



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO.1437 OF 2002

YABI SALIOU alias

JOSEPH TINKASIMIRE CHRISTOPHER..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

**[From original Conviction and Sentence in Criminal Case No.
148 of 2000 of the Chief magistrate's Court at Nairobi]**

JUDGMENT

The appellant herein was on 17.11.2000 convicted by S.M Mungai, Esq., Senior Resident magistrate in the Chief magistrate's Court, Nairobi of the following offences:-

Count 1: Obtaining by false pretences, contrary to section 313 of the Penal Code (Cap.63).

Count 2: Attempt to obtain money by false pretences, contrary to section 313 as read with section 389 of the Penal Code.

Count 3: Knowingly possessing and using a forged passport, contrary to section 13 (1) (d) of the Immigration Act (Cap 172).

Count 4: Being unlawfully present in Kenya, contrary to section 13 (2) (c) of the Immigration Act.

On 01.12.2000 he was sentenced as follows:-

Count 1: Eighteen (18) months imprisonment.

Count 2: Eighteen (18) months imprisonment.

Count 3: Fined Shs.15,000/=, in default one (1) year imprisonment.

Count 4: Fined Shs.10,000/=, in default nine (9) months imprisonment.

He lodged the present appeal against conviction and sentence on each count. The essence of his appeal against conviction is that the subject offences were not proved beyond reasonable doubt. As regards sentence, he submitted that the sentence under each count was excessive in his situation since according to him he was a victim of circumstances. He urged that his convictions be quashed and sentences set aside.

Some 5 prosecution witnesses testified against the appellant. The evidence on record established that he was a Benin National but was in Kenya illegally. That he encashed stolen travellers cheques using a Ugandan Passport. He was also found in possession of a temporary movement permit in the name of Bob Musoka Kwanjana but bearing his photograph. He was described in that document as a resident of Mukoba Mbarara in Tanzania. In his defence the appellant gave sworn evidence and said he was a broker and that the travellers cheques had been issued to him by some Arabs who told him they came to finance investors in Kenya. The police challenged him to show them the Arabs but he could not. Cross-examined by the prosecutor, the appellant said he did not know why the Arabs could not go and exchange the travellers cheques themselves. He pleaded with the trial court to treat him as a victim of circumstances but the court was unsympathetic. He urged this court to accord him the sympathy he was denied by the trial court and allow him appeal.

Learned counsel for the respondent, Mr. Monda supported the appellant's conviction and sentence under each count and urged that his appeal be dismissed in its totality.

The basic issue for the determination of this court is whether there is evidence on record to sustain the appellant's conviction.

I have undertaken my own independent evaluation of the evidence on record and I find it overwhelming against the appellant. The learned trial magistrate was eminently justified in convicting the appellant for all the offences charged and I have no hesitation in upholding the appellant's convictions.

The appellant's appeal against his conviction under each of the 4 counts is hereby dismissed.

With regard to sentence, all I wish to say is that the sentence for obtaining by false pretences under count 1, the sentence for attempt to obtain by false pretences under count 2 and the sentence for knowingly possessing and using a forged passport under count 3 are all within the law and none of them is manifestly excessive. The appellant's appeal against his sentence under count 1, count 2 and count 3 is hereby also dismissed.

There is a technical problem about the sentence of nine (9) months imprisonment in default of the fine of Shs.10,000/= for the offence of being unlawfully present in Kenya under count 4. Section 13 (2) (c) of the Immigration Act under which the appellant was charged makes no provision for default prison sentence if the fine imposed is not paid. Under the circumstances, I am of the view that the best guide would be section 28 (2) of the Penal Code. At the time of the subject sentence the maximum default prison sentence for failure to pay a fine of between Shs.3,000/= and Shs.10,000/= was six (6) months only. Accordingly, the default prison sentence of nine (9) months exceeds the maximum permitted by law at the time and is, therefore, unlawful. The appellant's appeal against the default prison sentence of nine (9) months imprisonment under count 4 is hereby allowed, the said sentence set aside and substituted with a default prison sentence of six (6) months imprisonment.

The trial court ordered the appellant to be repatriated after serving sentence. That order is hereby upheld.

Orders accordingly.

Delivered at Nairobi this 18th day of February, 2004.

B.P. KUBO

JUDGE