



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 115 Of 2016.

JEREMIAH OKWUNNA OBIOHA

Alias **JEREMIAH WAMBUA KILONZO.....APPELLANT**

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrates

Court at Kibera in the Criminal Case No. 623 of 2013 delivered by Hon. C. Ondieki delivered on 27th July, 2016.)

JUDGMENT

BACKGROUND.

Jeremiah Okwunna Obioha alias Jeremiah Wambua Kilonzo, the Appellant herein was charged with committing 10 offences on various dates. The first count was that of making a document without authority contrary to section 357(a) of the Penal Code whose particulars were that between 7th July 2010 and 13th July 2010 at Matiani village in Wote Division within Makueni county, jointly with others not before court, with intent to deceive and without lawful authority made a certain secondary school leaving certificate admission number 2917 for Kilome S.A Secondary school in the names of Jeremiah Wambua Kilonzo, purporting it to be a genuine Secondary School leaving certificate signed and issued by the head teacher Kilome S.A Secondary School, Makueni District.

The second count was with regards to the offence of uttering a false document contrary to section 353 of the Penal Code. The particulars were that on 13th July 2010 at Wote Registration Centre in Makueni District within Makueni county, knowingly and fraudulently uttered a certain forged Secondary School leaving certificate, Admission number 2917 in the names of Jeremiah Wambua Kilonzo to James Muli Mutungi a registration officer with the National Registration Bureau, purporting it to be a genuine Secondary School leaving certificate signed and issued by the head teacher Kilome S.A Secondary school in Makueni District.

The third count involved committing the offence of procuring execution of a document by false pretences contrary to section 355 as read with section 349 of the Penal Code. The particulars of the offence were that on 13th July 2010 at Wote registration centre in Makueni District within Makueni County, jointly with others not before the court, by means of false and fraudulent representation as to the nature, content

or operation of a document, procured Mr. James Muli Mutungi, a Registration Officer with the National Registration Bureau to issue a Registration form namely Reg. 136A Serial Number 021997N in the names of Jeremiah Wambua Kilonzo, for the purpose of Registration for a Kenyan National Identity Card to him.

The fourth count was for the offence of giving false information to a person employed by the public service contrary to section 129(a) of the Penal Code. The particulars of the offence were that on 13th July 2010 at Wote Registration Center in Makueni District within Makueni county, informed Mr. James Muli Mutungi a registration officer with the National Registration Bureau that he is the genuine holder of a school leaving certificate Admission number 2917 from Kilome S.A Secondary School with date of birth 15th November 1980 and a real biological son to Kilonzo Wambua, the holder of National Identity card No. 1029202 and Esther Obio Kilonzo and that he wanted the said James Muli Mutungi to register the said Jeremiah Okwunna Obioha alias Jeremiah Wambua Kilonzo for a National Identification card using the particulars of Kilonzo Wambua as the biological father, a Kamba by tribe and resident of Matiani village, Mukaa location in Makueni district, information that caused the said James Muli Mutungi to register the said Jeremiah Okwunna Obioha alias Jeremiah Wambua Kilonzo using the particulars of Kilonzo Wambua as the biological father, information that the said James Muli Mutungi ought not to have done if the true state of facts respecting which such information was given had been known to him.

The fifth count was linked to committing the offence of procuring registration by false pretenses contrary to section 320 of the Penal Code. The particulars of the offence were that between 13th July and 3rd December 2010 at Wote Registration Centre in Makueni District within Makueni County, willfully procured registration of a Kenyan National Identity card Number 29295658 serial number 2295451593 in the names Jeremiah Wambua Kilonzo through an application form namely Reg 136A serial number 021997N, by falsely pretending that the said Jeremiah Wambua Kilonzo is a Kenyan citizen, the genuine holder of a Secondary School leaving certificate admission number 2917 from Kilome SA Secondary School and a real biological son of Kilonzo Wambua, holder of National Identity Card Number 1029202.

The sixth count was linked to the offence of uttering a false document contrary to section 353 of the Penal Code. The particulars were that on 6th June 2011 at Bishops Gardens House at Community in Nairobi within Nairobi county, knowingly and fraudulently uttered a certain forged Secondary School Leaving Certificate Admission number 2917 in the name Jeremiah Wambua Kilonzo to Hilton Kariuki Waweru, a senior registrar with the department of Civil Registration, purporting it to be a genuine Secondary School leaving certificate signed and issued by the Head teacher Kilome S.A Secondary School in Makueni District.

The seventh count was linked to the offence of procuring registration by false pretenses contrary to section 320 of the Penal Code. The particulars were that between 2nd June and 6th June 2011 at Bishops Gardens House at Community within Nairobi county, jointly with others not before court, willfully procured registration of a Kenyan Birth Certificate serial number 745367 Birth entry number 02101823/11 in the names of Jeremiah Kilonzo Wambua, by falsely pretending that the said Jeremiah Okwunna Obioha alias Jeremiah Wambua Kilonzo is a biological son of Kilonzo Wambua holder of a Kenyan National Identity Card No. 1029202 born on 15th November 1980 at Machakos District and the genuine holder of a Secondary School leaving Certificate Admission number 2917 for Kilome SA Secondary School and the genuine holder of a Kenyan Identity Card Number 29295658.

Count eight involved the offence of procuring registration by false pretence contrary to section 320 of the Penal Code. The particulars were that between 6th and 8th June 2011 at the Immigration offices at Nyayo House in Nairobi within Nairobi county, jointly with others not before the court willfully procured registration of a Kenyan passport number A1657494- Immigration file R number 1621934 in the names of Jeremiah Wambua Kilonzo, by false pretence that he is a Kenyan citizen, the genuine holder of a Kenyan Identity card number 29295658, Birth certificate serial number A745367, Birth entry number 02101823/11 and a real biological son to Kilonzo Wambua holder of an identity Card number 1029202.

Count nine involved the offence of being unlawfully present in Kenya contrary to section 53(1)(j) of the

Kenya Citizenship and Immigration Act, 2011. The particulars of the offence were that on 11th November 2011, the Appellant, being a Nigerian National was found at Jomo Kenyatta International Airport within Nairobi county being unlawfully in Kenya in contravention of the law as he had no valid pass or permit authorizing him to remain in Kenya.

The last count, tenth, involved the offence of refusing to have his fingerprints taken contrary to section 55(1) as read with section 55(5)(6) of the National Police Service Act. The particulars of the offence were that on 20th February 2013 at Kilimani Police Station within Nairobi County, while under the custody of a police officer, Sergeant Anderson Mwaro Nguu of Provincial CID headquarters Nairobi area, without lawful excuse, refused to have his fingerprints taken for the purpose of evidence and records.

The Appellant was arraigned before the trial court and upon conclusion of the trial was found guilty in counts 1,2,3,4,5,7,8 and 10 and acquitted in counts 6 and 9. He was sentenced as follows; in count 1 to payment of a fine of Kshs. 50,000 or in default serve 2 years imprisonment, in count II to a fine of Kshs. 50,000 or in default serve a sentence of 2 years imprisonment, in count III to a fine of Kshs. 30,000 or in default serve a sentence of 1 year imprisonment, in count IV he was sentenced to a fine of Kshs. 30,000 or in default serve 1 year imprisonment, in count V to a fine of Kshs. 20,000 or in default serve 6 months imprisonment, in count VII to a fine of Kshs. 20,000 or in default to serve 6 months imprisonment, in count VIII to pay a fine of Kshs. 20,000 or in default to serve 6 months imprisonment and finally in count V to a fine of Kshs. 10,000 or in default to serve 3 months imprisonment.

The Appellant was dissatisfied with both the conviction and sentence as a result of which he lodged this appeal. His first ground of appeal was that the trial magistrate erred in misdirecting his mind as to the law, degree and standard of proof relating to the burden of proof and instead paid undue emphasis on the fact that the Appellant chose to remain silent. Secondly, that the trial magistrate did not properly analyze all the evidence on record and this selective analysis meant he failed to form a balanced view and prejudiced the Appellant and further that he did not consider the inconsistencies, discrepancies and contradictions in the prosecution's case. Thirdly, that the trial magistrate erred in admitting and considering evidence which was recovered in a manner contrary to the Constitution specifically the fact that the house where certain exhibits were recovered was never proved to belong to the Appellant. Fourthly, that the prosecution failed to call for material evidence and/or crucial witnesses which should have been construed against the prosecution's case. Fifthly, that the sentenced meted out was illegal, harsh and excessive in the circumstances of the case.

SUBMISSIONS.

The Appellant was represented by Mr. G. Kamau and Wang'alwa Advocates who filed written submissions. Counsel submitted that the prosecution failed to discharge their burden in proving the case beyond a reasonable doubt. They asserted that the Appellant was convicted after the learned trial magistrate shifted the burden of proof on the Appellant. It was their observation that the police investigations were shoddy. More specifically, they poked holes in the manner the key document, being a school leaving certificate was recovered. The prosecution advanced a case that the document was recovered from the house of the Appellant. Unfortunately, no search warrant was obtained when the search was conducted. An inventory was also not prepared after the recovery which raised doubt on the source of the document. Therefore, the conviction of the Appellant based on the alleged recovery of the said document was improper.

It was the counsel's submission that the documents adduced to demonstrate that the Appellant was a Nigerian were computer generated. The documents were however not properly produced pursuant to Section 65(8) of the Evidence Act. It was further the submission of the counsel that crucial witnesses were not called in support of the prosecution case. More particularly was one, a Mr. Kilonzo Wambua who presented the Appellant to the local administration as his son on whose information the registration of the Appellant as a Kenya Citizen began. The said Mr. Kilonzo Wambua's whereabouts were known and could easily be reached. The failure to call this crucial witness gave the inference that had the witness testified, he would have adduced adverse evidence for the prosecution. The case of **Bukenya & others vs Uganda [1972] EA 549** was cited in support of the submission. On the count of failure to give finger

prints, counsel submitted that in the trial, it was established that the investigating officer had already obtained them. In any case, the Appellant's initial refusal to give the finger prints was based on his advocate's advice not to do so. As such, the prosecution ought to have withdrawn the charge.

Finally, counsel submitted that it was erroneous that he learned trial magistrate ordered for the repatriation of the Appellant when in fact he had acquitted him on the account of being unlawfully present in Kenya.

The Respondent through learned State Counsel, M/s Aluda conceded to the appeal based on the submission of the Appellant.

EVIDENCE.

This is the first appellate court whose duty is to reevaluate the evidence on record and come up with its independent conclusions. The court should however bear in mind that it has neither seen nor heard the witnesses and give due regard for that. *See Njoroge v Republic (1987) KLR, 19.*

PW1, James Wambua Mutua testified that he was an immigration officer. He recalled that on 29th November, 2011 he was at JKIA on night duty clearing passengers when at about 10:00 p.m. a Kenya Airways (hereafter KQ) officer brought a passenger to him together with his travel documents. He wanted the witness to ascertain whether the passenger in question was a Kenyan citizen. He had spoken to him in Kiswahili but there was no response which led the witness to conclude that he did not understand Kiswahili and they started conversing in English. He checked the passenger's passport and he found that he was born in Machakos, the witness' locality, and thus tried to converse with him in the Kamba language which he also did not understand. He found that the passenger's accent was not Kenyan and he therefore advised his seniors not to allow him to travel and they denied him departure. He handed the passenger and his documents to his supervisor and wrote his statements.

In cross examination he admitted that there was an exit stamp on the passport that was canceled. He testified that the KQ staff did not inform him the reason he suspected the authenticity of the passport. He further admitted to endorsements in the passport that showed that the Appellant had traveled to Turkey using the passport. He further testified that talking to the passengers in several languages is part of profiling them and that he detained the Appellant to ensure that his nationality was ascertained.

PW2, James Muli Mutungi worked for Immigration Department in Makeni. He testified that he processed the registration of the Appellant upon presentation before him the Appellant parents' original identity cards and the Appellant's school leaving certificate from Kilome S.A. Secondary School. In lieu of a birth Certificate, the Appellant presented a letter from the Chief indicating that he was born of a father from the locality.

PW3, Jecinta Wamalwa was from the Department of Registration of Persons. She specifically worked in the Birth registry. She received an application for baby Jeremiah Kilonzo Wambua – baby no. 02101823/11 requesting for a late registration. The application was accompanied by a copy of identity card of Kilonzo Wambua, the baby's father. **PW4, Gladys Munya Karemi** also worked for Immigration Department on issuance of passport. She processed an application for a passport for Jeremiah Wambua Kilonzo on 7th June, 2011. All the necessary documents including a birth certificate and an identity card were in the file.

PW5, Anthony Njoroge Njoki was the Chief Immigration Officer stationed in Nairobi. His main duties were investigations. He conducted investigations in the respect of the Appellant's file no. 1621934 in the name of Jeremiah Wambua Kilonzo. He was accompanied by two administration officers to conduct a search in the Appellant's house. The search was aimed at ascertaining the Appellant's nationality. They found a register with the name Jerry Ambioha and a certificate for registration of business names. The data in his office produced the name of one, Jeremiah Okwunna Ombioha, a Nigerian National. The photograph in the system was identical to the one on the National Identity Card. A flight manifest showed that the Appellant arrived in Kenya on 31st July, 2009. From his house, was recovered a school leaving

certificate which later turned out was not issued to the Appellant by the school.

PW6, Francis Kyalo Kimaiyo was the Assistant Chief where the Appellant hailed. He was approached by the Appellant for purposes of his registration for an identity card. He escalated the matter to the District Registrar of Person. At the time the Appellant was accompanied by one Nzoka who claimed to be his cousin. The said Nzoka spoke on behalf of the Appellant claiming that the Appellant was shy to speak. This was the commencement of the registration of the Appellant as a Kenyan Citizen. **PW9, Joseph Mwanzia Kalendi** was the village elder of Kiani village, Mikaa Location where the alleged father of the Appellant hailed from. His testimony was that he had sired the Appellant with a woman from Western Kenya but had separated with her. The Appellant used to visit him at home. The Appellant wanted the elder to facilitate his registration. He elevated the matter to PW6. PW6 on the other hand escalated the matter to **PW10, Joseph Maweu Nyanga**, the then Chief of Mikaa Location in Makueni County. Before PW9 was the Appellant, his alleged father and other village elders. He found the documents presented by the Appellant to be in order. **PW7, Purity Wantai Mwendwa** of Nyayo House Nairobi processed the Appellant's passport on being satisfied that all documentation was in order. **PW8** was the Principal Kilome SA Secondary School since the year 2013. His testimony was that the Appellant was not a student in the said school and had therefore not been issued with an admission number 2917. Instead, the admission number belonged to one Francis Mwanzia who left the school in 2013.

PW11, Sergeant Anderson Ngua, was the investigating Officer. He summed up the evidence of the prosecution witnesses and preferred the charges against the Appellant. In addition, he testified that he forwarded the Appellants finger prints to Nigeria through the Interpol with a view to ascertaining whether the Appellant originating from Nigeria. Unfortunately, his request was not responded to.

PW12, Chief Inspector Alex Mwongela was the document examiner. He confirmed that the school leaving certificate had not been signed and issued by the then Principal of Kilome SA Secondary School. The schools stamp appended to the school leaving certificate produced in court was also not a stamp originating from the school. This also applied to the letter head logo.

In defence, the Appellant chose to keep quiet and wait the court's decision.

DETERMINATION.

After considering the evidence on record and the respective submissions, the duty of this court is to determine whether the prosecution proved its case beyond a reasonable doubt. I find it prudent to begin with issues raised regarding Count No. X. This related to the assertion that the Appellant refused to have his finger prints taken contrary to Section 55(1) as read with Section 55(5) (6) of the National police Service Act No. 11 A of 2011. The Appellant in his defence stated that he declined to have his finger prints taken on advice of his advocate. The proceedings do however show that after he was arraigned in court, he conceded to having his finger prints taken. It appears that the investigating officer did not follow up on this although he testified he obtained the finger prints from the Immigration Department. Accordingly, the prosecution ought to have withdrawn the charge on concession by the Appellant to cooperate with the police. I hold that his conviction in respect of this count was not proper.

Counts II, III, IV, V and VII relate to documents allegedly recovered from the house of the Appellant. This calls the court to interrogate the manner in which the recovery was made. In the Appellant's view, the search in his house was illegal. Firstly, because it was done in his absence secondly, because no search warrant was obtained and thirdly, because an inventory on the recovered goods was not prepared. The case for prosecution on the other hand was that the search officers more particularly PW5 who was an Immigration Officer was given consent to conduct the search by the Appellant's wife. PW5 was at the time of the search in company of two Administration Police Officers. The first loophole in this search was that the Administration Police officers who accompanied PW5 were not called as prosecution witnesses. The corroboration of PW5's evidence in the respect of the search could not be wished away. I say so because it was through the recoveries made that the prosecution deduced that the Appellant was a Nigerian and not a Kenyan. It is also through the search that it was concluded that the Appellant had

fraudulently registered himself as a Kenyan.

A school leaving certificate from Kilome S.A. Secondary School bearing the name of Jeremiah Wambua Kilonzo was said to be one of the documents used to facilitate his registration as a Kenyan. It was alleged that he uttered the said document to PW2 which in turn facilitated the issuance of a Kenyan Identity Card. According to PW2, in addition to the school leaving certificate, the Appellant's parents' identity cards and a letter from the chief were presented to him for this purpose. Suffice to state, no search warrant was obtained prior to the recovery of the school certificate. And since the wife of the Appellant who allegedly gave consent for the search was not a prosecution witness, it was mandatory that an inventory be submitted to court as prove of not only the recovery but the presence of the persons during the recovery. None of these was adduced before the court. That ought to have created a doubt in the mind of the trial magistrate as to the origin of the birth certificate. It follows then that since counts II, III, IV, V and VII were premised on the presence of the school leaving certificate had to fail. In short, the said school leaving certificate having not been properly obtained was not a document the court ought to have founded a conviction on.

This leaves the court to determine the strength of Count I. The Appellant was charged with making a document without authority contrary to Section 357(a) of the penal Code. It was alleged that between 7th July, 2010 and 13th July, 2010, at Matiani Village in Wote Division, in Makueni District within Makueni County, jointly with others not before the court with intent to deceive and without lawful authority made a certain secondary school leaving certificate admission no. 2917 for Kolome SA Secondary School in the names of Jeremiah Wambua Kilonzo, purporting it to be a genuine Secondary School leaving certificate, signed and issued by the head teacher Kilome SA Secondary School, Makueni District. It suffices to emphasize that no evidence was called in support of this charge. The conviction was once again hinged on the school leaving certificate itself which the court has already ruled was not properly admitted in court. In that regard, Count number I could not stand as well. I emphasize more specifically that no witness was called to demonstrate that the Appellant made the said document.

Turning on to count VIII, the Appellant was charged with procuring registration by false pretenses contrary to Section 320 of the penal Code. The document in question was a Kenyan Passport number A.1657494- Immigration File No. 1621934 in the names of Jeremiah Wambua Kilonzo. It was alleged that he procured the said passport by falsely pretending that he was a Kenya Citizen and a genuine holder of a Kenyan Identity Card No. 295658, birth certificate serial No. A745367-birth entry number 02101823/11 and a real biological son to Kilonzo Wambua holder of Identity Card No. 1029202.

A summary of the prosecution evidence was that the Appellant used his purported parents' identity cards as well as the recovered school leaving certificate to register for a Kenya National Identity Card, Birth Certificate and Passport. PW2, James Muli Mutungi of the Ministry of Immigration registered the Appellant for the Birth Certificate. He used the local chief's letter. On the other hand, the chief who was PW10 testified that he was approached by the village elder (PW9), the Appellant and a Mr. Wambua who informed him that the said Mr. Wambua claimed that the Appellant was his son. On the strength that the Appellant was sired by a woman who was not living with Mr. Wambua and Mr. Wambua being his resident recommended for his registration. The turn of events was that Mr. Wambua had first reported to the village elder after which he was referred to the Assistant Chief (PW6) and finally to PW 10. The prosecution only needed to fulfill one task that is, to call Mr. Kilonzo Wambua who claimed to have sired the Appellant. He was a resident within the location and sub-location of both PW6 and 10. To the chagrin of this court, the person was not a prosecution witness and no explanation was given for the failure of the prosecution to call him. He is the only person who would have cleared the air and sealed the prosecution's case that the Appellant was not sired by him. That way, it would have been established that the Appellant procured his registration as a Kenyan Citizen by false presences. I emphasize that the failure to call this crucial witness gave the inference that had he been called his evidence would have been adverse to the prosecution's case. Moreover, it is also the same witness who would have directed the investigators on the origin of the mother of the Appellant. Therefore, I find that the failure to call the said witness rendered a fatal blow to the prosecution's case. I find solace in the holding in the case of **Bukenya Vs Republic [1972] EA, 549** in which the then East African Court of Appeal held as follows:

It is well established that the director has the discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. First, there is a duty of the director to call and make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has merely the right but the duty to call any person whose evidence appears essential to the just decision on the case. Thirdly, while the director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of those witnesses, if called would have been or would have tended to be adverse to the prosecution case.”

From the foregoing, it follows that the prosecution failed to prove the case in all the counts the Appellant was convicted for beyond a reasonable doubt. The appeal herein is accordingly allowed.

Finally, I must add that the learned trial magistrate misdirected himself by making an order of repatriation after acquitting the Appellant for the offence of being unlawfully present in Kenya. In that respect, that order is hereby set aside as the same was improper. I quash the conviction, set aside the sentences and order that the Appellant be and is hereby forthwith set free. It is so ordered.

Dated and Delivered at Nairobi this 15th day of December, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

- 1. Mr. G. Kamau and Wang’alwa for the Appellant.*
- 2. M/ s Sigei for the Respondent.*