



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**(CORAM: OJWANG, J.)**  
**CRIMINAL APPEAL NO. 181 OF 2006**

**BETWEEN**

**WILBERFORCE HUNJA MWANGI..... APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

*(An appeal from the Judgement of Principal Magistrate K.W. Kiarie dated 20<sup>th</sup> April, 2006 in Criminal Case No. 2455 of 2005 at the Kiambu Law Courts)*

**JUDGEMENT**

The appellant had been charged with several counts of offences, as follows: (i) obtaining timber by false pretences contrary to section 313 of the Penal Code (Cap.63); (ii) forgery contrary to s.350 of the Penal Code (Cap.63); (iii) making a document without authority contrary to s.357(a) of the Penal Code (Cap.63); (iv) uttering a false document contrary to s.353 of the Penal Code (Cap.63) (v) uttering a false document contrary to s.353 of the Penal Code (Cap.63); (vi) possession of forged bank notes or currency contrary to s.359 of the Penal Code (Cap.63); (vii) stealing from a locked motor vehicle contrary to s.279(g) of the Penal Code (Cap.63). In the case of the 1<sup>st</sup> count, the appellant had been charged with two others – **Caleb Otieno** and **George Kimani Ng'ang'a**; in the case of the 2<sup>nd</sup> count, he had been charged alone; in the case of the 3<sup>rd</sup> count also, he had been charged alone; in the case of the 4<sup>th</sup> count, the appellant had been charged with a 2<sup>nd</sup> accused, **George Kimani Ng'ang'a**; in the case of the 5<sup>th</sup> count, he had been charged with one other, **George Kimani Ng'ang'a**; in the case of the 6<sup>th</sup> count, the appellant had been charged alone; and in the case of the seventh count, he had been charged with two others, **Caleb Otieno** and **Kimani Ng'ang'a**.

Against the appellant herein, **Wilberforce Hunja Mwangi**, the trial Court found the case proved in respect of count 1, count 4 and count 5. After the prosecution asked that he be treated as a first offender, the appellant made a mitigation address in which he said he was HIV-positive, and was the sole bread-winner for a family of six. He prayed that he be placed on Community Service Order. The learned Magistrate took that into account and ruled:

***“I have considered that the accused is a first offender....However, the complainant lost timber worth a lot of money and I therefore do not find a non-custodial sentence to be appropriate. Secondly, being HIV-positive is not a licence to commit an offence. I therefore sentence the***

***accused to serve three years' imprisonment on each of counts 1, 4 and 5; sentences to run concurrently."***

In the grounds of appeal, the appellant contended that: the sentence is harsh and excessive; the trial Court erred in law by not considering the possibility of a mistaken identity; appellant is the sole bread-winner for the family; there was no proof of forging of L.P.O by appellant.

Learned State Counsel ***Mrs. Kagiri*** contested the appeal, as regards both conviction and sentence. She urged that the prosecution had adduced sufficient evidence showing that the appellant had obtained timber by false pretences, and had uttered a false document.

PW1, a timber trader testified that on the material date, the appellant had introduced himself as ***Wilberforce Mwangi*** and said he wanted to buy timber. He was given quotations for different types of timber, and later he called to say he was ready to collect the same; and he then sent two people, bearing two cheques, to collect the timber; but the cheques had certain irregularities, and the complainant (PW1) referred the same to the appellant herein. The appellant responded to PW1 by stating that the irregularities would be corrected by a respectable name, Consolata Missionaries, Westlands. When PW1 sought the said correction with Consolata Missionaries, the said cheque was found to be a fake one – and it is then that this fraud was reported to the Police.

It was PW2's testimony, and he was a worker at PW1's timber yard, that those who collected the timber had presented a cheque in payment of purchase price. The testimonies of PW2 and PW5 (also a timber trader) corroborated that of PW1; and it is PW3 who laid the trap that led to the arrest of the appellant. Just one day after PW1's timber was stolen, the same was sold to PW5 at the price of Kshs. 38,000/=.

Learned counsel submitted that the testimonies of PW1, PW2, PW3, PW4, PW5 and PW6 proved beyond reasonable doubt that the appellant is the one who stole PW1's timber by pretending that the cheque he had paid was a genuine one. That same cheque had been stolen from PW4 one year earlier, and PW4 gave testimony to that effect. And it was PW6, the CID officer, who laid the ambush which led to the arrest of the appellant.

Learned counsel submitted that the three counts of the charge against the appellant, counts 1, 3 and 4, had been duly proved; the appellant had the intention to defraud both PW1 and PW3, by making and uttering a document he well knew did not belong to him. The appellant had raised no testimony to shake the prosecution evidence; and thus the conviction was in every respect safe.

After carefully considering the evidence, the judgement of the trial Court, and the submissions made on appeal, I have come to the conclusion that the proof adduced by the prosecution was precise, and entirely consistent as it came forth from each witness. All the elements of the testimonies accurately dovetailed to establish that the appellant had committed the offences charged. He was, therefore convicted on the merits of evidence, and he is not able to show any flaw in the proof.

I therefore dismiss the appeal herein. I uphold conviction. I confirm sentence as meted out by the learned Magistrate.

***It is so ordered.***

**DATED and DELIVERED** at Nairobi this 24<sup>th</sup> day of October, 2007.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J**

**Court Clerk: Ndung'u**

**For the Respondent: Mrs. Kagiri**

**Appellant in person**