



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 105 OF 2018 & 109 OF 2019

(Appeal arising out of conviction and sentence of Andayi F. W. (Chief Magistrate)

in Nairobi Chief Magistrates' Court (Milimani) Criminal Case No. 94 of 2016

delivered on 14th June 2018)

MOHAMMED SANI.....1ST APPELLANT

OUSMAN IBRAHIM.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The 1st Appellant Mohammed Sani alias Dr Mustafa and the 2nd Appellant Osman Ibrahim Bako were charged with a raft of offences before the trial magistrate's court. The offences can be classified into two:

The first set of offences related to **being found in possession of counterfeit currency and being found in possession of equipment to make counterfeit currency**. In the 1st count, the appellants were **charged with forgery** contrary to the **section 350** of the **Penal Code**. The particulars of the offence were that on unknown dates at Diamond Park II Estate within Nairobi County, the Appellants joint with others not before court, with the intent to defraud forged 13, 156, 400 notes purporting them to be genuine US Dollars. In the 2nd count, they were **charged with a similar offence of forgery**. The particulars of the offence were that on unknown dates in the same place within Nairobi County, jointly with others not before court, with the intent to defraud, they forged 5,344,500 notes purporting them to be genuine Euro Currency.

In the 4th and 5th counts, the Appellants were charged with **having in possession papers of forgery** contrary to **Section 367 (a)** of the **Penal Code**. The particulars of the offence were that on the nights of 14th and 15th January 2016, at Diamond Park II Estate within Nairobi County, jointly with others not before court, without lawful authority, knowingly had in possession 13,156,400 and 5,344,500 papers respectively, intending the same to resemble and pass as US Dollar and Euro Currencies. In the 6th Count, the Appellants were charged with **having in possession instruments for making forgery** contrary to **Section 367 (b)** of the **Penal Code**. The particulars of the offence were that on the nights of 14th and 15th January, 2016, at Diamond Park II Estate in Nairobi County, jointly with others not before court, without lawful excuse, had in possession instruments namely; 2 scanners, and 2 bottles of iodine substance for producing figures and marks peculiar to and used in making Euro and US Dollar currency notes.

In the second category of offences, the appellants were charged with **obtaining money by false pretenses** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on diverse dates between 1st October 2015 and 15th January 2016, within Nairobi County, the Appellants, jointly with others not before court, with the intent to defraud obtained Ksh26 Million from Omar Hussein Abdisalaam by falsely pretending that they had deposited millions of US Dollars in a brief case at De La Rue Global Lab Company, a fact they knew to be false. The 2nd Appellant was further charged with two counts under the **Kenya Citizenship and Immigration Act**. In the 1st count, he was charged with **failing to register as a foreign national** contrary to **Section 56(2)** as read with **section 56 (3)** and **60** of the **Act** and **Regulation 46** thereof. The particulars of the offence were that on 14th January 2016 at Kilimani Mosque, being a Cameroonian national was found not having registered as a foreign national in contravention of the **Act**. In the 2nd count, he was charged with **being unlawfully present in Kenya** contrary to **Section 53(1) (j)** as read with **Section 53(2)** of the **Act**. The particulars of the offence were that on

14th November 2015 at Kilimani Mosque, the 2nd Appellant being a Cameroonian national was found unlawfully present in Kenya without a valid pass or permit allowing him to be in Kenya. In respect of the 1st Appellant, he was charged with **engaging in employment without being authorized to do so by a work permit** contrary to **Section 53(1) (m)** of the **Act**. The particulars of the offence were that between 3rd December 2015 and 14th January 2016, at Green House off Ngong Road in Nairobi County, the 1st Appellant being a Niger national was, without a work permit, engaged in employment as a Director of Zabram Construction Company Limited.

In all these charges, the Appellants pleaded not guilty. After full trial, the Appellants were convicted of all the counts save for the 9th count. In respect of the forgery charges, each Appellant was sentenced to serve 7 years of imprisonment on each count. The sentences were ordered to run concurrently. In respect of the obtaining charge, the appellants were each sentenced to serve one year imprisonment. However, the sentence was ordered to run consecutive to the above sentences. In respect of the 4th 5th and 6th counts in relation to possession of forgery papers, the Appellants were ordered to serve two years imprisonment on each count. The sentences were ordered to run concurrently of themselves but consecutively as regards the 1st, 2nd and 3rd counts above. In respect of the 7th and 8th counts that related to breach of the **Immigration Act**, the 2nd Appellant was ordered to pay a fine of Ksh100,000/- on each count or in default serve 6 months imprisonment. All the counterfeits that were recovered together with the implements and chemicals were ordered to be destroyed by the DCI in the presence of the court.

The Appellants were aggrieved by their respective conviction and sentence. They each filed a separate appeal challenging the said conviction and sentence. In their petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted in the absence of evidence which established their guilt to the required standard of proof beyond reasonable doubt. They faulted the trial magistrate for failing to properly evaluate the evidence which in their view fell short of establishing the ingredients of the charges that were brought against them. In particular they were aggrieved that they were convicted of being found in possession of the counterfeit currency when in actual fact no evidence was adduced to connect them to the house where the counterfeit currency was recovered, and secondly, with the counterfeit currency themselves. They faulted the trial magistrate for failing to appreciate that the evidence adduced by the witnesses was full of contradictions and inconsistencies that the same could not sustain a conviction if the trial court had properly applied its mind to the facts of the case and the applicable law.

The Appellants were aggrieved that their respective defences were not taken into consideration before the trial court arrived at the impugned decision. They were of the view that crucial prosecution witnesses who would have exonerated them were not called to testify in the case. They faulted the trial magistrate for disbelieving their respective defences and putting undue credibility to the prosecution's case and thereby arriving at the erroneous decision finding them guilty as charged. The Appellant took issue with the custodial sentences that were imposed on them. They were of the view that the same was harsh, excessive and unjustified in the circumstances. In that regard, the Appellants urged the court to reconsider the sentences if their appeal on conviction fails. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their conviction and set aside the custodial sentences that were imposed upon them.

During the hearing of the appeal, this court heard oral submissions made by Mr. Were for the 1st Appellant, Mr. Kimathi for the 2nd Appellant, and Mr. Momanyi for the State. Mr. Were submitted that the trial court did not properly evaluate the evidence presented before it. The prosecution did not establish its case against the Appellants to the required standard of proof. The owner of the house where the counterfeit currency and the counterfeiting equipment were found, was not known. Mr. Were submitted that at the time of his arrest, the 1st appellant told the police who the owner of the house was. However, the police did not bother to look for the real owner of the house. The Investigating Officer did not know the real owner of the house. No tenancy agreement was produced to establish the nexus between the appellants and the house. Learned Counsel was of the considered view that failure by the prosecution to identify the owner of the house rendered the entire case weak. He explained that crucial witnesses who would have clarified this position were not called. The counterfeit currency which was produced in court was not found in the Appellants' possession.

Learned Counsel for the 1st Appellant further submitted that the prosecution failed to prove to the required standard that the Appellants had access to the lockers in the house. He ascertained that PW4's evidence was clear: he saw nothing at the time the inventory was prepared. None of the photographs pointing to PW4 and the 1st Appellant seated together were produced in evidence. On the issue of forgery, learned Counsel submitted that the prosecution failed to prove that the Appellants were the authors of the forgery. He urged the court to find that there were gaps in the prosecution's case that militated against their conviction. On sentence, learned counsel submitted that the sentence meted on the appellant was harsh and excessive. It should have been ordered to run concurrently instead of consecutively. There was no basis upon which the consecutive order was made.

Mr. Kimathi for the 2nd Appellant told the court that he was relying on the written submissions that he filed before the trial court. He faulted the trial magistrate for finding that the prosecution had established constructive possession by the Appellants of the items that were recovered from the house. He pointed out that the trial court placed undue reliance on the evidence of PW4 and PW5. He submitted that the evidence by these witnesses was unreliable since it did not connect the 2nd Appellant to the house. It did not establish that the 2nd Appellant was in control of the house. The 2nd Appellant was categorical that he had nothing to do with the house at Diamond Park II Estate. The 2nd Appellant was arrested at Hurlingham Mosque. He was not found in possession of fake currency. The police were taken to the house by PW4.

Learned Counsel for the 2nd Appellant was emphatic that the 2nd Appellant could not be convicted of being in possession of the counterfeit currency. He explained that if the court finds that the prosecution failed to prove possession, then the charge of forgery will not succeed. As regard the charge of obtaining by false pretences, Mr. Kimathi submitted that the trial court believed the evidence of PW3 yet there was no evidence placed before the court to prove that PW3 indeed had in his possession the sum of Ksh26 Million. He pointed out that the documents produced in evidence only showed that the total amount established to have been paid was US Dollars 168,800. PW3 later testified that he gave other sums which added up to a total of US Dollars 250,000. He asserted there was no evidence that PW3 gave to the 2nd Appellant the sum of US Dollars 500,000. He was emphatic that the 2nd Appellant did not receive any sums from PW3. From the evidence adduced, it was clear that the person paid the money was one Omar Hussein.

Mr. Kimathi further submitted that the evidence adduced by the prosecution witnesses was full of material discrepancies that the only

conclusion that can be reached is that such evidence was unreliable to secure conviction. He explained that there was no evidence to support the assertion by PW3 that he was possessed of the money that he said he gave to the Appellants. There is lack of proof of ownership of the money. Regarding the immigration charge, learned Counsel submitted that the 2nd Appellant who was lawfully in Kenya at the time of his arrest. He had been issued with a multiple entry visa that entitled him to stay in the country until June 2016. He urged the court not to be persuaded by the testimony of PW11. On sentence, learned Counsel was of the same view as Mr Were for the 1st Appellant. He added that the trial court should have taken into consideration the period that the Appellants were in remand custody prior to their conviction. If that period was taken into account, then the Appellants will serve a shorter sentence in prison. He urged the court to allow the appeal.

Mr. Momanyi for the State opposed the appeal. He submitted that the prosecution called 16 witnesses who established to the required standard of proof the charges brought against the Appellants. The prosecution established that the Appellants were in constructive ownership of the counterfeit currency that was recovered from the house at Diamond Park II Estate. The Appellants were placed at the scene where the counterfeit currency was recovered. The prosecution adduced evidence which established that the Appellants were in control of the house even though the lease of the house had been signed by a third party. The Appellants used the house as a place of business.

On the charges of obtaining by false pretences, learned Prosecutor submitted that the evidence by PW3 was cogent and credible. It established how monies were exchanged between PW3 and the Appellants. An agreement and acknowledgments were produced into evidence. This evidence was not controverted by the Appellants. As regards the immigration charges, he pointed out that even though the 2nd Appellant had a multiple entry visa, he was required to validate his stay in the country with the immigration department. At the time of his arrest, he was unlawfully present in Kenya. The learned Prosecutor was of the view that the trial court properly evaluated the evidence and arrived at the correct verdict. The trial court took into consideration the period that the Appellants were in remand custody prior to their conviction. He was of the view that the sentences meted on the Appellants were in fact lenient. He urged the court to dismiss the appeals and uphold the sentences.

This being a first appeal, it's the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial magistrate's court before reaching its own independent determination whether or not to uphold the conviction. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (**See Njoroge Vs Republic [1986] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution established the charges brought against the Appellants to the required standards of proof beyond any reasonable doubt.

As stated earlier in this judgment, there are two broad categories of charges that were brought against the Appellants. The first category relates to **forgery** contrary to **Section 350** of the **Penal Code**, having in **possession papers for forgery** contrary to **Section 367 (a)** of the **Penal Code**, and having in **possession instruments for making forgery** contrary to **Section 367 (b)** of the **Penal Code**. All these charges relate to the discovery of counterfeit currency in US Dollars and Euros in a house at Diamond Park II Estate in Nairobi. The undisputed fact is that on the nights of 14th and 15th January 2016, the police raided house No. 256 at Diamond Park II Estate wherein they recovered 13,156,400 counterfeit US Dollar notes and 5,344,500 counterfeit Euro currency notes. They also recovered two scanners and two bottles of iodine substance used for producing figures and marks similar to the ones that obtain in paper currency. According to the prosecution (again this was undisputed) when they took these counterfeit currencies for examination by the US Government and by a representative of the German Embassy in Kenya, it was indeed confirmed that the said notes were counterfeits. The reports were produced into evidence by the prosecution.

The issue that was contested and disputed was whether the Appellants had access to the house at Diamond Park II Estate. It was the prosecution's case that the Appellants had either actual or constructive possession of the house where the counterfeit currency was found. According to the prosecution, after the arrest of the 1st Appellant, he led them to the house where the counterfeit currency was found. The 1st Appellant disputes this fact and reiterates that he had no connection whatsoever to the house. Indeed, the lease agreement produced into evidence showed that the house was leased to someone else other than the Appellants. However, the prosecution adduced evidence which pointed to the fact that the Appellants, and especially the 1st Appellant used the said house as his place of business. In that regard, PW4 Edwin Walieli and PW5 Isaac Kamau Karimi taxi drivers who were often hired by the 1st Appellant told the court that they used to pick the Appellants from their respective residences at Valley Arcade and Ongata Rongai to their office at Diamond Park II Estate in South B. When the Appellants were arrested, upon a search being conducted in the house, it was established that the 1st Appellant had keys to the house and rooms within the house.

It was the Appellants' appeal that the evidence that was adduced by the prosecution did not connect them to the house. The 2nd Appellant was emphatic that he was arrested elsewhere and had no connection with the house or the counterfeit currency that was found in the said house. Similarly too, the 1st Appellant told the court that he was an innocent person who was connected to the house by the police after a report was made to them by a disgruntled business associate. During the hearing of the appeal, the prosecution, while conceding that indeed the house at Diamond Park II Estate was not leased to the Appellants, insisted that the house was in actual or constructive possession of the Appellants. In that regard, the prosecution relied on **Section 4** of the **Penal Code** which defines what constitutes possession. The said **Section 4** provides that:

“(a) being in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person;

(b) if there are two or more persons and any one or more of them, with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.”

On re-evaluation of the evidence adduced before the trial court, this court agrees with the prosecution that it indeed established to the required standard of proof beyond any reasonable doubt that the Appellants, jointly and severally, had constructive possession of house No. 256 at Diamond Park II Estate. The evidence adduced particularly by the two taxi drivers connected the Appellants to the house. The

Appellants did not use the house for residential purposes but rather as an office where they conducted business. The counterfeit currency and the scanning equipment were found in the house. This court holds that the prosecution established the required standard of proof that the Appellants had control of the house where the counterfeit currency was found. The fact that the 1st Appellant had keys to the house is more the reason why this court cannot fault the trial magistrate for reaching the decision that he did. For the above reasons, the Appellant's appeal against conviction in respect of the above charges lacks merit and is hereby dismissed.

The second set of charges relate to the charge of **obtaining by false pretences** contrary to **Section 313 of the Penal Code**. It was the prosecution's case that the Appellants, jointly with others not before court, defrauded Omar Hussein Abdisalaam who testified as PW3, the sum of Ksh26 Million under the pretext that they had deposited millions of US Dollars at the De La Rue Global Company, a fact they knew to be false. PW3 testified that he was befriended by the 2nd Appellant at a mosque where they used to attend prayers. After gaining his confidence, the Appellant introduced him to the 1st Appellant. It was after gaining his confidence that they told him that they had money in US Dollars which was being shipped in a container from Syria to Kenya. They told him that in the container, there were brief cases which contained US Dollars. They requested him to give them money which they would use to clear the container and later use to have the same released from storage at De La Rue Global Company.

It was clear that the evidence adduced by the prosecution that PW3 was persuaded of the genuineness of the deal after he was promised a cut from the US Dollars upon the same being released to the Appellants. PW3 adduced evidence to the effect that he gave the Appellants the said sum of money in several installments while the Appellants and their accomplice was giving him a cock and bull story that they were about to have the said sums in US Dollars released to them. It is after the story had become elongated and convoluted that PW3 became suspicious. This was more so due to the fact that the persons he had borrowed some of the money from to give to the Appellants started demanding the same from him. After pressurizing the Appellants, he was informed that the money was kept in a safe in a house. PW3 hired PW2 Moses Mwangi Muturi, a technician to open the safe. It was then that he discovered that the currency in the safe were counterfeit. He made a report to the police after which the Appellants were arrested.

During the hearing of the appeal, the Appellants disputed the assertion by PW3 that he had given them money. They insisted that even if it was established that PW3 had given them money, it was not in the amounts claimed by PW3. On re-evaluation of the evidence adduced in that regard, this court finds no fault with the verdict reached by the trial magistrate that the Appellants conned PW3 after convincing him that he would make money from the deal that he had entered with them. It was clear from the evidence adduced by the prosecution witnesses that the printing of the counterfeit currency was part of the scheme to defraud PW3 of his money. The Appellants' defence was properly considered by the trial court and dismissed as having no merit. The appellants appeal against conviction on the charge of **obtaining by false pretences** lacks merit and is hereby dismissed. Similarly too, **the immigration** charges were established. This court cannot interfere with the conviction of the trial magistrate.

As regards sentence, the Appellants were convicted under **Section 350 (1)** of the **Penal Code** which provides a custodial sentence of life imprisonment. On those charges, the Appellants were sentenced to serve 7 years imprisonment on each count. The Appellants complained that this sentence was harsh and excessive. They further complained that the period they were in remand custody was not taken into consideration before the trial court imposed the sentence. They further lamented that they were sentenced to serve a consecutive sentence instead of a concurrent one. On the other hand the prosecution was of the view that the sentences that were imposed was lenient in the circumstances. This court is guided by the Court of Appeal decision of **Bernard Kimani Gacheru Vs Republic [2002] eKLR** where it was held thus:

“It is now settled law, following several authorities by this Court and the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the Appellate Court will not easily interfere with the sentence unless the sentence is manifestly excessive in the circumstance of the case or that the trial court overlooked some material facts or acted on wrong principle. Even if the Appellate Court feels that the sentence is heavy, and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentences unless anyone of the matters already stated is shown to exist.”

In the present appeal, it was clear to the court that the trial court committed no error in principle or applied wrong considerations in arriving at the said sentence. The trial court took into account the period that the Appellants were in remand custody prior to their conviction. Taking into consideration that the maximum custodial sentence that the Appellants could have served is life imprisonment, the sentence of seven (7) years imprisonment, taking into account the economic damage that this country could have faced had the counterfeit currency been released on circulation, was extremely lenient. This court will not interfere with the same. The only issue that the Appellants have persuaded this court as regard sentence, is the custodial sentences imposed shall run concurrently instead of consecutively. For the avoidance of doubt, the Appellants shall serve (7) years imprisonment with effect from the date of their sentence by the trial court. Upon completion of their sentence, they shall be repatriated to their respective countries of origin.

It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF OCTOBER 2020

L KIMARU

JUDGE