REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 155 OF 2018

(An Appeal arising out of the conviction and sentence of HON. E. RIANY (SRM)

delivered on 6th September 2018 in Nairobi CMC. CR. Case No.1628 of 2017)

RONALD KIPTOO YATOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Ronald Kiptoo Yator was charged with **conspiracy to defraud** contrary to **Section 317** of the **Penal Code**. The particulars of the offence were that on diverse dates between 8th and 22nd September 2017 at Dyer & Blair Investment Bank along Loita Street in Nairobi County, the Appellant, jointly with others not before court, conspired to defraud Dyer & Blair Investment Bank of Kshs.2,133,000/-. He was further charged with the offence of **stealing** contrary to **Section 268(1)** as read with **Section 275** of the **Penal Code**. The particulars of the offence were that on the same day and at the same place, the Appellant, jointly with others not before court, stole three cheques Nos.102320, 102321 and 102322 all valued at Kshs.2,133,000/-, the property of Dyer & Blair Investment Bank. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged on the first count of **conspiracy to defraud**. He was however acquitted of the second count of **theft.** He was sentenced to serve two (2) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has appealed to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he was convicted on the basis of evidence that did not establish the charge to the required standard of proof. In particular, he stated that the ingredients to establish the charge were not established to the required standard of proof. The Appellant faulted the trial magistrate for failing to appreciate that the evidence adduced by the prosecution did not link him to the offence that he was convicted. He was aggrieved that his defence was not taken into consideration, and when the court did, it shifted the burden of proof and used the evidence adduced in his defence to convict him. The Appellant was of the view that the evidence that was adduced was insufficient to sustain a conviction. In the premises therefore, the Appellant 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, this court heard submission made by Mr. Arusei for the Appellant and by Mr. Momanyi for the State. Mr. Arusei submitted that the Appellant was convicted for a charge of **conspiracy** yet such charge cannot succeed against one person. The prosecution adduced evidence that there was one Peter Githinji who was the Appellant's co-conspirator. However, this person was non-existence. The trial court formed the view that Peter Githinji and the Appellant were one. Learned counsel reiterated that a charge of **conspiracy** can only succeed where there are two or more persons who are charged for the offence. There was no agreement or consent between the Appellant and his alleged co-conspirator. He submitted that there was no sufficient evidence to support the finding reached by the trial court that the Appellant was guilty as charged. In the premises therefore, he urged the court to consider the cited authorities and reach the finding that the trial court erred in convicting the Appellant. Mr. Momanyi for the State conceded to the appeal. He submitted that the evidence adduced by the prosecution witnesses did not establish the charge to the required standard of proof.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and***

conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see <u>Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)</u>".

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **conspiracy to defraud** contrary to **Section 317** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

The court has carefully re-evaluated the evidence that was adduced before the trial magistrate's court. It has also considered the submission by the parties during the hearing of this appeal. The evidence that was adduced by the prosecution in support of the charge was by three witnesses. The star witness was PW1 Brita Nyaga, an employee of Dyer and Blair Investment Bank. She worked as a Risk and Compliance Officer. She testified that on 19th September 2017, she received a payment request from one of their clients called Peter Githinji. The said Peter Githinji had sold a number of shares and wanted to be paid proceeds from the same. The amount requested was Kshs.2,133,000/-. This amount was supposed to be forwarded to his bank account at the then Chase Bank, Riverside Branch in Nairobi. PW1 checked the particulars of the said Peter Githinji in their Database. She noted that the phone number, signature and the copy of the identity card attached to the request were different from what they had in the system. She became suspicious. She notified PW3 PC James Aswani, a police officer attached to the Capital Markets Investigations Unit. A sting operation was put into operation. PW1 prepared three cheques for the said sum of Kshs.2,133,000/-. She then called the ***"customer"*** through mobile No.0790015117. This is the number that was contained in the request for payment form. Shortly thereafter, the Appellant went to the bank with a note allegedly written by Peter Githinji authorizing him to collect the cheques on his behalf. The Appellant was given the cheques after which he was arrested by PW3 and later charged.

The particulars of the identity card which was presented to the bank with the form requesting for the release of the funds was sent to PW2 Philbert Liwa, a fingerprints officer from the Office of Registrar of Persons. He noted that the number in the copy of the identity card *i.e.* No.7564142 belonged to Peter Githinji. However, the fingerprints impressions on the identity card were not the same as that contained in the records kept by the Registrar of Persons. In essence, PW2 was saying that the identity card that was attached to the request for payment was a forgery.

When the Appellant was placed on his defence, he told the court that on the material day, he was requested by Peter Githinji to go to the offices of Dyer and Blair Investment Bank to collect cheques on his behalf. He was given a note to enable him collect the cheques. When he arrived at the offices of the bank, he was made to wait before he was given the cheques. Upon being given the cheques, he was arrested and charged with the offence. He asserted that he was just a messenger and should not have been arrested or charged. Instead, the police should have sought the whereabouts of Peter Githinji.

In her judgment, the trial court held thus:

> ***"The circumstances in which the accused and the said Peter Githinji met are also questionable. As much as people bump into each other over mistaken identity, it is very rare that thereafter, they exchange phone numbers. However, on that, I will just leave it at that. What was not adding up was that despite having exchanged numbers and meeting on the streets of Nairobi for the past 6 – 7 years, it was the first time that the said Peter Githinji was calling him and it was to request him to pick cheques on his behalf then they meet at Afya Centre. A cheque is something very personal and sensitive. You just do not send anyone to collect for you. These are people who barely knew each other and they just met on the streets then out of nowhere and for the first time, accused is called to go and pick cheques on behalf of someone and he agrees. Further, he has a note to this effect yet the instructor is supposed to be somewhere along Jogoo Road in a traffic snarl up. While accused is involved in real estate, he was categorical that his company does not deal in debt collection but this was a favour he was doing to the said Peter Githinji who had called him for the first time despite exchanging phone numbers 6 – 7 years prior. It is very clear that there are so many cover ups."***

This court cannot disagree with this finding reached by the trial court. However, the finding by the trial court ideally relates to a charge either of **personation** under **Section 382(1)** of the **Criminal Procedure Code** or the offence of **attempted to obtain by false pretences** contrary to **Section 313** as read with **Section 388** of the **Penal Code** instead of the offence of **conspiracy to defraud** contrary to **Section 317** of the **Penal Code**. This court agrees with the Appellant's counsel that for the offence of **conspiracy to defraud** to be complete evidence must be adduced to show that there existed an agreement, consent or combination of the two or more persons. For that proposal, the Appellant's counsel relied on the case of **<u>Christopher Wafula Makhoha –vs- Republic [2014] eKLR</u>**. This court agrees with the holding in that case where the court (Mabeya J) held that the charge of conspiracy to defraud must involve two or more persons and not a single accused person.

In the present appeal, it was clear that a critical witness who should have been called to testify in the case is Peter Githinji. PW1 testified that Peter Githinji was their client. He should have been called to testify in the case to debunk the Appellant's assertion or claim that he had been sent by the said Peter Githinji to collect the particular cheques on his behalf. This was a critical piece of evidence which when left out, left a gap in the prosecution's case. This court agrees with the finding reached by the trial court that the story given by the Appellant in his defence was so improbable and unbelievable that the only inference that could be drawn is that the Appellant and the said ***"fake Peter Githinji"*** is one and the same person.

In the premises therefore, this court finds that the prosecution failed to establish the charge of **conspiracy to defraud** contrary to **Section 317** of the **Penal Code** but established the disclosed offence of **attempt to obtain by false pretences** contrary to **Section 313** as read with **Section 388(1)** of the **Penal Code.** This disclosed offence was established to the required standard of proof beyond reasonable doubt. Being an inchoate offence and being cognate to the original charge that the Appellant was convicted by the trial court, this court convicts the Appellant of the disclosed offence. He is accordingly convicted.

On sentence, this court has considered the fact that the Appellant did not succeed in his attempt to defraud the complainant. The attempt was nipped in the bud. The period that the Appellant has been in prison is sufficient punishment. His custodial sentence is therefore commuted to the period served. He is ordered set at liberty and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF MAY 2019

L. KIMARU

JUDGE