



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Appeal 234 of 2003

**(From original conviction (s) and Sentence(s) in Criminal case No. 1280 of 2002 of the
ChiefMagistrate’sCourt at Kibera (Mrs. Karanja – C.M.)**

JOHN WAINAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

JOHN WAINAINA has appealed to this court against the convictions and sentences imposed against him by the Chief Magistrate’s Court Kibera on 16th January 2003. He was convicted in count 1 for the offence of **making a document without authority** contrary to Section 357(a) of the Penal Code, in count III of uttering a document with intent to defraud contrary to Section 357(b) of the Penal Code and in count IV of obtaining money by false pretences contrary to Section 313 of the Penal Code and in count VI of operating an insurance broker without a valid Insurance Certificate contrary to Section 150(1) of the Insurance Act. In count I, III and IV he was sentenced to serve 18 months imprisonment while in count VI he was fined 20,000/- in default 12 months imprisonment. MR. GITHINJI, counsel for the Appellant relied on only two grounds, in the filed petition of appeal. The first ground relied on was that the learned trial magistrate erred in law and fact in failing to give the Appellant the benefit of doubt in light of the discrepancies, omissions and contradictions in the prosecution case. The second ground was that the learned trial magistrate erred in law and fact in shifting the burden of proof from the prosecution to the defence.

In the first count, the Appellant was alleged to have made a letter to Association of Kenya Insurers on the letter heads of Phoenix of East African Insurance Company purporting it to have been issued by Phoenix. The evidence in support of this count came from PW1, one FRANCIS WACHIRA, an Administrative Assistant with Association of Kenya Insurers (AKI). FRANCIS said that AKI received a letter from Phoenix applying for booklet of Aviation Certificates. That letter was dated 23rd October 2001 and was exhibit 26. Acting on that letter on 16th December 2001 FRANCIS issued 50 certificates to the Appellant whom he knew before. The Appellant signed for the booklet on the issuing form which was exhibit 28. The Appellant wrote his names as JOHN MUIRURI and wrote his Identification Card Number. The booklet the Appellant received from FRANCIS contained certificate Nos. 000926 to 000950.

MR. GITHINJI argued that the learned trial court could not have convicted the Appellant for the offence of making a document contrary to Section 35(a) of the Penal Code since she acquitted him for the forgery count (count II). MR. GITHINJI submitted that under Section 357 of the Penal Code definition contained herein stated “makes, signs or executes on name of or account of another whether by procuration or

otherwise,..." MR. MAKURA, learned counsel for State submitted that even though the Appellant did not write the document, "making of a document" cannot be taken in its literal meaning and that it could have been committed through procuration.

I have carefully evaluated afresh the entire evidence adduced before the trial court. The evidence adduced by the prosecution in support of the charge of making a document without authority did not establish a nexus between the Appellant and the document in question which was a letter, exhibit 26. The Appellant is not shown to have come into contact with that letter. All the Appellant is shown to have done is to collect Aviation Certificates from AKI on the basis of the said letter. KISIA, PW6, who was purported to have signed the letter, exhibit 26 denied signing or even writing it. The Document Examiners report exonerated KISIA from having written on the said letter.

The Appellant on other hand denied two things in relation to the letter. He denied signing or making or executing the letter exhibit 26. For that the document examiner was in agreement. The Appellant also denied collecting the certificates Nos. 000926 to 000950 from FRANCIS PW7. From the evidence by the prosecution I find that the Appellant's denial that he did not collect the certificates from FRANCIS was untrue. FRANCIS evidence that the Appellant had the certificates received corroboration from other witnesses. The booklet the Appellant collected from FRANCIS contained all three certificates that the Appellant issued to PW1 MONOHALI SINGH and all three certificates that the Appellant issued to PW4, MARGARET MUTHEU. MANOHALI and MARGARET were independent witnesses. They did not know the Appellant before. They did not know each other and neither did they know FRANCIS. They were truthful witnesses in my considered view.

There is no doubt that the Appellant collected the 50 Aviation Certificates and issued six of them to MANOHALI and MUTHEU. However, that evidence does not support the charge of making a document without authority. It strongly supports the charge of Stealing contrary to Section 275 of the Penal Code. The Appellant stole the certificates because at the time he collected them on behalf of Phoenix East Africa Insurance Company in 2001, he had ceased working for that Company six years before. That was adduced by ABEL, PW5 from Phoenix. PW2, BRIAN, a Manager with AKI also confirmed that Phoenix denied having collected the 50 certificates and that when AKI discovered that, they advertised the loss of the certificates in the local dailies of 4th January 2002. Nation Newspaper of that day was exhibit 5 and contained notice of cancellation of these certificates.

On count 1, I find that the evidence adduced could not support the charge and therefore the conviction entered was unsafe and cannot be sustained. I quash the conviction and set aside the sentence. In count III, the Appellant was alleged to have uttered the same letter, exhibit 26, to FRANCIS PW7. I will not belabour the evidence adduced in support of the charge because it was the same evidence adduced in support of count 1. It is clear that at no time in his evidence did FRANCIS claim that the Appellant uttered the document to him. FRANCIS knew the Appellant before. He said he saw the Appellant on 10th December 2001 when he went to collect the certificates. The letter was dated 23rd October 2001 and was already with AKI by the time the Appellant went to FRANCIS for the certificates. The charge could not be sustained on that ground since as stated earlier, there was no evidence adduced to establish a nexus between the Appellant and the letter. I also allow the appeal in respect of count III, quash the conviction and set aside the sentence.

In count IV the Appellant is alleged to have obtained Kshs.40,000/- from **MARGARET MUTHEU PW4**, with intent to defraud. The charge alleges that the Appellant made a false representation that he would insure two aircrafts belonging to Kings Air Services. The Appellant denied dealing with **MARGARET** for the Aviation Insurance saying his mandate at Fixed Wings Insurance Limited, his employers, was limited only to non Aviation Insurance Business. **MARGARET** not only produced the 2 certificates she received from the Appellant on 13th December 2001, exhibit 17 and 18, but also the receipt for Kshs.40,000/- which the Appellant issued to her as payments for the 2 insurance covers. The receipt was exhibit 19. The two certificates exhibit 17 and 18 are part of those AKI cancelled through notice in the Daily Nation Newspaper of 4th January 2002, exhibit 5. That was the same notice that Margaret saw and which caused her to report the matter to the police. **MARGARET** went further and identified the Appellant to the police and he was arrested and charged. Margaret later on 10th January

2001, received a letter canceling the Insurance certificates that the Appellant had issued to her.

The evidence in support of the charge is further supported by the evidence of AKI through its employees, **BRIAN PW2**, a Manager and **PW7 FRANCIS**. Brian confirms the cancellation of the certificates in issue while **FRANCIS** confirms that the same certificates had earlier been collected from AKI by the Appellant. **PW5 ABEL** confirms that Phoenix did not have the booklet from which the Insurance Certificates exhibit 17 and 18 were derived from exhibit 17 and 18 were in the name of Phoenix East Africa Insurance Company. Yet Phoenix did not own them or have them. By issuing the two certificates to Margaret, the Appellant made a false representation that the two certificates had insured the two aircrafts for which Margaret bought the Insurance Cover from the Appellant.

The Appellant also succeeded in defrauding Margaret of Kshs.40,000/- which was the cost of the two certificates. In support of the charge I find overwhelming evidence was adduced. I do not find any substance in the learned counsel for Appellant's submission that there was no evidence that Margaret gave the Appellant Kshs.40,000/-. The evidence is clearly on record and it speaks for itself. Not only was the Appellant paid, he also issued both certificates exhibit 17 and 18 and a receipt for the payment, exhibit 19 to Margaret on the same day. The appeal against count IV fails and is dismissed.

On count VI, it has been admitted that the prosecution charged the Appellant with operating an Insurance brokerage without a valid Insurance Certificate. The learned counsel for the Appellant submitted correctly that the evidence adduced before the court and the charge preferred were not clear. The charge alleged that the Appellant was not registered to operate an Insurance brokerage while the evidence adduced indicated he failed to renew the registration and the licence. MR. MAKURA did not think it mattered. The learned counsel for the State submitted that the difference between a certificate and a license was not fatal and that the Appellant knew that he was being charged for operating without a license.

Section 150(1) of the Insurance Act provides: -

“150(1) - No person shall after expiry of three months from the appointed date, commence, transact or carry on in Kenya the business of a broker, agent, risk manager, loss assessor, loss adjuster, insurance surveyor or claims settling agent unless he is registered under this Act.”

The Appellant was alleged to have operated an Insurance Agency without a valid Insurance Certificate between 31st December 2000 and 13th February 2002. The evidence adduced in support of this charge was from **GIDEON PW1**. **GIDEON** worked with the Commissioner of Insurance. His evidence was that the Appellant and another were registered with the commission as Insurance Agents for a period between 10th August 2000 and December 2000. Thereafter they were supposed to renew their registration in order to continue to operate as agents, which they did not do, despite a reminder through a letter by **GIDEON** produced as exhibit 12. **GIDEON** said that after that letter, the Commission of Insurance authorities decided that the two, Appellant and one **JOHN EDWARDS** should not be licensed again.

The section of the law invoked is very clear that the offence charged can only be committed if the person carrying out the brokerage was never registered. The evidence adduced shows clearly that the Appellant was registered as an agent on 10th August 2000. The evidence is also clear that a certificate was issued to Appellant and another which gave them the license to operate up to December 2000. They were to renew the registration but failed to do so. The offence committed by the Appellant at the time alleged in the charge is not failure to register but failure to renew registration. Failure to renew could only be charged under Section 188 of the Insurance Act and not Section 150(1) of the same Act. In the circumstances the appeal has merit on this count and is allowed. The conviction is quashed and the sentence set aside. The upshot of this appeal is that the appeal succeeds in respect of counts I, III and VI. The appeal fails in respect to count IV and the conviction is upheld and the sentence confirmed.

Dated at Nairobi this 22nd day of September 2005.

LESIIT, J.

JUDGE

Read, signed and delivered In the presence of;

for Appellant

for Respondent

LESITT, J.

JUDGE