REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 20 OF 2018

JOSEPHAT ONDIEKI MOKANDU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. B. M. Kimtai – SRM dated and delivered on the 14th day of June 2018 in the Original Keroka Criminal Case No. 1269 of 2014}

JUDGEMENT

The appellant and his co-accused were jointly charged with obtaining by False Pretences contrary to Section 313 of the Penal Code.

The particulars of the charge were that on diverse dates between 23/7/2014 and 8/12/2014 at Metamaywa village in Masaba North District within Nyamira County, jointly with others not before court, with intent to defraud obtained from Yunuke Kerubo Okeyo Kshs. 550,000/= by falsely pretending that they were in a position to secure a chance for Mary Kwamboka Okeyo in the Kenya National Police Service and Steve Ratemo Abuga in the Kenya Defence Forces a fact they knew to be false.

The appellant in addition to the aforesaid charge faced four other counts of making a document without authority contrary to Section 357 (a) of the Penal Code.

The appellant pleaded not guilty to the charges and the prosecution called four witnesses to prove its case. Thereafter both the appellant and his co-accused gave sworn testimonies in which they both maintained their innocence. However, upon considering and evaluating the evidence by both sides, the trial Magistrate found them not guilty on Count I and acquitted them. The appellant was however convicted in respect to Counts 2, 3, 4 and 5 and sentenced as follows: -

Count 2 – 5 years imprisonment.

Count 3 – 5 years imprisonment.

Count 4 – 5 years imprisonment.

Count 5 – 5 years imprisonment.

The sentences were to run concurrently.

Being aggrieved by the conviction and sentence the appellant preferred this appeal. The gist of the appeal is that the trial Magistrate erred in his evaluation of the evidence.

This appeal was canvassed through written submissions. I have considered the submissions fully and also evaluated the evidence adduced at the trial so as to arrive at my own independent conclusion. I do so bearing in mind that unlike the trial Magistrate I did not see or hear the witnesses giving evidence and so did not observe their demeanour.

The appellant is alleged to have made two Docket No. for Kenya Defence Forces forms with intent to defraud and without lawful authority purporting them to be genuine and signed by the DOD/Eldoret and two similar Docket No. for Administration Police Service Forms purportedly issued by the Inspector General of Police. Those documents were tendered in evidence by the Investigating Officer as Exhibits 4 (a) (b) (c) and (d). The documents purport to be forms admitting the persons named therein to the Kenya Defence Forces and Administration Police Service respectively. There is evidence that the forms were sent to the Kenya Defence Forces and the Administration Police Service respectively for verification and they were found to be forgeries. Exhibit 6 is a letter from the Kenya Defence Forces to which a genuine calling letter is attached. It has no resemblance at all to Exhibits 4 (a) and (b) and clearly Exhibit 4 (a) and 4 (b) are not what they purport to

be. Similarly Exhibit 4 (c) and (d) were ruled out as being genuine. By a letter produced as Exhibit 7, one F. M. Mwei writing on behalf of the Deputy Inspector General stated that those were not even the forms used during the 2014 NPS/APS recruitment exercise. He further, like his counterpart in the Kenya Defence Forces stated that the admission forms did not originate from their office and the signatures thereon were not by a person in that office. The forms however bore serial numbers of forms issued to other recruits other than those named therein. Clearly these documents were all forgeries and were made to dupe the complainants that they had been recruited into the Kenya Defence Forces and the Administration Police Force respectively whereas they had not. This court finds that these documents were made by the appellant. There is evidence that they were found in his possession and it was also proved beyond reasonable doubt through a report of a handwriting exhibit that the signatures thereon, which were all forgeries, were his.

Section 77 (1) of the Evidence Act permits the production of a document examiner's report without necessarily calling the maker. The appellant was represented by an Advocate at the trial and no indication was made to the court that the defence required the analyst to be called for cross examination. I do not find therefore that the omission to call the document examiner was prejudicial to the appellant. In his defence the appellant admitted knowing Yunuke Kerubo Okeyo (Pw1), the complainant in Count 1 very well. He stated that they travelled to Kericho together on 15th September 2014 which confirms that she was a witness of truth. She testified that she sent Kshs. 35,000/= and later paid Kshs. 350,000/= in cash to a purported GSU officer introduced to her by the appellant. The money was to secure a place for her daughter Pw2 in the GSU. The appellant later promised her two more vacancies and so she looked for her friend Pw3. Pw3 sent Kshs. 23,000/= to the number provided but when Pw1 introduced him to the appellant and they met physically he became suspicious as he had encountered the appellant before and knew that he was not a KDF officer. He cautioned Pw1 but Pw1 did not heed his advice. It was Pw1's daughter Mary (Pw2) who after going to Eldoret became suspicious and reported the matter to the police first in Eldoret and then to Keroka Police Station. The witnesses therefore spent sufficient time with the appellant as to identify him positively. It was after they disclosed his identity to the police that his house was searched and the forged documents were found.

There is nothing in the evidence to suggest that the investigating officer (Pw4) had any reason to fabricate evidence against the appellant. It is my finding that the evidence against the appellant was consistent, credible and watertight. The judgement of the lower court is clear on the charges he was convicted and I find no merit in the appeal against conviction.

As for the sentence the trial court took into account the nature and circumstances of the offence and the fact that the appellant was a first offender. It however noted such offences were on the rise. It therefore took all relevant factors into account. It is my finding therefore that the sentence was just in the circumstances and there is nothing to warrant this court to interfere and accordingly the appeal on sentence is dismissed as well. It is so ordered.

Signed, dated and delivered in open court this 20th day of June 2019.

E. N. MAINA

JUDGE