



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL CASE NO. 148 OF 2014

***Being an appeal from Bungoma Criminal case No. 1894 of 2010 by Hon. C.L. Yalwala [PM]
delivered on 11^h December, 2014***

GILBERT KHAEMBA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

1. The accused person herein was charged with 4 counts; namely personation contrary to Section 382 of the Penal Code to one Ben Simiyu Wanjala in February, 2006, obtaining money by false pretenses contrary to Section 313 of the Penal Code from the said Ben Simiyu Wanjala in the month of February 2006; making a document without authority contrary to Section 357 of the Penal Code; and personation on 8th October, 2010 to Ben Simiyu Wanjala.

The trial court acquitted the accused on the 4th count but convicted him on the 1st for 1 year, the 2nd 2 years and the 3rd count 1 year. The sentences were to run concurrently.

2. Being dissatisfied with the judgment the appellant preferred this appeal on grounds that; the trial court failed to resolve the contradictory evidence amongst the prosecution witnesses; failed to appreciate the defence evidence that no money was paid, judgement resulted to a miscarriage of justice; evidence insufficient; and the trial court failed to consider the defence.

3. At the hearing the State did not object to the appeal on grounds that the appellant had served 1 year 3 months and further that the evidence of **PW1, 2 & 3** was contradictory.

This court is not bound by the sentiments of the prosecution. It has to satisfy itself on whether the verdict was sound by considering the evidence and analyzing the same in order to arrive at an independent opinion.

4. **PW1** the complainant stated that in February, 2006 he attended a Kenya Armed Forces recruitment in Kanduyi with his brother Peter Mukamia Wanjala and accompanied by their father. None of them were successful and as they left they stopped at Kanduyi Inn to take soda where they met one Godfrey Mulongo when their father spoke to regarding their unsuccessful attempt and the said Godfrey introduced them to the appellant whom the said Godfrey sat with, as a sergeant with the army and who could assist them.

The appellant removed an identification card and told their late father that he could assist the two sons on

payment of Kshs. 50,000/=. His father went to the bank and returned with Kshs. 100,000/= and each one of them got calling letter to report to the Army recruitment training centre in Eldoret on 27.2.2006. He also learnt from one Paul PW3 that he also paid a similar amount on a promise to be assisted. That on 27.2.2006 they went to Sossion Hotel and met the appellant, who arrived in a saloon car. The appellant then took them to the centre but he later informed them the boss was asleep and he asked them to go back as they would be called later. After this encounter they returned home and thereafter they could not reach the appellant as he changed his telephone line. They searched for the appellant to no avail until witness spotted the appellant at Chwele at another recruitment in 2014 and he alerted the Chwele D.O's office leading to the arrest of the appellant.

5. PW2 Annah Makina Wanjala on her part narrated how in the company of her nephew she also got a promise by the appellant at Kanduyi Inn. They paid Kshs. 50,000/= to the appellant who assured her that her nephew would get an admission. He also gave her a letter. She later accompanied her nephew to Sosiani Hotel where they met other "recruits." The appellant came in a saloon car, took the children with him but later they returned with their ID cards which the appellant had earlier taken. He told them to go home and wait. He also stated that after his arrest the accused offered to refund the money which he had not done at the time of hearing.

6. PW3 Paul Masika Mauka recalled that in February 2006, he attended a recruitment excise where he was not successful and on the said day he met a teacher who in turn introduced him to a sergeant, Gilbert Khaemba the appellant who said he was stationed at Thika.

The appellant showed them his army identity card and letter sending him to recruit and some calling letters for the successful candidate. He asked his mother for Kshs. 50,000/=. His mother looked for the money and gave the appellant in turn the appellant gave them a calling letter, he was to report on 27.2.06. On the said date the appellant appeared at Sossion and took them to the training ground. The appellant spoke to an officer at the gate returned and informed them that the boss was at the showground and would see them the next day he took the original calling cards and returned then original ID cards. He told them he was heading to Thika, and would hand in their calling letters. Thereafter he could not be reached. On 10.10.2010 he learnt from PW1 that the appellant had been arrested.

PW4 Cpl. Philip Ripis. He recalled arresting the appellant on 8.10.10 upon receiving instructions from C.I Albert the DCIO then.

7. PW5 A.P. Anthony Ngure recalled that on 8.10.2010 PW1 reported that a person who had conned home of Kshs. 100,000/= in 2006 had been seen in Chwele and he alongside other officers were instructed to arrested the said person who was pointed out to them. He arrested 2 people one was the appellant. On arrest the appellant was searched and on him were a medical examination form, a diary containing recruitment dates of Kenya Army, a list of persons and telephone numbers. At the time was army recruitment at Chwele.

The accused was found to have a case to answer and was put on his defence. He stated that he was a Principal teacher of Tendalo Secondary School and on 8th October, 2010 he had gone to Chwele where he arrived at 7.00 a.m. to meet a supplier at 9.00 a.m. then at 10.30 as he was at Chwele matatu stage 3 people approached him and alleged that they suspected him of conning people by pretending to be an army officer. He was arrested and later he was joined by his co-accused whom he did not know. The following Monday they were arraigned in court.

8. Having analyzed the evidence before court there is no doubt that there are minor contradictions in the evidence of the prosecution witnesses. However the evidence generally is credible and mainly consistent on how the appellant impersonated as army officer the rank of a Sergeant, tasked to recruit; how he asked for Kshs. 50,000/= to assist the complainant, another like sum for and his brother Peter, **PW2** and others; how he issued "calling letters" for admission of the young men to the training centre on 27.2.2006, and his disappearance thereafter. In this regard the evidence of **PW1 – 3** was consistent. I find the witness to have been credible so that minor discrepancies cannot be said to have watered down the then evidence. The defence was a mere denial did not dislodge the otherwise consistent and cogent evidence. All the 3

identified the appellant unmistakably as the person who conned them. I therefore find myself to be in concurrence with the trial court. In this regard.

I find the submission by the State that the evidence of the witness to be full of contradictions totally misplaced and not well thought over. At the trial the prosecution asked to be allowed to use photocopies of calling letters as the originals had been taken by the appellant, it explained why the document examiner could not be called in the absence of the original. There was no opposition by the appellant at the time and therefore this cannot form a basis for allowing this appeal. The prosecution at the trial no doubt proved its case to the required standard. For the above reasons the appeal fails. It is dismissed.

Dated at Bungoma this 28th day of July, 2016.

ALI-ARONI

JUDGE.