



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL APPEAL NO. 76 OF 2002**

**(From the conviction and sentence of Ezra. O. Owino, S.R.M.**

**in Limuru SRM. Criminal Case No. 1924 of 2000)**

**JOSEPH NGUGI KOGI.....APPELLANT**

**V E R S U S**

**R E P U B L I C.....RESPONDENT**

**JUDGMENT OF COURT**

The appellant, Joseph Ngugi Kogi, was with another, jointly charged with four counts. These 1 and 2 counts were those of an attempt to obtain by false pretences contrary to section 313 of the Penal Code. The 3 count was forgery contrary to section 349 of the Penal Code. The fourth count was making a document without authority contrary to section 357(a) of the Penal Code. The fifth count, which was brought against the appellant alone, was uttering a false document contrary to section 353 of the Penal Code. The appellant was convicted of count one, count two and count five. That is to say that he was convicted of attempt to obtain by false pretences (2 counts) and uttering a false document. He appealed against the conviction and the sentence, the latter being a fine of Kshs. 30,000 in respect to each count and in default 12 months imprisonment to each count. The total fine would come to 90,000 and the total imprisonment would come to 36 months. A summary of the facts is as follows:

On 17.8.2000 at about 2.35 p.m. some documents were presented to PW1 John Nzioka Ngulu by the office Clerk. They included a driving license, motor vehicle T.L.B. and Transport Order, all of them for the purpose of receiving and transporting tea leaves from Karirana Tea Estates. The documents were produced and presented to PW1 with an intention to convince him for the said Karirana Tea Estates to release a certain load of tea leaves as therein stated. The appellant and -accused at the lower court had represented themselves as having been sent by Malde Transport Agents. However, the said PW1 soon suspected that the appellant and his group had not really been sent by Malde Transporters because he noticed that the motor vehicle brought by the appellant's group to carry the load of tea leaves was totally unsuitable for the purpose. It is at this moment in time that PW1 instructed the appellant and his group to go away and later come back with a more suitable truck carrying the load of tea. In the meantime Malde Transporters telephoned and wanted to know if the complainants, Karirana Tea Estates wanted a lorry to carry any load of tea leaves. They denied having sent the appellant's motor vehicle earlier because it was unsuitable and confirmed also that they had not sent anyone to collect tea that day nor was the lorry registration KAE 812D theirs or even known to them. It would, from this moment, appear that the complainant confirmed its fears that the appellant and his group were common thieves. They now decided to go along with the suspects to catch them. On 18.8.2000, the appellant's group once more

reported to Karirana Tea Estates and saw PW1, who as indicated above, was already aware that they were not used by Malde Transporters. At this stage PW1 telephoned Malde Transporters and the latter confirmed once again that they had not sent suspects. In the mean time the motor vehicle was being loaded with some tea leaves while some officer of the Company had gone to collect the Police as the Company telephones were not working at the time. Soon the Police came and arrested the appellant and was accused in the lower court. At this time the suspect's lorry had been filled with tea leaves amounting in value to about – 3 million Kenya shillings. This time the lorry they had come with to carry the tea leaves was KAH 785M registered in the name of Daniel Ngugi. It would appear from the evidence that on this second occasion on 18.8.2000, the appellant's lorry did not present the T.L.B. they had presented on 17.8.2000 since the documents had been retained by PW1 at the factory on 17.8.2000. It was in the Karirana Tea Estate's record that the last time they had transported tea through Malde Transporters on 11.8.2000, and this was to Mombasa. PW2, Bargwani L. Shali evidence confirmed the above. He also was shown the documents which had been presented to Karirana Tea Estates on 17.8.2000 and he clearly stated that the same were not presented by Malde Transporters. He said he was the only person at Malde who would give and sign such orders and he had not given or signed those presented by the suspects on 17.8.2000. He called the order presented by the appellant and his colleagues, fake or forged, it contained a signature different from his and also confirmed that the order presented could not be theirs possibly stolen by other people. He then noticed that the orders marked as MF1 2 and presented by the appellant and his colleagues to Karirana Tea Estates on 17.8.2000 looked exactly like Malde's and carried the same number as Malde's Order marked as MF1 6. But he had not sent the appellant or any of his colleagues, nor had he before then seen the lorry presented by the appellant on 17 and 18 August 2000 to Karirana Tea Estate.

The evidence of PW3, Kennedy Pareneles Lepaiko confirmed that he is a driver who drove vehicles belonging to one Gicheru who owned lorries registration numbers KAH 185M and KAH 785M. On 18.8.2000 PW3 drove the vehicle KAH 185M and was informed by his boss Gicheru that the vehicle had been hired to transport tea leaves to Mombasa. He was led to Karirana Tea Estates to collect the load to transport to Mombasa by one Karanja and one Ngugi. Karanja was accused and Ngugi was the second accused in the lower court. The third accused is the appellant herein .

When they presented the motor vehicle KAH 185M the motor vehicle was accepted to enter the factory and was later loaded with tea leaf bags. However, the policeman arrested them. He claimed he did not know what he was going to transport to Mombasa since the agreement was between the appellant herein and his boss Gicheru. He also at the same time realized that his motor vehicle which is usually registration number KAH 185M, was in fact now carrying a number plate No. KAH 785M. He did not know who had changed the number plate . When a search was done in the motor vehicle it was discovered that the motor vehicle sometimes carried registration numbers KAH M1 805r KAH 785M or KAE 812D. He denied being involved in whatever misconducts that was being played. PW4, PW5, PW6 and PW7 effectively confirmed the evidence of PW1 with various differences which the court will look at hereafter. The only further detail used in their testimony is that the ring leader of the appellant's group and who led the group to Karirana Tea Estate factory on 17.8.2000 and who also signed the gate entry book did not come on 18.8.2000. He disappeared after 17.8.2000. He was never arrested and was therefore never charged. His name was Daniel Ngugi Muli. The appellant who was second accused is called Joseph Ngugi Kogi.

Peter Gicheru Kirika confirmed that he was the owner of motor vehicle's registration Nos. KAH 590L and KAH 1 85 MO. On 18.8.2000 his motor vehicle registration No. KAH 185 M was hired by one Karanja to transport some luggage to Mombasa. He did not find it necessary to enquire. When the motor vehicle did not return from where he had released it to go for the collection of the luggage, he reported the matter to Kamukunji Police Station. Later he learnt that his vehicle was held at Karirana Tea Estate and his driver and turn boy were held at Tigonj Police Station . He was surprised to find that this vehicle had different registration number.

The appellant's defence was that he was an employee of one Sammy Karanja Chege who was the first accused in the lower court. On 17.8.2000 one Sammy Gicheru requested his boss to transport some goods to Mombasa. Gicheru and his boss agreed that the job would be done on 18.8.2000. On 18.8.2000

the appellant on instructions from his employer, 1s act cused, accompanied the driver of KAH 185M to Karirana Tea Estate to carry the goods as instructed by his boss Karanja. They at thae tge explained that they had gone there to carry a load which could not be carried on 17.8.2000 and that the relevant documents had been presented to the factory on 17.8.2000. They were then allowed into the compound and tea leaf bags were packed on the vehicle. It is then that they were arrested and later charged with the offences enumerated in the charge sheet. The s a1tccused's story was substantially similar.

The trial magistrate looked at all the evidence as recorded above. He concluded that no evidence was adduced to prove the alleged forgery, especially in the absence of hand writing expert evidence. He also established that there was no evidence to support the charge of making a document without authority, as no evidence was adduced with regard to the maker or author of the transport order relevant to count. He concluded that the s a1t ccused was nowhere near Karirana Tea Estate where the document was alleged to have been presented on 17.8.2000 or 18.8.2000. He proceeded to acquit the appellant and the first accused of the three counts of forgery and making a document without authority.

Counts one and two were the attempt to obtain tea leaves by false pretences on 17.8.2000. The appellant drove the motor vehicle to Karirana Tea Estate to try to collect a lorry load of tea leaves. The first accused hired a motor vehicle KAH 185M and sent his driver the appellant to collect the goods to a place where Appellant would be led to by one Sammy. As rightly found, the first accused did not accompany the appellant and was not there when the appellant allegedly presented the documents at Karirana Tea Estate and requested to be given the goods to transport to Mombasa. On this ground the trial magistrate found that the part played by the appellant, the appellant's boss, was minimal. He acquitted him of the false pretence charge. He then proceeded to find that the appellant is the one who presented the relevant documents and determined that he presented them knowingly and knowing that the documents were false. The identification card bore another person's photograph and not his and that proved his fraudulent intention. He accordingly found him guilty of attempting to obtain tea leaves from PW1, John Nzioka Ngulu by falsely pretending that he was a servant of Bargway W. Shali who had been sent to collect the tea leaves on behalf of the said Bargway W. Shali. From this conclusion it was not difficult for the trial Magistrate to also find him guilty of uttering the same documents as contained in count V.

I have fully considered the evidence on the record and the manner the trial magistrate treated it to convict the appellant as aforesaid. There is evidence on the record that the documents were presented either by one Daniel Ngugi Muli or by the appellant. The gate record shows that it was Daniel Ngugi Muli. Some prosecution witnesses are confused over the issue, particularly PW7. However, there is also evidence on the record that after they were submitted on 17.8.2000, the documents were kept at the factory by the Manager until 18.8.2000. If this is so, and that is probable, there is no way they could have been presented by the Appellant on 18.8.2000 as that would not have been possible. It is my view therefore that a serious doubt was created as to whether the documents were presented by the appellant or by the said Daniel Ngugi Muli. With such a doubt it will be difficult to come to the conclusion that the appellant on 17.8.2000, presented any document with a fraudulent intention to obtain the tea leaves from KARIRANA Tea Estate which action when it failed to materialize, would amount to an attempt charged in count one. Examination of the lower court record fails to show that the trial magistrate really considered the appellant's defence. The appellant in his defence stated that he and the driver and turn boy of his boss Karanja, Accused One, went to Karirana Tea Estate gate where they explained that they had come there to carry the goods which those who had come there on 17.8.2000 had failed to do. The driver who did not himself sign the gate documents and the lorry was allowed in relation to the order of 17.8.2000. They were arrested by the police as the lorry was being loaded. The trial magistrate failed to consider this defence and either accept it or reject it after tabulating it. He proceeded to consider and finally rely on the prosecution evidence in isolation. This was a serious legal error. Had he considered the defence properly, it cannot be said that it might not have influenced him otherwise. On my part, I find that the defence statement, especially in this case where the prosecution evidence appears contradictory and in some aspects inconsistent, was probably true.

I further notice that the defence of the first accused whom the trial magistrate acquitted is almost similar to that of the appellant. It is difficult to see why the court believed the same story in relation to the first accused but refused to accept it in relation to the appellant.

There is also adequate evidence to prove the fact that appellant who was the accused's employee and who on 18.8.2000 during the period when the offences were committed was in company of the accused. It is not clear even as to who really presented the documents on 18.8.2000 to the gate keeper. There is no reason from the record to believe that the appellant was the spokesman at the gate. PW5's evidence is confused. He claims that on 17.8.2000 the people who presented themselves were allowed into the factory but sent away without the door. He argues that the driver who then had the vehicle was Daniel Ngugi who he then misidentified as the appellant Daniel Ngugi Kogi. He then tries to correct the misidentification and says the drivers on 17.8.2000 and 18.8.2000 were different. This by itself creates doubts as to whether the appellant was at that gate on 17.8.2000 and 18.8.2000. On the other hand the charges are based on the fact that the appellant was the driver who presented the documents on both days, otherwise once again, the story of the appellant that he only was present on 18.8.2000 gains credence.

The upshot is that the evidence of the several witnesses, upon which the trial magistrate convicted was inconsistent and contradictory in many aspects. The evidence is therefore not sufficient to have proven the charges beyond a reasonable doubt. The trial magistrate erred convicting the appellant.

I accordingly quash the conviction and set aside the sentence of 30,000 fine or 12 months imprisonment in respect of counts 1, 2, and 5. The appellant shall forthwith be released from prison unless lawfully detained. It is so ordered.

Dated and delivered at Nairobi this 8th day of April, 2003.

**D.A. ONYANCHA**

**J U D G E .**