REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 159 OF 2013

DAVID KAHI AMBUKU.....APPELLANT

VERSUS

REPUBLIC……..…RESPONDENT

(Being an appeal from the original judgment and conviction Eldoret Principal Magistrate's Court in criminal case 2920 of 2010 Republic v. David Kahi Ambuku and another delivered by F.N Kyambia, Principal Magistrate, on 2nd August 2013)

JUDGMENT

1. The appellant was convicted on a count of obtaining money by false pretences contrary to section 313 of the Penal Code. He was also convicted on a count of personation contrary to section 382(1) of the Penal Code. He was sentenced to serve three years imprisonment on each count. The sentences were to run consecutively.
2. The particulars of obtaining by false pretences were as follows-

> *"On the 9th day of January, 2010 at Eldoret town in Uasin Gishu District within Rift Valley Province, jointly with intent to defraud, obtained a sum of Ksh. 3.5 million from Mr. Patrick Mwangi Muchuki by false pretending that you were in a position to secure to secure him tender of supplying furniture at the United Nations Office in Entebe Uganda, a fact you both knew to be false or untrue."*

3. There was a second count facing his co-accused, Laban Kamau Rubiri. The latter was discharged under section 210 of the Criminal Procedure Code. The appellant was charged in count III with personation the particulars being that-

> *"On diverse dates between 15th December 2009 and 9th January 2010 at Eldoret town in Uasin Gishu District falsely represented himself to Mr. Patrick Mwangi Muchuku as an employee of United Nations Headquarters in Gigiri Nairobi."*

4. The appellant is aggrieved by the conviction and sentence. The petition of appeal was filed on 12th August 2013. The grounds of appeal can be condensed into five: first, that the evidence was contradictory and not corroborated; secondly, that the learned trial magistrate failed to properly evaluate the evidence and considered irrelevant facts; thirdly, that the trial court disregarded the

appellant's defence; fourthly, that the appellant's mitigation was not considered; and, lastly, that the sentence was irregular and excessive. In a synopsis, the appellant's case is that the charges were not proved beyond reasonable doubt.

5. The appellant filed detailed submissions on 26th September 2014. At the hearing of this appeal, the appellant highlighted pertinent parts of his appeal. I will summarize his key arguments. On sentencing he faulted the consecutive sentences of three years as unusual and excessive. This was because he was ordered, in addition, to refund the sum of Ksh. 3,500,000 to the complainant within sixty days. He submitted that the trial court also convicted him on a count that related to his co-accused. The appellant contended that the trial court disregarded his defence of *alibi*. The appellant also faults the succeeding trial magistrate for failing to comply with the mandatory provisions of section 200(3) of the Criminal Procedure Code. The appellant cited a number of legal precedents to support his arguments. I will deal with some of them in the course of the judgment.
6. The State has contested the appeal. The case for the State is that the evidence tendered at the trial proved the charge beyond reasonable doubt. Regarding identification of the appellant, the State submitted that the appellant was the person who obtained money from the complainant by falsely pretending to be an employee of the UN and in a position to secure a tender for the complainant. The appellant had met the complainant in Eldoret in broad daylight. The State submitted that the appellant was positively identified by PW1, PW4 and PW3. The sum of Kshs 3,500,000 was given to the appellant on 9th January 2010 in the presence of PW3 and PW4. The case for the State is that the evidence tendered was reliable and consistent; and, that it established the guilt of the appellant. In a nutshell, the State submitted that the appeal lacked merit and should be dismissed.
7. This is a first appeal to the High Court. I am required to re-examine, re-evaluate, and analyze all the evidence on record. Thereafter, I must draw my own conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190, *Arum vs. Republic* [2006] 2 E.A 10, *Patrick Njeri Mbogo vs. Republic* High Court, Embu Criminal Appeal 151 of 2010, [2013] eKLR.
8. The prosecution called ten witnesses. According to PW1 the appellant masqueraded as a United Nations (UN) procurement officer. PW1 stated that he was introduced to the appellant by Laban Kamau Rubiri (who was the appellant's co-accused and who was later acquitted. He later testified for the defence as DW6). PW1 said he runs a company. He desired to do business with the UN. He testified that he met DW6 who posed as the appellant's driver at the UN in Gigiri, Nairobi, and who connected him to the appellant. They later met at Sirikwa Hotel and struck a deal to supply furniture to a training center in Entebbe Uganda worth Kshs 45,000,000. The transaction was to be facilitated by the UN.
9. PW1 testified that the appellant informed him he was late in tendering; and, that he needed to move with rapidity. The appellant also informed him that his tender would not be accepted without ISO certification. He testified that the appellant offered to facilitate acquisition of the ISO certificate at US$500 or thereabouts. He said the appellant demanded Kshs. 3,500,000 as a deposit for processing the tender and the ISO certificate. PW1 managed to raise the amount on 9th January 2010. He gave it to the appellant in the presence of Nyakundi (PW4) and Mwangi (PW3). The appellant failed to secure the deal. He pledged to refund the money. He didn't. He vanished.
10. PW2 worked with UN in charge of investigations in Africa. On 8th June 2010 he confirmed to police officer Edwin Metto (PW10) that the appellant and DW6 were not the employees of UN.
11. PW3 was requested by PW1 to lend him Kshs 300,000 to raise the sum of Kshs 3,500,000 demanded by the appellant. He gave him the money. He accompanied PW1 to Sanjiil Hotel within Eldoret Town. They were joined by Nyakundi (PW4). At 5.00 pm on 9th January 2010, the appellant arrived and claimed he was in rush. They all went to PW1's vehicle where PW1 handed over Kshs 3,500,000 to the appellant. The money was in a green paper bag. That narrative was confirmed by PW4.
12. PW5 is an operation officer at Transnational Bank Eldoret Branch. He testified that on 9th January 2010, PW1 withdrew Kshs. 3,060,000 as per the bank statement (exhibit 1). PW6 worked with the same bank as a customer care officer. She confirmed that PW1 was a customer of the bank.
13. PW7, a manager at KCB at Mbale branch, testified that the following transactions were made on

the appellant's account: On 11th January 2010 Kshs. 375,000 was deposited at Kipande House, on 12th January 2010 there was a deposit of Ksh. 374,500 at Kipande House Branch, on 12th January 2010 there was a deposit of Ksh. 725,500 at Industrial Area branch and on 18th January 2010 there was a deposit of Ksh. 407,000 at Eldoret KCB branch. He produced the bank statements (exhibit 4).

14. PW8 conducted an identification parade on 19th May 2010 while PW9 produced SIM card records or print outs from the mobile phone records of the appellant. He confirmed that the SIM card registration number 0721366288 belonged to David Kahi Ambuku, the appellant. PW10 was the investigating officer. He received the complaint from PW1. The complainant showed him a text message from the mobile phone number of the appellant in which the appellant requested part payment. He arrested the appellant on 18th May 2010.
15. Based on that evidence, the trial court found that a *prima facie* case had been made out. The appellant denied the charges. He said he has never been an employee of UN and was unaware of the tender in question. He raised the defence of *alibi*. He said that on 9th January 2010, he was at his home in Vihiga with a prospective client, DW4 who wanted to buy his car. He stated that he later met the client in Kisumu. He testified that on the same date he carried out various repairs on his car in Kisumu. That narrative was confirmed by his mechanic DW7. DW4 testified that she paid a deposit of Kshs. 80,000 for the car on that date. She produced the sale agreement. DW5 witnessed the agreement at Mega Plaza, Kisumu.
16. The appellant also attended to his sick child. The child's mother DW9 testified that the child received treatment at Masha Hospital in Kisumu. DW3, an insurance agent, said he met the appellant in Kisumu at 12.30 pm to renew cover for motor vehicle Registration No. KAX 922Z belonging to the appellant. DW2, the appellant's mother, stated that on 9th January 2010, she accompanied the appellant to Kisumu. That was at around 2.00pm. She left him in Kisumu. She said the appellant returned home at around 9.00pm.
17. DW6 had been charged with the present offences but was acquitted. He testified for the defence as follows: that he did not know the appellant and only met him when they were charged; and, that he never introduced the appellant to PW1.
18. Upon reappraisal of the evidence, I am left in no doubt that the appellant met PW1 on at least two occasions. This followed some telephone conversation between PW1 and the appellant that set up the first meeting. The first meeting took place at Sirikwa Hotel in Eldoret in mid-December 2009. On that occasion PW1 was accompanied by PW3, Patrick Mwangi. The second meeting took place on 9th January 2010 when the sum of Kshs. 3,500,000 was paid to the appellant by PW1. The second meeting was attended by PW3 and PW4. They sat for some time in Sanjiil Hotel Eldoret. Both meetings were held in the day time. The meetings took quite some time giving PW1, PW2 and PW4 sufficient time to identify the appellant. Certainly, PW1 and PW2 were meeting the appellant for the second time.
19. In addition PW8 conducted an identification parade on 19th May 2010. Although the appellant submitted that the parade was irregular, I am satisfied that it was conducted with scrupulous fairness and according to the Judges' Rules. See *Joseph Mukoya v Republic* Eldoret High Court Criminal appeals 6 & 9 of 2010 [2014] eKLR. The appellant was identified at the parade. I accept the appellant's submission that the fact that he *signed* the parade form does not necessarily *mean* he was *satisfied* with the outcome. The point to be made is that the identification of the appellant was *not* a worthless dock identification.
20. I have analyzed the defence of *alibi* proffered by the appellant. The totality of the evidence of the appellant and his eight witnesses was that the appellant was in Vihiga and Kisumu on 9th January 2010 and could not therefore have committed the offence. The appellant contends that the trial court did not consider his defence of *alibi*. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution's case. It was thus open to the trial court to weigh it against the evidence already tendered. See *Wang'ombe v Republic* [1976-80] KLR 1683. It is not true that the trial court disregarded the defence of *alibi*. In his judgment, the learned trial Magistrate held-

> *"I also had the benefit of observing the demeanor of the accused herein and his witnesses.*

There is every possibility that the accused and his witnesses manufactured the version of the defence case and I find it to be an afterthought".

21. I have found that the learned trial Magistrate considered the *alibi* and reached a proper finding that it was a red herring. There is no doubt in my mind that the appellant was positively identified as the person who met PW1, PW3 and PW4 and who received the money from PW1 under false pretences. PW1 was giving the appellant a huge sum in cash. He was meeting him for the *second* time. There were witnesses in both meetings. There is also the identification parade. There are telltale signs from the huge amounts the appellant deposited into his accounts between 9th and 18th January 2010 into his various bank accounts. In addition, the learned trial Magistrate said he studied the demeanor of the appellant and reached the conclusion that the *alibi* was fabricated. I have reached the conclusion that the appellant *cannot* be the same person who *was* in Vihiga and Kisumu at about 5.00pm or thereabouts on 9th January 2010. There are also time gaps in the evidence of the defence witnesses that leave doubt about the series of activities that the appellant undertook on that date. It was a little too convenient and self-serving. When I weigh the *alibi* against the prosecution evidence, I do *not* believe the appellant even for one moment.
22. In the two meetings I referred to, the appellant introduced himself as an *employee* of the UN. He had a laptop and took PW1 and PW3 through the tendering procedures for the UN. That was false posturing. The appellant in his sworn testimony conceded that he has *never* been employed by the UN. Furthermore, there is the evidence of PW2 who worked with the UN and in charge of investigations in Africa. On 8th June 2010 he confirmed to police officer Edwin Metto (PW10) that the appellant and DW6 were not employees of the UN.
23. I have reached the inescapable conclusion that the appellant obtained the sum of Kshs 3,500,000 in cash in a green paper bag outside Sanjiil Hotel Eldoret on 9th January 2010. The time was about 5.00pm or thereabouts in the afternoon. Doubt is also removed by the evidence of PW5, an operation officer at Transnational Bank Eldoret Branch who testified that on 9th January 2010, PW1 withdrew Ksh. 3,060,000. PW1 was added a further Kshs 300,000 by PW3. I have already commented about the huge sums of money the appellant deposited into his accounts between 9th and 18th January 2010. I agree with the learned trial Magistrate that the appellant *masqueraded* as a procurement officer working with the UN. In doing so he duped PW1 to believe that he would secure a tender for him. He asked for Kshs 3,500,000 as a facilitation fee; it was paid in cash by PW1. He failed to secure the tender; in fact he had no capacity to do so. He then went underground.
24. Section 313 of the Penal Code states as follows-

> *"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."*

25. Subject to section 111 of the Evidence Act, the legal burden of proof rests with the prosecution. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332 at 334, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported). In my view the key ingredients of the offence of obtaining by false pretences were *proved* beyond reasonable doubt. From my re-appraisal of the evidence and the analysis I have given, I cannot say that the *onus of proof* was shifted to the appellant. The appellant was fittingly convicted for this offence.
26. It is not true as urged by the appellant that section 200 of the Criminal Procedure Code was violated. The trial record shows that when Mr. Shiundu, Principal Magistrate, took over the trial, the rights under section 200 (3) of the Code were *explained* to the appellant. The appellant elected to have the trial start *de novo*. But before the trial could commence, the magistrate was transferred. The appellant's new counsel told the succeeding magistrate (Ms. Alego, Principal Magistrate) that the appellant now only wished to *recall* PW1, PW3, PW4 and PW10. All those witnesses were recalled and the case for the prosecution closed. The trial court found the appellant had a case to answer. The succeeding Magistrate (Mr. Kyambia, Principal Magistrate) in a considered ruling

delivered on 9th November 2012 declined to *expunge* the ruling on a case to answer as urged by the appellant. I agree. That stage had passed. I thus find that there was compliance with the procedure provided for a succeeding magistrate. The case cited by the appellant in *Rebecca Mwikali Nabutola v Republic*; High Court at Nairobi Misc. Criminal Appeal Nos. 445, 448 & 452 of 2012 [2012] eKLR is thus not exactly on point in this appeal.

27. The appellant was also charged on a second count of personation contrary to section 382(1) of the Penal Code. The foot note to section 382 of the Penal Code is entitled *Personation in General*. Section 382(1) therefore states as follows;

> *"Any person who, with intent to defraud any person,*
>
> *falsely represents himself to be some other person, living or dead, is guilty of a misdemeanour."*

28. The learned trial Magistrate found the appellant guilty on count II. However, that count *related* to his *co-accused* who was acquitted earlier. I agree with the appellant that the evidence on *personation* relating to him could not support count II. I am *not* also persuaded on the evidence that the appellant *presented* himself as any *other* person living or dead as contemplated by section 382(1) of the Penal Code. What the appellant did was *masquerade* as an *employee* of the UN. He *pretended*, in his own capacity as David Kahi Mbuku, to be a procurement officer at the UN. In doing so he received the sum of Ksh. 3,500,000 from PW1 pretending to be in a position to secure the tender and ISO Certificate. Like I have found, those are ingredients of the offence of *obtaining by false pretences* and not *personation*. I am thus of the considered opinion that the conviction of the appellant on count II was not only *irregular* but also *not* proved. I will thus set aside the conviction and sentence on that count.

29. That leaves the matter of the sentence on the first count. Section 313 of the Penal Code provides that 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*. That is the sentence that was handed down to the appellant. Having set aside the conviction on the other count and the sentence that was to run consecutively, I cannot say that the remainder of the sentence is oppressive. Where the statute has set a sentence, it would be a misnomer to say the sentence is too harsh or oppressive. Considering the offence, I also uphold the order for restitution.

30. In the result this appeal only succeeds in *part*. The *conviction* of the appellant on count (II) for the offence of personation and the *sentence* thereon of three years imprisonment is hereby set aside. I *uphold* both the *conviction* and *sentence* on the first count for obtaining by false pretences. The appeal in respect of the first count is accordingly *dismissed*.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 27th day of November 2014

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

The appellant (in person).

Ms. Busienei for the State.

Mr. J. Kemboi, Court clerk.