George Jack Tobias's loan application forms to PW18 for processing. She testified that the customer care personnel at the bank usually received loan applications, and that it was unusual that the 2nd Accused person received the loan application forms from a customer. After confirming that all the application documents were in order, PW19 contacted the bank's external advocates, Njoroge Regeru & Co. Advocates, for purposes of registration of the charge documents.

PW19 told the court that usually, the advocate would send a messenger from his office to pick the documents, but in this case, the 2nd Accused Person personally took the documents to the advocate's office. After the charge was duly registered, the loan amount was credited to the applicant's bank account. They were later informed that the transaction was fraudulent. PW19 identified the loan applications documents, the certificate of title for the security property as well as the registered charge document in court. She stated that she never met the applicant, George Jack Tobias, in person.

The Appellant was put on his defence. He availed Leah Kiguatha who testified as DW1. DW1 was an advocate of the High Court of Kenya. She witnessed execution of the charge document between CFC Stanbic Bank Limited and George Jack Tobias. The same had been drafted by Njoroge Regeru and Company Advocates. DW1 told the court that the Appellant reached out to her and informed her that he was being accused of signing the charge document as George Jack Tobias. DW1 stated that the Appellant was not the person who appeared before her and executed the charge document.

The Appellant adduced evidence as DW2. He told the court that between the years 2005 and 2010, he resided at Nyayo Embakasi Estate in Nairobi. The 2nd Accused Person (DW3) was well known to him since they lived in the same estate. He stated that sometime in January 2009, he met DW3 at a grocery shop within the estate. DW3 informed him that he worked at CFC Stanbic Bank Ltd. He requested him to open a bank account at the said bank. The Appellant gave him the requisite account opening documents including a copy of his national identity card, utility bills, KRA PIN Certificate and passport size photos. DW3 referred the Appellant to their branch at Kenyatta Avenue where he signed the account opening documents.

On 15th June 2009, he was swimming at Nyayo Stadium when police officers came and arrested him. He was accused of defrauding CFC Stanbic Bank Ltd of Ksh.13 million. He told the police that he had only opened an account at the said bank but he denied applying for any loan facility. The police showed him the loan application form in the name of George Jack Tobias. Attached to the application form was his passport size photo, which he had given to DW3 when he was opening the account. He stated that he did not know anyone by the name George Jack Tobias. He denied withdrawing the loan amount from the said bank. He stated that the forensic report established that he did not sign the account opening documents and loan application forms. DW1 also confirmed that he did not sign the charge documents.

Upon cross examination, the Appellant admitted that he had been charged in a different criminal case involving Housing Finance Group Kenya where he was accused of fraudulently obtaining Ksh.20 million from the said bank. He admitted that the same passport size photo that appeared the loan documents at CFC Stanbic Bank Ltd was the same photo that appeared in the documents at Housing Finance Group Kenya. He however maintained that DW3 used his passport photo to fraudulently obtain the funds from the bank.

DW3, James Saita, was charged alongside the Appellant before the trial court as the 2nd Accused person. He worked as a loan processing officer at CFC Stanbic Bank Ltd. It was his testimony that sometime in February 2009, he received a call from the Appellant who inquired about the home loan application process. The Appellant later passed by the bank to pick the loan application forms. DW3 stated that he met the Appellant at the parking lot. The Appellant told him that he had a client who was interested in the facility. The Appellant left with the application forms. He later returned them to the bank. The application form had been duly filled and signed and all requisite documents were attached. DW3 forwarded the application documents to PW18 for verification. He also forwarded the documents to the Credit Department for further verification and approval. DW3 denied meeting the Appellant at Nyayo Estate. He told the court that he first met the Appellant at the bank when he picked the loan application forms. He stated that the applicant of the loan facility was George Jack Tobias. The Appellant told him that the said George was his client.

This being a first appeal, this Court is mandated to re-evaluate afresh the evidence presented before the trial court. The Court of Appeal in the case of **Gabriel Kamau Njoroge vs Republic [1987] eKLR** stated this on the duty of the 1st Appellate court;

“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own

inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.

In the present appeal, the issue for determination by this court is whether the prosecution established the Appellant's guilt on the charges brought against him to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal.

The Appellant was charged alongside the 2nd Accused Person in Count I with the offence of conspiracy to defraud contrary to **Section 317** of the **Penal Code**. The said section provides as follows:

'Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.'

The **Black's Law Dictionary 9th Edition** defines conspiracy as:

"An agreement by two or more persons to commit an unlawful act coupled with intent to achieve the agreement's motive, and (in most states), action or conduct that furthers the agreement; a combination for an unlawful purpose."

From the foregoing, the prosecution is required to prove that a conspiracy was occasioned by two or more people acting in concert to execute a common intention to defraud the complainant. In the present appeal, the Appellant was alleged to have conspired with James Saita (2nd Accused Person), who was an employee of CFC Stanbic Bank Ltd, to defraud the said bank of Ksh.13.7 million. The prosecution's case was that the Appellant, with help of the 2nd Accused Person, impersonated a person known as George Jack Tobias, and presented fraudulent documents to the bank which he used to obtain a loan amounting to Ksh.13.7 million.

The evidence by the prosecution established that the Appellant, with the help of the 2nd Accused Person, filled out a home loan application form from the bank and attached a copy of his national identity card, KRA PIN Certificate, copies of bank statements from Standard Chartered Bank for a period of 12 months, an introduction letter from his employer, and copies of two payslips for the months of November and December 2009. The Appellant presented himself as George Jack Tobias. All the application documents were in the name of George Jack Tobias.

PW18 stated that her duty at the bank was to ensure that the loan application documents were duly filled and all requisite documents attached. She told the court that she received the loan application documents for George Jack Tobias from the 2nd Accused Person. After ensuring the application was in order and all requisite documents had been attached, she sent the application to the Credit Team who approved the processing of the loan. A letter of offer was then sent to George Jack Tobias. He was invited to the bank to open a bank account for purposes of processing his loan. The account opening documents as well as the attached documents were all in the name of George Jack Tobias. The bank's external advocates facilitated registration of a charge document against property L.R. No.7785/679 allegedly owned by the applicant, after which a loan amount of Ksh.13.7 million was credited to George Jack Tobias's bank account.

The prosecution witnesses who interacted with the said George Jack Tobias all identified the Appellant as the said person. PW1 was instructed to facilitate an account opening for the said George Jack Tobias. He stated that the Appellant came to the bank and introduced himself as George Jack Tobias. He assisted the Appellant fill out the account opening application form. The Appellant also gave him the requisite account opening documents including his passport size photo, a copy his national identity card, a tenancy agreement which indicated that he resided at Nyayo Estate in Embakasi, payslips from Livingstone Registrars Ltd and an introduction letter from his employer. The Appellant however did not have his KRA PIN Certificate and previous bank statements from Standard Chartered Bank Ltd. PW1 met with Appellant later that day at Jevanjee Gardens where the Appellant gave him the said documents.

PW2 and PW13 were bank tellers at CFC Stanbic Bank Ltd. They stated that the Appellant who introduced himself as George Jack Tobias came to the bank on 6th March 2009 and 7th March 2009 and presented a cheque for withdrawal of Ksh.2 million and Ksh.6.445 million respectively. Both tellers stated they paid out the said funds to the Appellant. The Appellant presented to them a national identity card in the name of George Jack Tobias. PW7 was a property valuer. He stated that the Appellant, who introduced himself as George Jack Tobias, instructed him to value his property in Runda LR. No.7785/679 and forward a report of the same to CFC Stanbic Bank Ltd. PW14 was an advocate at the firm of Njoroge Regeru and Company Advocates which was acting for the bank. He prepared the charge document for a loan of Ksh.13.7 million which was granted by the bank to George Jack Tobias. PW9 and PW10 were employees of the said law firm. They all interacted with the said George Jack Tobias. They identified the Appellant as the said person. The Appellant's passport size photo appeared on the home application form as well as on the national identity card in the name of George Jack Tobias.

The prosecution further established that all the documents that the Appellant presented to the bank during the loan application process were not genuine. They were forgeries. The evidence of the forensic document examiner as well as that of PW4, PW5 and PW6 established that the certificate of title for property L.R. No.7785/679 presented by the Appellant was a forgery. PW4, PW5 and PW6 stated that the signatures on the said certificate of title were not appended by them. Their testimony was corroborated by that of the document examiner (PW3) who testified that the said signatures were forged. The investigating officer, PW17, stated that after conducting a search at the land registry, they discovered that Mr. Hirji Rabadia was the registered owner of the said property.

The national identity card No.22479478 that was presented by the Appellant to the bank was also not genuine. PW15 told the court that the said identity card number was issued to Ganyere Gure Teche and not George Jack Tobias. Further, the payslips and introduction letter from

Livingstone Registrars Ltd that were presented by the Appellant were established to be forgeries from the testimony of PW12. PW12 stated that they did not have any employee by the stated name.

It therefore clear from the evidence on record that the Appellant impersonated a person by the name George Jack Tobias, presented forged personal documents in the stated name to the bank, and applied for a loan facility of Ksh.13.7 million which was disbursed to him. The Appellant, pretending to be someone else, managed to defraud the bank of the stated amount. He did so with the help of the 2nd Accused Person. PW18 told the court that the 2nd Accused Person presented the Appellant's loan application documents to her. PW19 who was the 2nd Accused Person's supervisor testified that it was unusual for the 2nd Accused Person to receive loan applications directly from a customer. She stated that loan application documents were handled in the first instance by customer care consultants who would help the applicants fill in the forms.

The 2nd Accused Person was a loan processor and his duties did not include receiving loan applications from customers. The fact that the Appellant gave the loan application documents to the 2nd Accused Person who in turn presented them to the bank shows that they knew each other. Further, PW9 told the court that the 2nd Accused Person called the law firm to request a quotation of the legal fees for a client who wanted to apply for a loan from the bank. The said client turned out to be George Jack Tobias. Once the charge documents were registered, she stated that the 2nd Accused Person personally went to the law firm to pick them up. PW11 who worked in the same department as the 2nd Accused Person stated that most of the communication from the bank to George Jack Tobias was through the 2nd Accused Person. PW16 and PW17 stated that when they interrogated the 2nd Accused Person, he told them that the Appellant had promised to give him Ksh.100,000/= if the loan was approved.

It is therefore clear to this court that the Appellant and the 2nd Accused Person knew each other and acted in concert to defraud the bank. The 2nd Accused Person assisted the Appellant fast track his loan application process which was fraudulent. This court is of the view that the prosecution established the Appellant's guilt in Count I to the required standard of proof beyond any reasonable doubt.

The Appellant was charged in Count II, III, IV and V with the offence of **making a document without authority** contrary to **Section 357(a)** of the **Penal Code**. The said section provides as follows:

“Any person who with intent to defraud or to deceive without lawful authority or excuses makes, signs or executes for or in the name or on account of another person, whether by procurement or otherwise, any document or electronic record or writing.”

The Appellant was alleged to have made a certificate of title No. IR 67825 (L.R. No.7785/679) purporting it to be genuine and valid document issued by Registrar of Titles, a National Identity Card No.22479478 in the names of George Jack Tobias purporting it to be genuine and valid document issued by the Director of National Registration Bureau, and payslips for the month of November and December 2008 in the names of George J. Tobias purporting them to be genuine and valid payslips issued by Livingstone Registrars Ltd.

As stated earlier in this judgment, the evidence of PW3, PW4, PW5, PW6, PW12 and PW15 established that all the above listed documents were not genuine. They were forgeries. The said documents were presented to the bank by the Appellant with a view of defrauding the bank of Ksh.13.7 million. The Appellant was a beneficiary of these forged documents. The loan amount was credited to a bank account that was opened by the Appellant. The prosecution also established that the Appellant withdrew the said funds from the bank account. The forged documents were made to be used as genuine documents to the advantage of the Appellant. The forged documents could only have been made by the Appellant who had no authority to make them. His guilt with regard to the offences in Count II, III, IV and V was therefore established by the prosecution to the required standard of proof beyond any reasonable doubt.

The Appellant was charged in Count VI with the offence of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The said section provides that;

“Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”

Therefore, the prosecution is required to establish the Appellant obtained something capable of being stolen; obtained it through a false pretence; and with the intention to defraud. This court has already established that the Appellant used forged documents to obtain Ksh.13.7 million from the bank in form of a home loan facility. PW2, PW13 and PW16 testified that the Appellant withdrew the said funds which were credited to his account. The total sum of Ksh.13.7 million received by the Appellant from the bank is something that is capable of being stolen in law. Was the money obtained in false pretence and with intention to defraud? **Section 312** of the **Penal code** defines the term false pretence as:

“Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.”

In the present appeal, the money obtained by the Appellant from the bank was a home loan facility. The Appellant, whose real name is Joshua Kiprop Kisorio, presented himself as George Jack Tobias. He presented forged documents to the bank with a view of defrauding the bank of the said sum of money. The Appellant knew that the said documents were not genuine. He used a forged certificate of title to secure the loan facility, knowing very well that he was not the registered owner of the said property. He made a false representation to the bank with intent to defraud the bank.

The Appellant's contention in this appeal is that he did not apply for a loan facility at the bank in the name of George Jack Tobias. He told the court that the 2nd Accused Person was his neighbour at Nyayo Estate in Embakasi. He averred that the 2nd Accused Person lured him to

open an account at CFC Stanbic Bank Ltd. The 2nd Accused Person then used his passport size photo to pose as George Jack Tobias and defraud the bank of Ksh.13.7 million. The Appellant stated that the forensic evidence established that he did not sign the account opening documents and loan application forms. He asserted that DW1 confirmed that he did not sign the charge document.

The forensic evidence established that the signatures on the account opening application form and home loan application form did not match the Appellant's specimen signature. However, this court notes that since the Appellant was posing as a different person, the probability that his real specimen signature would be the same as that of George Jack Tobias was minimal. Further, the evidence of DW1 was displaced by that of PW9, PW10 and PW14 who worked at Njoroge Regeru and Company Advocates. The said witnesses all testified that the Appellant did pay a visit to the law firm and introduced himself as the borrower, George Jack Tobias. PW10 told the court that the Appellant accompanied him to the land registry to register the charge document and see if they could fast track the registration. Majority of the prosecution witnesses interacted with the Appellant who told them that he was George Jack Tobias. The forged identity card had the Appellants photograph. The forged documents in question originated from the Appellant. None of these facts are in doubt.

The Appellant's testimony that he did not apply for the loan facility was therefore not anchored in the truth. The Appellant made a false representation to the bank and deliberately defrauded the bank of Ksh.13.7 million in form of a home loan facility. The evidence adduced by the prosecution against the Appellant was overwhelming. His defence constituted a mere denial which did not dent the otherwise strong evidence adduced by the prosecution witnesses. In the premises therefore, this court finds no merit with the appeal lodged by the Appellant with respect to all the counts that he was convicted of. His appeal against conviction in all six counts is hereby dismissed.

On sentence, this court is of the view that the sentence meted out by the trial court fitted the crime. If the Appellant had offered to refund the money that he unlawfully obtained from the complainant, this court would have treated him with leniency. However, since the Appellant is still adamant that he did not take the money and this court having found as a fact that he did, he shall serve the custodial sentence imposed by the trial court. The appeal on sentence is similarly dismissed. The Appellant shall serve the sentence imposed by the trial court. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF JULY 2020

L. KIMARU

JUDGE