



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 265 OF 2009

(From original conviction and sentence in Criminal Case No.4463 of 2006 of the Principal Magistrate's court at Nyahururu – T. MATHEKA, PM)

SAMUEL KIRUGA WAMBUGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

SAMUEL KIRUGA WAMBUGU appeals against the conviction and sentence handed to him by the Principal Magistrate's Court, Nyahururu. He was charged with the following offences:-

1. Obtaining money by false pretences contrary to Section 313 of the Penal Code.
2. Making a document without authority contrary to Section 357 of the Penal Code.
3. Forgery contrary to Section 349 of the Penal Code.
4. Uttering a false document contrary to Section 355 of the Penal Code.

The appellant was acquitted of count II but was found guilty and convicted on counts 1, III and IV. The grounds upon which he brings this appeal are contained in the memorandum of appeal. He also made oral submissions. The grounds upon which he prefers this appeal are that after he was arrested there was a delay of 3 days in bringing him to court; that the court failed to call the evidence of crucial witnesses; that the law relating to Public Service Vehicle (PSV) licences was repealed by the 2007 budget Gazettement; that the appellant was denied a chance to call his witnesses; that the court failed to consider the evidence that there existed a grudge between the complainant and the appellant over a barmaid; that the prosecution failed to call some key witnesses; that the evidence of the document examiner was not conclusive.

Briefly, the facts of the case are that PW1, Apollo Boro Mwaura, owned a PSV vehicle. His PSV licence had expired and he wished to renew it. He informed Geoffrey Musoma (PW2) about it and PW2 agreed to introduce him to a person that could get him a PSV and it is the appellant that was introduced to PW1. The appellant in turn called one Kamotho to bring the PSV Certificate which he did and PW1 paid the appellant Kshs.2,500/-. After a week, the police arrested PW1 for using a fake PSV. PW1 managed to trace the appellant in a bar in Nyahururu, called PW4, PC Maina, who arrested the appellant. On the appellant was recovered a pen which PW1 said was used by the appellant to endorse on the certificate that

the appellant issued to him.

PW2, Ismael Mohamed Farah, an employee of KRA confirmed that the certificate found with PW1 was fake as it lacked the water mark when looked at it using the ultra violet torch (Ex.3). PW4 also took the appellant's specimen writing and forwarded it to the Document Examiner, PW5 for comparison with the writing on the certificate PW5 found the specimen taken from the appellant and the writing on the certificate to have been made by one hand.

In his sworn defence, the appellant gave an alibi, that he was not in Nyahururu on the date the offence was allegedly committed but was in Direct Line Assurance Co. Ltd offices Hazina Towers 17th floor. He produced receipts evidencing where he slept and evidence of travel but the prosecution objected to their production requiring that the author produce them. Despite an adjournment, the appellant was not able to produce the authors of the receipts or the witnesses he wanted to call to support his alibi.

In opposing the appeal, Ms Nyagol, State Counsel, submitted that some witnesses were not called because those that were called were sufficient. She urged that PW1 alleged that the appellant gave him a fake PSV licence which evidence was corroborated by that of PW3 who introduced the appellant to PW1 and the document examiner confirmed that the certificate was not genuine. Ms Nyagol also urged that the vehicle once belonged to one Grace who sold it to the complainant who was still paying for it.

In respect to violation of his fundamental rights, it was urged that the delay was partly caused by the appellant; That he had requested that the case start de novo, and when he was put on his defence and asked to call witnesses, he did not do so. His alibi was not believed because he failed to call witnesses and the receipts he produced could have been issued anywhere in the streets. As regards the repeal of the law relating to PSV licences, it was urged that the offence was committed in 2006 when PSV was still a legal requirement. Counsel urged the court to uphold the conviction and sentence.

Allegations of breach of fundamental rights should be raised at the earliest time possible when one appears in court. Though the appellant claims to have raised the issue of delay in being brought to court, there is nothing on record to that effect. Further, this is not the matter in which the appellant should have brought this application. He should have raised it in the lower court, then that court would have considered whether indeed there was substance in the allegations and if the court found there to be substance in the allegation, it would have referred the issues to the High Court for determination. Breach of fundamental rights cannot be raised as a ground of appeal. When the appellant was charged on 27/10/06, legal notice 6/2006, that promulgated the Rules governing the filing of Constitutional references and applications to the High Court, were operative. These Rules should have been complied with. Had the issue been raised then, the prosecution would have been accorded an opportunity to respond to the said allegations, as to whether there was delay of 3 days in bringing the appellant to court for plea and maybe the investigation officer would have filed an affidavit in reply. In any event breach of fundamental rights cannot vitiate criminal charges. Further allegations of breach of fundamental rights have to be pleaded with particularity as regards the section, subsection or paragraph allegedly breached and the nature of the breach, to enable the respondent respond appropriately. That has not been done. (See the case of **MATIBA V. AG HMISC. NO. 666/1990.**)

As regards delay in the trial, and conclusion of this case, I have perused the record, the case was adjourned severally for reasons that the exhibits had been taken to the Document Examiner and had not been received back. On another occasion the trial magistrate was away in a seminar, then he went on leave. After the prosecution case was closed, the appellant also asked for adjournment severally in order to produce some documents from the KRA. Later, the appellant also failed to attend court severally on account of illness. The delay in concluding this matter after 3 years is attributable to both the prosecution and the appellant.

The trial court found that the evidence of PW1 was corroborated by that of PW3 who testified. That he is the one who introduced the appellant to PW1. PW3 further said that though the appellant called one Kamotho to bring the PSV certificate, it is the appellant who endorsed on the licence and it is the appellant who received the payment. The Document Examiner also corroborated PW1's evidence that the

writing on the certificate and that of the appellant are similar. The evidence of the Document Examiner was unchallenged. Even though Kamotho was not called as a witness there is ample evidence on record that it is the appellant who agreed to avail a PSV licence, used Kamotho to bring it. The appellant received payment for it and endorsed it. There is no evidence that any material witnesses were ever left out by the prosecution against whom an adverse inference could be made. The appellant claims that he had had a quarrel with PW1 over a barmaid. However, he did not disclose the nature of the disagreement nor did he disclose the name of the barmaid. He never even made any reference to the barmaid in his defence. His defence was an alibi. Introducing the allegation of a disagreement over a barmaid is a new line of defence which cannot be allowed on appeal.

The appellant raised an alibi in his defence. He did not put the prosecution on notice that he would be raising an alibi. However, this court would not have such objection to that omission because the appellant acted in person. The appellant only put it to PW1 that he was not in Nyahururu the day of the alleged offence. At no time during the prosecution case, did he make known the documents he would rely on. He was given an opportunity to call the witness to support his alibi and the authors of the receipts he intended to rely on but he did not produce either. He had had ample time to avail the witnesses especially taking into account that the case had to start de novo upon transfer of the magistrate who initially had conduct of it. The court found that the appellant was not denied a chance to call witnesses as he had had ample time to do so but failed. He is the same one complaining of delay yet part of the delay is attributed to him.

The first charge that the appellant faced was one of obtaining money by false pretences. According to PW1, the appellant did avail the certificate and then he paid him. For one to obtain by false pretences the promise must relate to the past but not to the future. In this case, the certificate had already been issued before payment was made and I will uphold the trial court's finding that the appellant did commit the said offence and this conviction on count I stands.

The trial court found that there was no evidence that the appellant made the document and therefore acquitted him. According to PW1, it is the appellant who gave him the fake certificate after he endorsed on it the complainant's motor vehicle registration numbers KAM 620P. In my view, the appellant was the source of the certificate. Endorsing amounts to making of the document and I would find to the contrary, that the appellant made the document. He was lucky to be acquitted on that charge. In regard to count III and IV, the court found that the Document Examiner's evidence was unchallenged. It is the appellant who endorsed on the document and gave it to the complainant. I would be of the same view that the appellant committed the said offences and uphold the conviction.

The appellant was sentenced to a fine of Kshs.20,000/- on each count, in default 6 months imprisonment. I find that the sentence is not harsh and will not interfere with it in any way. I uphold it and the appeal is hereby dismissed.

DATED and DELIVERED this 4th day of February, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

The appellant present – in person.

Mr. Nyakundi for the State.

Kennedy – Court Clerk.