



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**CRIMINAL APPEAL NO.127 OF 2017**

**(Appeal Originating from Nyahururu CM's Court Cr.No.1705 of 2012 by: Hon. S.N. Mwangi – R.M.)**

**JECINTA MUTHONI KIMANI..... APPELLANT**

**- V E R S U S -**

**REPUBLIC..... RESPONDENT**

**J U D G M E N T**

**Jecinta Muthoni Kimani** with another, were charged with the following offences:

**Count I:**

***Obtaining money by false pretences contrary to Section 313 of the Penal Code.***

The particulars of the charge are that on 2<sup>nd</sup> July, 2012, at Agrarian Credit services Ltd in Ol Kalou Township, in Nyandarua County, jointly with intent to defraud, obtained a loan of Kshs.220,000/= from Isaac Mwangi Kanyoro using forged title deeds **No.Bahati/Kabatini Block 1/16691** and **Bahati/Engorusha Block 3/245** as security for the said loan a fact they knew to be false.

**Count III:**

***Forgery contrary to section 349 of the Penal Code.***

The particulars are that on unknown dates within the Republic of Kenya, jointly with others not before the court, with intent to defraud, forged and signed a title deed **No.Bahati/Engorusha Block 3/245** purported to have been issued by Nakuru District Land Registrar.

After the full trial, the appellant was convicted on both counts and sentenced to two years imprisonment on each count and the sentences were ordered to run consecutively.

Being aggrieved by both conviction and sentence, the appellant preferred this appeal dated 22<sup>nd</sup> September, 2016 through the firm of Nderitu Komu Advocate. The petition of appeal lists 13 grounds of appeal as here below:

- 1. The trial magistrate erred in law and fact by making a finding that the appellant had obtained money by false pretence;***
- 2. The trial magistrate erred in law and fact by failing to find that the prosecution had not proved the remission of any money from the complainant to the appellant;***
- 3. The trial magistrate erred in law and fact by failing to make a finding that the prosecution had not proved the existence of Kshs.220,000/= that was capable of being obtained;***
- 4. The trial magistrate erred in law and fact by failing to find that the signatures appearing on the loan application forms and the payment vouchers were not subjected to hand writing expert, in order to relate them to the appellant;***
- 5. The trial magistrate erred in law and fact by making a finding that the appellant signed the loan application form and the payment voucher;***
- 6. The trial magistrate erred in law and fact by finding that the appellant presented to the complainant an original title deed, whereas the loan application form states that it's a photocopy that should have been presented;***

- 7. The trial magistrate erred in law and fact by failing to find that the prosecution had not proved the directorship of the complainant, and its capacity to lend money;**
- 8. The trial magistrate erred in law and fact by making extraneous findings that lacked any basis from the evidence on record;**
- 9. The trial magistrate erred in law and fact by failing to find that there was no iota of evidence to prove that the appellant forged the alleged title deed;**
- 10. The trial magistrate erred in law and fact in finding that the prosecution had proved the two charges beyond reasonable doubt;**
- 11. The trial magistrate erred in law and fact in disregarding the defence of the appellant;**
- 12. The trial magistrate erred in law and fact by in finding a conviction that was against the weight of evidence;**
- 13. The trial magistrate erred in law and fact by passing a harsh sentence under the circumstance.**

The appellant prays that the conviction be quashed and sentence be set aside.

The appeal was opposed by learned counsel for the State, Mr. Mong'are.

This being a first appeal, it behoves this court to examine all the evidence tendered in the trial court and draw its own determination. The court has to however bear in mind that it neither heard nor saw the witnesses testifying as the trial court did. I am guided by the decision in **Okeno v Republic (1972) EA 32.**

Briefly, the facts of the case were as follows:

**Isaac Mwangi (PW1)** the Managing Director (MD) of Agrarian Credit Services Ltd, a Micro Finance Company was that on 2/7/2013, approached by the appellant and another at their office seeking loans. He went with them to their homes of which he took photographs; that both ladies took a loan of Kshs.220,000/=; that the appellant got Kshs.180,000/= and she was guaranteed by her husband and the appellant also guaranteed her colleague Flora (accused 1). PW1 withheld title deeds to their land as security and he dispatched the money through Equity Bank; that the borrowers defaulted in paying.

PW1 then went to do a search at the lands registry and found the titles to be fraudulent; he reported to the police and the two ladies were arrested; the cheque leaf issued to the appellant was No.0\*\*\*\*\*0 dated 2/7/2012; that the appellant was issued with a cheque of Kshs.220,000/= which had to be repaid with interest of 20%; that only one cheque was issued to both ladies and they signed the voucher. PW1 denied having done any search on the titles till the appellant defaulted then he did a search.

**Charles Irungu (PW2)** the Land Registrar Nakuru, recalled receiving a letter on 7/12/2012 seeking to confirm genuineness of the titles ***Bahati/Kabatini Block 1/6691 0.45 Ha*** and ***Bahati/Engorusha Block 3/245***. PW2 found that the plots were registered in the names of Joseph Mirigu (**Block 1/6691**) and **Block 3/245** was in the names of Njenga Wilson Njuguna and George Mungai and produced the green cards in respect thereof. He denied that the lands had ever been owned by the appellant and co-accused.

**PW3 Teresia Wanjiku Mwangi** an employee of Agrarian Credit Services corroborated PW1's evidence that after the application was made, they visited the appellant's home, assessed her and that the appellant qualified for a loan of Kshs.180,000/= while the other accused for Kshs.84,000/=; that the appellant asked for one cheque and that they signed a counter foil and were required to repay on 2/8/2012 but they did not show up on that day. PW1 & 2 went to check whether the titles the appellant had left as security was genuine but found it was not. PW3 produced the titles and the loan forms with the appellant's photograph;

**PW4 CPL Benedict Mwanza** of CID Nyandarua was the investigating officer. He recalled the 20/9/2012 when he met Mwangi Kanyoro PW1 and PW3, who reported to him about the loan issued to the appellant and her failure to repay and the fact that the titles given as security were forged. He took possession of the titles and other documents used in the loan agreement.

The appellant was placed on her defence in which she said that indeed she went to borrow money from Agrarian Credit Services and was granted a loan of Kshs.5,000/=. She denied filling the form for Kshs.180,000/= (Exh.5) and that the form she filled was not in court. She admitted having left a copy of her identity card and photograph; that she sent PW1 Kshs.14,000/= for fuel to their homes; that later she was arrested and saw the titles in court for the first time. She denied ever owning land and that she did not receive any money from Agrarian Credit Services and also denied signing any documents.

In support of his grounds, Mr. Nderitu submitted that the appellant was alleged to have obtained Kshs.220,000/= from the complainant and it was upto the complainant to prove that money passed over to the appellant; that the agreement was never subjected to a handwriting expert and that there is no evidence convicting the appellant to the signature; counsel further submitted that there was no proof that the cheque that was issued was encashed.

On the offence of forgery, counsel submitted that the signature were never subjected to a handwriting expert; that it was for the complainant to explain how he came by the original titles which bore the appellant's names and that the burden placed on the prosecution was not discharged.

In opposing the appeal, Mr. Mong'are argued that the appellant should have explained how she came in possession of the title deeds and a handwriting expert was not necessary; that all ingredients required to prove the offence of obtaining by false pretence were proved.

Section 312 of the Penal Code defines a false pretence to mean:

***“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.”***

Section 313 of the Penal Code creates the offence of obtaining by false pretence and it provides:

***“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.”***

The definition of a false pretence can be broken down as follows:

- (i) A representation of fact by word, writing or conduct;***
- (ii) The representation is either past or present;***
- (iii) The representation must be false;***
- (iv) The person made the representation knowing it to be false or did not believe it to be true;***

***(See Joseph Wanyonyi Wafukho v Republic CRA.200/2012).***

I have considered the evidence on record in light of the above provisions and submissions by counsel. According to PW1 and 3 upon application for a loan from Agrarian Credit Services Ltd, the appellant qualified for Kshs.180,000/= and that she signed on the cheque folio No.0\*\*\*\*\*0 Ex.7 and a payment voucher Ex.6. The appellant also signed a loan application form P.Ex.5.

The appellant denied applying for such a loan or signing any form but instead applied for a loan of Kshs.50,000/= which she did not receive. Having so denied, it was the duty of the prosecution to subject the disputed signatures on the above documents to a handwriting expert to ascertain whether indeed the appellant is the person who signed them. Although the trial court came to the conclusion that the appellant obtained the money, it never addressed itself as to whether or not the appellant signed the application form voucher and counterfoil. Counsel referred this court to some authorities and I am guided by the decision in Silvanus Njuki Nguku v Republic CRA 267/2002 where the court in considering documentary expert opinion made reference to Cross on Evidence, 3<sup>rd</sup> Edition at page 504 on proof of handwriting by comparison says:

***“A document which is proved to have been signed or written by the person whose handwriting is in issue is first produced and this is compared with the writing which is being considered by the court. On the basis of such comparison, an expert in those matters may give evidence.***

***Section 48 of our Evidence Act recognizes the existence of handwriting experts and expressly allows evidence to be given of their opinion “as to identity or genuineness of handwriting. It may be that if a positive opinion is given that a particular writing is in the hands of a particular person it should be received with caution, but it seems to us that at any rate under the law of this country, a handwriting expert must be allowed to give his opinion that the documents were written by the same hand....”***

In my considered view, to establish whether indeed the disputed signatures on the said documents, i.e. the application forms, voucher, cheque counterfoil, were indeed the appellants', they should have been subjected to examination by an expert. Failure to do so left a doubt in the prosecution case as to whose signatures they were or who signed the documents if at all. The trial court fell into error by not considering whose signatures they were.

The other complaint by the appellant is that there was no proof that money was paid to her. According to PW1 and 3, a cheque of Kshs.220,000/= was written in favour of the appellant. A copy of the cheque was produced in evidence. But that is not sufficient to prove that the money was withdrawn from the bank.

The investigating officer should have gone further to get evidence from the bank that the said cheque was honoured and money paid to the appellant. The investigating officer admitted that he did not get any documents to prove that the cheque was ever cashed. The prosecution did not therefore prove that the appellant received any money from the complainant.

The second offence which the appellant faced was one of forgery contrary to section 349 of the Penal Code in that he forged title deed Bahati/Engorusha Block 3/245. This court notes that no offence is disclosed under Section 349 but Section 345 of the Penal Code. Forgery is defined under Section 345 of the Penal Code:

***“Forgery is the making of a false document with intent to defraud or to deceive.”***

Section 347 lists instances when a false document is deemed to have been made. In this case the appellant is alleged to have presented a title

deed to PW1 in her name but on searching the Lands Office, the land was found to belong to other people. PW2, the Land Registrar Nakuru denied that the said land **Bahati/Engorusha Block 3/245** ever belonged to the appellant and he produced the green card in respect thereof. The said title is in the names of Jecinta Muthoni Kimani; what I do not understand is how the complainants just took the said titles as security without doing due diligence by doing a search at the Lands Registry. It just does not make sense that they would just trust a stranger.

In light of my findings on Count 1; that the charge of obtaining by false pretences, had not been proved to the required standard, it follows that the charge of forgery cannot stand because it is totally dependant upon the first charge. The appellant denied that she ever gave the title to the complainant or received any money. The burden still lies on the prosecution to prove that indeed the appellant forged the title. Mr. Mong'are was suggesting that the appellant should reveal how she came by the title deed. The appellant having denied giving the title as security and since the prosecution did not prove that the appellant obtained the said loan, then the burden could not shift to her. In this case the investigation officer did not carry out any investigation but just went ahead to charge the appellant once the complaint was made.

Accordingly, I find that the trial court erred in finding that the appellant committed the offence of forgery. The appellant may be a prime suspect but suspicion alone cannot be a basis of a conviction. The upshot is that the conviction is unsafe, I quash it and set aside the sentence. The appellant is set at liberty unless otherwise lawfully held.

**Dated, Signed and Delivered at NYAHURURU this 16<sup>th</sup> day of December, 2017.**

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Mr. Mutembei - Prosecution Counsel

Soi - Court Assistant

Appellant – present

Mr. Nderitu - for appellant