



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 283 of 2010

BENSON MBENI KEBETU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 296 of 2005 of the Chief Magistrate's court at Nairobi by Ms L. Nyambura (Principal Magistrate))

J U D G M E N T

The appellant **BENSON MBENI KEBETU** Alias **GEOFFREY GICHANGI KABUU**, was convicted for the following 4 offences;

- (a) Making a Document without authority* contrary to section 357 (4) of the Penal Code. **For that offence he was imprisoned for 2 years;****
- (b) Uttering a false document* contrary to section 353 of the Penal Code. **The appellant was sent to jail for another 2 years, for that offence;****
- (c) Obtaining money by false pretences* contrary to section 313 of the Penal Code, **for which the appellant was fined Kshs.200,000/-;. In default of the fine, the appellant was ordered to serve 12 months in jail;****
- (d) Obtaining money by false pretences* contrary to section 313 of the Penal Code. **For that offence, a fine of Kshs. 300,000/- was imposed, in default of which the appellant was to be imprisoned for 12 months.****

The learned trial magistrate ordered the sentences on counts 1 and 2 to run concurrently.

In the appeal before me, the appellant challenged both the convictions and the sentences.

He asserted that the convictions could not be sustained by the inconsistent and contradictory evidence produced by the prosecution.

He also submitted that two crucial witnesses failed to testify. Those witnesses were named as Njoroge and Nyariki.

In any event, the appellant argued that even though **PW 1** alleged that he gave out money to the appellant, there was no evidence of acknowledgment by the appellant. Had there been an

acknowledgement, the appellant said that it should have been presented to the Document Examiner for analysis, to verify whether or not it is he (the appellant) who acknowledged receipt of the money.

The appellant further submitted that the offences of Making a Document , and of obtaining money by false presences, were not proved.

Finally, because the learned trial magistrate was hearing two distinct cases simultaneously, when such cases involved the same subject matter, the trial court is said to have occasioned a travesty of justice. The said 2 cases were said to be Criminal Case No. 472 of 2006 and Criminal Case No. 296 of 2005.

Faced with the appeal, Ms Maina, learned state counsel, conceded. The respondent pointed out that the Document Examiner exonerated the appellant from the making of the document. The said Document Examiner was said to have explained to the trial court that the signatures on the documents did not match the hand-writing of the appellant.

The respondent also accepted the appellant's contention, that the sentence was too harsh. In the respondent's view, the trial court appears to have disregarded the period which the appellant had spent in custody during the trial.

I note from the record that on 10th March 2005, the trial court rejected th appellant's application for bail pending trial.

On 9th November 2005, the trial court was informed that the appellant was in custody, serving sentence for another offence. A production order was issued by the trial court, and the appellant was produced in court on the following day.

On 14th March 2006, the appellant was not before the court. His lawyer, Mr Mwilu informed the court that the appellant was in custody, in relation to Criminal Case No. 472/2006. In that other case, the appellant had taken plea on the previous day.

About 3 months later, on 7th June 2006, Mr. Mwilu informed the court that the appellant had been released on Presidential Amnesty, in respect to Criminal Case No. 2257/2004.

Although it is not clear from the record about the exact date when the trial court granted bond to the appellant, the record shows that on 6th February 2007, the trial court made it clear that the appellant had been granted bond in this case.

On 4th November 2008, the court issued a warrant for the arrest of the appellant, after he had failed to attend court. But later, on the same day, the prosecutor informed the court that he had learnt that the appellant was in Industrial Area Prison.

On 11th December 2008, the trial court reinstated the appellant's bond, after being served with a copy of the order granted by Ojwang J. (as he then was).

The point I am making is that the appellant was not always in custody during the duration of his trial. He was granted bond by the trial court. The said bond was cancelled when the appellant failed to attend court. But the High Court granted Bail pending trial. On the strength of that decision of the High Court, the learned trial magistrate re-instated the bond.

As regards the testimony of the Document Examiner, he said;

“I compared the signature on exhibit marked B and signature on Exhibit marked C. After the examination I got similarities. The signatures are by the same author. I examined questioned signature on exhibit marked “A” with signature on exhibit marked B and C. After examination, I could not find any agreement. The signature was by different hand.”

In order to appreciate that piece of evidence, we have to look at the actual documents. From the Exhibit Memo, it is clear that;

“(1) Document marked A is a questionable document of NAIROBI/BLOCK 112/236; Document marked B is a certified true copy of the white card kept by the Principal Registrar of Titles; and Document marked C is the known title of Land Reference 112/236.”

Clearly, therefore, the signatures which were by the same author were those on the certified copy of the white card and on the known title document.

The Document Examiner made it clear that the signature on the questionable document was written by someone other than the person who had written on the original document. In fact, the Document Examiner recorded that the signature on the questionable document was written in a different style.

To my mind, that just confirmed the falsity of the document which the appellant handed over to the complainant.

And to confirm that the said document was false, the Document Examiner noted 2 further points, as follows;

“ 1, The exhibits have different paper quality and texture.

2. The type-prints on both exhibits were made by different machines.”

The next question that arises is the identity of the person who made the false or fake title document. That question can be reworded to read as follows;

“Is it the appellant who made the said fake or false document?”

Regrettably, there is no evidence on record to prove that the appellant is the person who made the said document.

In the circumstances, the conviction on count 1, for Making a Document without authority, cannot be sustained.

It is probable that the appellant was involved, either personally or through proxy, in the making of the said document. However, no evidence was adduced to prove that he made the document.

On the other hand, there is no doubt at all that the appellant uttered the false document to the complainant. And after causing the complainant to believe that the title document was authentic, the appellant received payment from the complainant. He was first paid Kshs.285,000/-, being 10% of the Agreed Purchase Price.

Later, he was paid a further sum of Kshs.350,000/-, in cash.

He had persuaded the complainant that his bank account was in debit, as it was overdrawn. Therefore, it was prudent that he be paid in cash.

The identity of the person who was paid the money is not in doubt, because he was with the complainant on several occasions, both before and during the time when he received the money.

For those reasons, I find myself unable to agree with the appellant's contention, that the document examiner testified that the signature on the false or fake document was not that of the appellant. In fact, the document examiner was never asked to ascertain if the signature on Exhibit 'A' was made by the appellant.

And because the author of that signature was not established by the evidence made available to the court, the conviction on Count 1 was set aside.

But the convictions on counts 2, 3 and 4 are sustained because the appellant uttered the false document to the complainant, and thereafter received payment in 2 instalments.

The appeal is dismissed, save to the extent that the conviction on count 1 is quashed, and the sentence relating thereto is set aside.

Dated, Signed and Delivered at Nairobi, this 28th day of November, 2012.

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FRED A. OCHIENG
JUDGE