



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL APPEAL 4 OF 2008

SAMUEL NGUGI KAHORO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant herein one Samuel Ngugi Kahoro was originally charged with another with 3 counts.

Count 1 – Forgery contrary to Section 349 of the Penal Code.

Count 2- Obtaining money by false pretences.

Count 3 – Obtaining money by false pretences. The particulars on all 3 counts are as in the charge sheet. They denied all 3 counts. His co-accused was acquitted under section 210 of the Criminal Procedure Code. The Appellant was subsequently convicted on all 3 charges and sentenced to 5 years on count 1 and 3 years imprisonment on 2 and 3 respectively.

Being aggrieved by the said conviction and sentences, he filed this appeal. It is noted that the appellant was represented before the trial court but he filed this appeal in person citing 6 grounds as particularized in his petition of Appeal. He also filed a written submission expounding on the said grounds. The learned counsel for the state supports both conviction and sentence. This being a first appeal, it is incumbent upon me to re-analyze the evidence adduced before the trial court and reach an independent decision as to whether the same was sufficient to support a conviction. In doing so however I will bear in mind that I did not have the advantage of seeing the witnesses as they testified and give an allowance for that. ***(See EKENO –V-REPUBLIC 1972 E.A 32.)*** I will therefore briefly restate and analyze the evidences adduced before the learned trial magistrate.

A total of 9 witnesses testified for the state. On his part, the appellant testified on oath and called no witnesses.

PW1 Jamleck Maina Waguru told the court that he is the one who was approached by the appellant at Equity Bank Kerugoya Branch for purposes of opening a bank account. He told the court that the appellant opened Account No. 01019493. A copy of the account opening card was produced as exhibit. The bank statement produced in court however show that the appellant’s account was actually No.9919494. The evidence of the bank workers i.e PW1, PW2, PW3, PW4 and PW5 all explained that

the appellant's account number was 9919494. It was explained that the digits 99 represent the code for savings account and so the actual Account number for appellant's account was 19494. The appellant conceded that he was an account holder at Equity Bank but he did not say what his account number was. It is my finding therefore that the difference of the last digit appearing on the account opening card and the Bank Statement was of no consequence at all. The appellant's account was number 19494. The Account number reflected in the charge sheet is therefore the same as that in the Bank Statement only that the one in the charge sheet also includes the savings account code. The difference was therefore clearly explained.

According to PW4 Paul Githinji Kiricho, he received the cheque in question on 15/8/2005. The same is said to have been received through Securicor Courier. The cheque was for Ksh.654,560 from the department of pensions. He told the court that he deposited the cheque into the appellant's account. The same was dated 3/8/2005. The Bank Statement exhibited as exhibit shows that the said cheque was deposited in the account on 10/8/2005. According to the witnesses, such a cheque is treated as a salary cheque and it is credited into the account upfront and one can even withdraw that money the same day. The evidence shows that the following day i.e 11/8/2005, a withdrawal of 50,000/= was made from the account. According to PW3 Martin Gatheiya Kiragu, the appellant was the one who made the withdrawal of 50,000/=. He identified exhibit 3- a withdrawal slip as the one signed by the appellant when he withdrew the money.

The same exercise was repeated on 15/8/2005. This time, PW2 Patrick Kimani was the cashier. He told the court that the appellant presented his bank plate, and I.D card. The witness confirmed the correctness of the details on the said documents. He therefore processed the withdrawal whereby the appellant signed the withdrawal voucher exhibited as exhibit 2. These 2 withdrawal slips were later taken to PW8 the documents examined along with the appellant's known signatures and specimen signatures. He concluded that they were made in the same hand. I will come to this later.

On the second occasion, the appellant is said to have withdrawn Ksh.300,000. These 2 withdrawals from the basis of counts 2 and 3 of the charge sheet. After the cheque was taken to the clearing house in Nairobi, it was found to be a forgery. Investigations were commenced. PW7 the Chief Accountant Pension's Department confirmed to the court that the same had not emanated from their department. Among other things, the serial number on the cheque was said to be the one in use in 1978. It had also not been signed by any of the authorized signatories from the Pensions Department. After investigations, the accused person was arrested and charged with the offence now before court.

In his sworn defence, he told the court that he was expecting some 245,000/= to be deposited into his account by an NGO he had worked for. He said that when he went to check on whether the money had been deposited, he found that his account had been frozen. He denied any knowledge of the pension cheque and denied having committed the offences he is charged with. I have considered all this evidence along with his 6 grounds of appeal, his submission and the reply thereto by the state counsel. I have also considered the law applicable in this case.

On count 1, the appellant was charged with forgery. Forgery means creating a false document or altering a document. For a person to commit a forgery, he must be involved in the making of the document or the entering of false data or information in a document while purporting it to be a true document. In this case, the person who forged the cheque in question would be the one who made it. There is no evidence that the appellant herein was involved at all in the making of that cheque. The charge of forgery cannot therefore be sustained. My finding therefore is that count 1 was not proved beyond any reasonable doubt as by law required. The court therefore quashes the conviction on count 1 and sets aside the sentence of 5 years imprisonment.

On count 2 and 3, I have no doubt in my mind whatsoever that it was the appellant who withdrew the amounts of money in question on the diverse dates as charged. I agree with the appellant when he says that the evidence of PW8 – the documents examiner was just an opinion and the same was not foolproof evidence. On the other hand however, I am satisfied that both PW2 and PW3 who processed the said withdrawals corroborated the evidence of the document's examiner. The two clearly explained the

process they subjected the appellant to. They examined his I.D card and bank plate. Indeed the appellant I.D card number appears on the said withdrawal slips. That evidence is not challenged. It is also clear that the appellant did operate his account from July 2004. These cashiers said they knew him as a customer well before August 2005. They would have had no reason to “*plant*” that kind of money in his account without his knowledge. My finding is that it was the appellant who was behind the depositing of the forged cheque into his account. He knew that the money had been deposited in the account and that is why he proceeded to make those large withdrawals. Indeed his account had not had more than 20,000/= before that date and it is therefore curious that he would go to the bank and ask to withdraw even 50,000/= if he was not the one who had deposited the money there. He knew that he had not been paid any pension and knew that the cheque was not good for payment. In making these withdrawals therefore, he obtained the money by false pretences. I make a finding therefore that the learned trial magistrate did not err either in law or in fact in convicting the appellant on these two counts.

Accordingly, I find that his appeal on those 2 counts lacks merit. The same is therefore dismissed. This appeal therefore only succeeds as far as count 1 is concerned. The appeal on count 2 and 3 is hereby dismissed and the conviction and sentence on those counts is hereby confirmed.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 10th day of June 2009.

In presence of:- The appellant and Mr. Omwega for the state.