REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 30 OF 2012

FORMERLY HIGH COUR OF KENYA AT MALINDI CRIMINAL APPEAL NO. 132 OF 2011

APPEAL FROM THE ORIGINAL CONVICTION AND SENTENCE BY THE RESIDENT MAGISTRATE AT HOLA (MR. M.O OBIERO, RM) IN CRIMINAL CASE NO. 208 OF 2009

ADEN ALI ABDI……………………………….APPELLANT

VERSUS

REPUBLIC…………………………………RESPONDENT

JUDGEMENT

Background

Aden Ali Abdi, the appellant, was charged in the Hola Resident Magistrate's Court jointly with others with various counts. There were six counts in total but the appellant had been charged jointly with others in Counts 1, 2, 5 and 6. He was acquitted on counts 2 and 6. He was convicted and sentenced on counts 1 and 5. He has come to this court on appeal in respect of these counts which are reproduced here below as follows:

i. **Count 1** - Conspiracy to commit a misdemeanor contrary to section 394 of the Penal Code. The particulars read that on 29th July 2009 at Division Officer's Office in Ijara District within North Eastern Province jointly conspired to commit a misdemeanor namely procuring a document namely waiting card S/No. 2243294697 by false pretences.
ii. **Count 5 –** Giving false information to a person employed in the Public Service contrary to section 129 (a) of the Penal Code. The particulars of this charge show that on the same date and place as in count 1, jointly gave false information to Mr. Stanley Njuguna Muturi the Division Officer in charge of Masalani, a person employed in the Public Service that he knew the applicant and his father which information he knew to be false intending to cause the said officer to authorize Okash Mohamed Farah to be given a Kenyan National Identity card which the said officer ought not to have done if the state of facts respecting which such information was given had been known to him.

The trial court called for a probation report after which he sentenced the appellant to two years' probation in each count to run concurrently.

Petition of appeal

This appeal was first filed in Malindi before it was transferred to Garissa High Court for determination.

By a petition of appeal filed in Malindi on 2nd December 2011 contesting the conviction and sentence, the appellant has raised the following grounds:

i. The learned trial magistrate erred in law and fact in holding that the appellant conspired to cheat the vetting panel when there was no evidence to support the same.
ii. The learned trial magistrate erred in law and in fact by holding that the appellant stopped the vetting committee from interviewing the 1st Accused and therefore arrived at the wrong conclusion that the appellant interfered with the vetting process with the aim of misleading the vetting committee.
iii. The learned trial magistrate erred in law and in fact by proceeding to convict and sentence the appellant on count IV of the charge when the appellant was not charged in count IV of the charge sheet.
iv. The learned trial magistrate erred in law and in fact by failing to appreciate and analyze the evidence of the appellant and therefore arrived at the wrong conclusion that he was guilty as charged.

Facts

Briefly, the facts of this case are that one Okash Mohamed Farah, who was jointly charged with the appellant, presented himself before the Vetting Panel at Masalani Division for purposes of obtaining a Kenyan National Identity Card. In that panel were Stanley Njuguna Muturi District Officer and chairman of the Panel, PW4, Rashid Athman Dhadho, PW1, Police Constable Denis Nderitu, PW5 and the appellant among others. The appellant was the Chief of Masalani. During the vetting process, the panelists interrogated the applicant on the documents he had presented. However, the appellant told the panel that he knew the applicant as a resident from his area. The chairman of the panel asked the appellant to write a letter to that effect and he wrote a letter produced as exhibit No.3. The panel caused the applicant Okash Mohamed Farah to be registered and to be issued with a waiting card.

Okash Mohamed Farah was arrested on 1st August 2009 and detained in police custody. Following that arrest, one Mohamed Farah claimed that Okash Mohamed Farah was his son. He too was arrested. Blood samples from Okash Mohamed Farah and Mohamed Farah were taken for DNA analysis. They did not match leading to the arrest of the appellant. He was charged jointly with Okash Mohamed Farah, Mohamed Farah and another.

Appellant's submissions

Mr. Otieno, counsel for the appellant, submitted that there is no evidence to support a charge of conspiracy; that the witnesses did not state that the appellant interfered with the vetting process as concluded by the trial magistrate; that what the appellant did was procedural and at no time did he interfere with the vetting process.

Counsel further submitted that the trial court heavily relied on the evidence of PW5 despite the fact that he was not one of the panelists; that there is no evidence to support prior plans or ill motive before the vetting exercise; that the trial court relied heavily on the blood samples without evidence clearly showing how the blood samples were taken; that the trial magistrate did not consider all the evidence and the record is clear that the appellant was not charged with count IV. Counsel asked the court to allow the appeal.

Respondent's submissions

The appeal was opposed by the respondent. The learned state counsel submitted that ground 2 of the appeal lacks merit because there is evidence to show that the appellant interfered with the vetting process; that the trial magistrate found the appellant guilty in counts 1 and 5 but erroneously indicated that it was count 4 during sentencing; that this is human error which is curable under section 382 of the Criminal Procedure Code; that the appellant was not prejudiced during sentencing since.

Learned state counsel further submitted that the evidence clearly shows that the appellant wrote the letter and that evidence has not been controverted; that it is not true as claimed by the appellant that his duty was only to sign because evidence shows he confirmed that he knew the applicant. Counsel submitted that the judgement of the lower court is sound and asked the court to dismiss the appeal.

Determination

Conspiracy is defined by the Black's Law Dictionary 8th Edition as:

> **"An agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective."**

From this definition, the essential element of the crime of conspiracy is the agreement by two or more persons to carry out a criminal act.

I have read the evidence of all the witnesses in detail. To start with I wish to lay to rest the issue concerning the conviction of the appellant on count IV when he was not charged with that count. I have checked the handwritten judgement and I have confirmed that the trial magistrate convicted and sentenced the appellant on counts one (1) and five (V). For avoidance of doubt I invite the two counsels to confirm this from the handwritten judgment dated 2nd December 2014. It is therefore a typographical error to indicate that the appellant was sentenced on Count 1 and IV.

In respect of ground four, I have noted that the trial magistrate narrated what the appellant stated in his defence without analyzing the same. However, this court is under an obligation to evaluate the evidence afresh. In his defence, the appellant repeated the vetting procedure and told the court that he was directed to write the letter that he knew Okash Mohamed by the chairman of the Board (PW4). He also said he saw Okash Mohamed on that day. Obviously, he meant that Okash Mohamed was not known to him. In cross-examination he told the court:

> **"I wrote a letter confirming that the said Okash originates from my location. I knew Mohamed Farah Abdi. I did not know his children. I did not know Okash Farah. My duty at the committee is to sign forms."**

Further, the appellant told the court that he wrote the letter because the 2nd Accused (Okash Mohamed Farah) had been identified by the elders.

The appellant cross-examined the chairman, PW4, and nowhere did he ask about PW4 directing him to write the letter in question. According to PW4, the appellant wrote the letter in the presence of the Vetting Panel. This agrees with the evidence of other witnesses.

In respect of grounds 1 and 2, the evidence is clear that the applicant, Okash Mohamed Farah, presented his documents, including age assessment form, photocopy of identity card purportedly belonging to his father Mohamed Farah and a letter from the appellant. Evidence of PW1, PW4 and PW5 agree that the letter in question was written by the appellant in their presence at the vetting room after PW4 asked the appellant to write the letter. This followed the appellant's intervention that he knew the appellant.

That the appellant wrote that letter is not in dispute. He has admitted writing the same and the handwriting expert, Mr. Antipas Nyanjwa, PW6, confirmed the same. The letter is dated 28th July 2009 and states that the bearer (Okash Mohamed Farah) comes from Masalani Location.

Evidence shows that at the time of vetting all seemed in order. Evidence shows that when the panelists probed the applicant (Okash) in search of answers as to his background, the appellant intervened and told the Panel he knew the applicant. This information was obviously believed because the chairman authorized the issuance of a waiting card on the strength that the appellant knew the applicant.

Later, the appellant was intercepted on his way to Mombasa and arrested. In his possession was the waiting card he had been issued with. Investigations led to his arrest on 1st August 2009 and placement in police custody. Evidence shows that while in police custody Mohamed Farah went looking for him. He too was arrested. Enquiries revealed suspicions that they were not father and son as they claimed.

PW8, Chief Inspector Alfred Ouko, caused their blood samples to be taken at the Masalani Hospital on 4th August 2009. It was taken for analysis at the Government Laboratory in Nairobi. The DNA profiling laid to rest the claim that Okash Mohamed Farah was the son of Mohamed Farah.

My careful analysis of the evidence by prosecution witnesses leads me to the conclusion that it cannot be true that the appellant was instructed to write the letter. The appellant seems to imply that he was forced to write that letter or instructed in a way that amounted to coercion. This cannot be true. The appellant was not alone with his boss, PW4. He wrote that letter in the presence of the other panelists. All evidence shows that the appellant intervened before the panel probed the applicant exhaustively. He told them that he knew the applicant. He was told to write a letter to that effect for the record and he did it. Indeed, a letter from a chief from the location of the applicant is one of the requirements of vetting as evidence shows. There is no other letter from another office safe that from the appellant.

His contradictions in evidence show that he had something to hide. He stated that he wrote the letter after he was instructed to do so by PW4. He contradicted this to say that he wrote the letter because the elders had identified the applicant.

Matters of issuing national identity cards are serious. Given the history of this country where refugees have sought identity cards, it is incumbent upon anyone vouching for an applicant to be extra careful to present truthful information. The appellant lied to the Vetting Panel by stating that he knew the applicant. He admitted in cross examination that indeed he did not know him but he knew his father Mohamed Farah who was found not to be his father as stated. What would have stopped him from telling the Vetting Panel that he did not know the applicant and seek time to confirm if indeed the applicant was from his location?

In my view, the appellant knew that the applicant was not from his location. He tried to stop further probing by the Panel to avoid them from discovering the truth. The appellant told the Panel an outright lie when he knew the applicant was not known to him.

I have stated elsewhere in this judgment that conspiracy involves an agreement between two or more persons to commit an unlawful act. In my view, the word “agreement” here should be taken in its ordinary sense without making the word too technical as to imply existence of a contractual relationship. In my view the existence of an agreement may be inferred from the appellant’s conduct of lying to the Vetting Panel. Being a public officer, the appellant must be accountable for the applicants he identified to the Panel. He cannot claim the applicant was identified by elders when he was the one bearing the heaviest responsibility. I have no doubt that he intervened to stop further probing of the applicant by telling the Panel that he knew the applicant. The Panel acted in good faith which was abused by the appellant.

After due consideration of all the evidence and the appellant’s defence, it is my conclusion that there is proof beyond reasonable doubt that the appellant committed the charges contained in counts 1 and V. I find he was properly convicted. I found nothing wrong with the sentence. The maximum sentence is 2 years imprisonment under section 36 of the Penal Code. The appellant was placed on 2 years’ probation in each count to run concurrently. I think the appellant should count himself lucky!

In conclusion, this appeal has no merit and is hereby dismissed.

Dated, signed and delivered this 30th day of June 2014.

S.N.MUTUKU

JUDGE