



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 35 OF 2011

BETWEEN

JOSPHAT MAINA KARUORO..... APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Embu Criminal Case 917 of 2004 by Hon. E.K. Nyutu R.M. on 18th March, 2011)

JUDGMENT

1. The appellant, **Josphat Maina Karuoro** was charged and convicted with the offence of conspiracy to defeat justice and interference with witnesses contrary to **section 117(a)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence were that in the month of May 2003 at Embu town, Embu township Location in Embu District of the Eastern Province, jointly with others not before Court, conspired to defeat justice by taking away P3 forms from James Chuchu Muchina, Jackson Mwaniki Njeru, Lukas Githuka Kagio, Anthony Fundi Njue and Emily Wawira Njagi by falsely pretending that he would assist them to be compensated.
2. He was also charged and convicted of the offence of uttering false documents contrary to **section 353** of the **Penal Code** the particulars of which were that on the 5th day Of March, 2004 at Mwea Market Kirinyaga District of the Central Province, the appellant knowingly and fraudulently uttered certain forged documents namely Medical Examination Reports purporting to be the documents of James Chuchu Muchina, Jackson Mwaniki Njeru, Lukas Githuka Kagio, Antony Fundi Njue and Emily Wawira Njagi.
3. Apart from the two counts for which he was convicted, the appellant was acquitted of five counts of forgery of official documents contrary to **section 351** of the **Penal Code**, one count of false assumption of authority contrary to **section 104(b)** of the **Penal Code**, one count of destroying evidence contrary to **section 116** of the **Penal Code**, one count of obtaining money by false pretences contrary to **section 313** of the **Penal Code** and one charge of attempting to obtain money by false pretences contrary to **section 389** as read with **section 313** of the **Penal Code**.
4. The prosecution called seven witnesses in support of its case. PW1, Janet Lilian Odere testified that on 10th April 2004, her matatu registration KAP 993D, plying the Embu-Nairobi route was involved in an accident in which two passengers died and others were injured. On 5th March 2004 at about 7.30pm, two unknown persons went to her home. One of them introduced himself as Maina, an investigator for United Insurance Embu who had called her earlier and the other person

- was his driver. Maina served PW1 with summons to enter appearance in ***Embu SPMCC No. 43 of 2004*** and police abstracts bearing the names of Lukas Githuka Kagio, Emily Wawira Njage, Anthony Fundi Njue, James Chuchu Muchira and Jackson Mwaniki Njiru. The summons had insurance company's stamp showing that the summons had been received by the insurance company. PW1 later went to her brokers, Baffer Insurance Brokers who rejected the documents and directed her to go to United Insurance. At United Insurance she was informed that they had already secured the summons and referred her to investigators. On cross examination, PW1 stated that he had been seeing the accused in court but that she didn't remember seeing him in the parade conducted by police and was not able to identify him.
5. PW2 testified that on the material day, she was aboard the ill-fated matatu which left Nairobi at 7.30 am and was involved in an accident at Makutano. As a result of the accident she was admitted to Mwea Mission Hospital. She recorded a statement at Sagana Police station after a month, as she had been admitted, and was issued with a P3 form. Upon discharge PW2 testified that the appellant approached her and introduced himself as an advocate of the High Court and offered to assist her regarding compensation for the accident. She accompanied the appellant to Sagana Police Station together with three other accident victims and were issued with P3 forms. PW2 retained her P3 form but after some days the appellant took possession of the P3 form and told her that he wanted to file a suit in court. On 25th March 2004, police officers went and arrested her at her place of work and took her to CID office where she was interrogated. She stated that she never took the P3 form to be filled by a doctor.
 6. PW3, Lucas Githuka Kagio and PW4 Anthony Fundi Njue were also passengers in the matatu. As a result of the accident they lost consciousness and awoke to find themselves in Mwea Mission Hospital. After discharge, they were later approached by the appellant who offered to assist them pursue compensation. They were issued with P3 forms. The appellant later took possession of the partly filled-out P3 forms. They denied being examined by the doctor who filled the P3 Form.
 7. PW5, Josphat Munene, a clerk at the firm of Charles Kariuki, Advocate testified that sometime in the month of August 2003, five people went to his office and wanted to be represented in a running down matter. They had blank P3 forms which they showed them. In the month of February 2004, he was sent by Mr Okwaro advocate to file a civil suit for the same clients being, ***Embu SPMCC No. 43 of 2004***. He later fetched the summons to enter appearance and returned to the office where he found the appellant and gave him the summons and plaint to deliver to the main offices at Charles Kariuki Advocates in Meru. The summonses were sent in Meru by a process server called Winnie and copies returned to the firm's offices in Embu. He later learnt that the appellant was arrested on matters arising out of the civil suit.
 8. PW6, Duncan Okwaro Muyodi, an advocate of the High court working for the firm of Duncan Okwaro & Company Advocates in Embu testified that in the month of May 2003, five people went to his office in Embu and informed him that they had been involved in a road traffic accident in motor vehicle KAB 993D along Embu/Makutano road and wanted to pursue compensation. He asked them to bring a police abstract, name of the insurance company that had insured the motor vehicle and the names of the owner of the motor vehicle and P3 forms. In the mean time, he issued demand letters to United Insurance Company and owner of the motor vehicle, PW1. The five people went to his office several times and he later learnt that the appellant was assisting them obtain police abstracts. He later forwarded the file of the five clients to his office in Meru so that filing fees could be realized as charged. After the plaint was prepared, the appellant was sent from their Meru office by a Mr. Kariuki to file the case. It was filed as ***Embu SPMCC No. 43 of 2004***. He stated that the case was filed after duly filled out P3 forms and abstracts were brought by clients.
 9. Nicholas Kisavi, PW7, a CID officer based in Embu gave evidence. He testified that on 10th March 2004, at about 2.00 pm he was at the Embu CID office when PW1 went to the office accompanied by a person from United Insurance Company. She reported that Maina had gone to her residence and delivered to her several documents including summons to enter appearance and

- Medical Examination reports of five persons and a plaint in respect to **Embu SPMCC 43 of 2004**. That the Maina demanded Kshs 15,000/= from her in order to assist her in order to assist her in the court case. He lodged investigations and confirmed that the accident occurred and that the driver, one John Kariuki Njeru had been charged with a traffic offence. He obtained a list of injured passengers involved in the accident and confirmed that the names appearing on the P3 forms were those of the passengers involved in the accident. He also inquired from the appellant about the doctor who had filled the P3 forms but the appellant did not know the doctor. The passengers whose names appeared on the P3 forms confirmed that they were not examined by any doctor.
10. When put to his defence, the appellant denied the allegations. He stated that when he was subjected to an identification parade, PW1 did not positively identify any one. He complained that he stayed in police custody for more than ten days. In cross-examination, he stated that no P3 form was recovered from him but that the investigating officer got the forms from Kerugoya Police Station.
11. The learned trial magistrate examined this evidence and came to a conclusion that only counts one and eleven, namely, conspiracy to defeat justice and uttering false document were proved and acquitted the accused on all the other counts. He was sentenced to a fine of Kshs. 50,000/= in default 12 months imprisonment on each count running concurrently.
12. In convicting the appellant the learned magistrate stated as follows, “ *I am satisfied with the evidence of PW2, PW3 and PW4 in this regard I am satisfied that the accused took possession of the P3 forms of PW2, PW3 and PW4 while blank in Part II. The said PW2, PW3 and PW4 denied having been examined by Dr. Gitari A.K or any doctor for that matter as far as the P3 forms are concerned. It is therefore safe to conclude that the accused person caused Part II of the P3 forms to be filled with the intention of perverting justice in the civil suit No. 43 of 2004 which was well within his knowledge as confirmed by PW5 and Pw6. This would amount to presenting false evidence before the court. For this reason I find him guilty on the charge of conspiracy to defeat justice on count one. It is also for this reasons that I find him guilty of uttering false documents on count eleven.*”
13. It is this conviction and sentence that the appellant now challenges. The prosecution supports both conviction and sentence. It is the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own independent conclusions in deciding whether the judgment of the trial court should be upheld. It must itself weigh conflicting evidence and draw its own decision on the evidence. (See **Okeno v Republic [1972] EA 32**). In doing so, the first appellate court must also take into account the fact that unlike the trial court, it lacks the privilege of hearing or seeing the witnesses testify.
14. The first count was on conspiracy to defeat justice and interference with witnesses contrary to **section 117(a)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. **Section 117** that provides for the offence of conspiracy to defeat justice states thus;
- Any person who—*
- (a) conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice; or*
- (b) in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so; or*
- (c) obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal, is guilty of an offence and is liable to imprisonment for five years.*
15. Although the learned State Counsel did not raise it nor did the appellant’s counsel, the appeal

against the conviction of the first count must succeed on the ground of duplicity. **Section 117(a)** of the **Penal Code** under which the appellant was charged is committed when any person is accuses another falsely of any crime or does anything to obstruct, pervert or defeat the course of justice. **Section 117(b)** of the **Penal Code** specifically deals with the obstruction of justice by preventing witnesses from appearing or testifying in court. From the manner in which the charge is framed two separate offences were charged in court one; that is conspiracy to defeat justice and interference with witnesses which are separate offences under **section 117(a)** and **(b)** of the **Penal Code** respectively.

16.The charge of uttering false documents relates to the events of 5th March 2004 it was alleged that the appellant went to the home of PW1 and showed he duly filled P3 forms for the persons injured in the accident. In order to prove the offence, the prosecution had to prove that the appellant presented documents to PW1 knowing that they were false and with intent to defraud. PW1 testified that she did not recall or remember whether in fact it is the appellant who is the person who gave her the documents. In cross-examination she stated that she was unable to identify him the identification parade. In the circumstances the evidence that the appellant presented the P3 forms with the intent to defraud falls below the required standard to support a conviction.

17.The appeal is therefore allowed and the conviction and sentence are hereby quashed. The fine shall be refunded to the appellant.

DATED and **DELIVERED** at **EMBU** this 16th December 2013.

D.S. MAJANJA

JUDGE