

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
HIGH COURT CRIMINAL APPEAL NO. 67 OF 1998
(Org. CM's NYI CR. C. 1352/95)

GILBERT KARIUKI NGATIA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged in the Chief Magistrate's Court Nyeri jointly with two others on 2 counts of forgery c/s 349 of the Penal Code; 2 counts of offering money by false pretences c/s 313 of the Penal Code. The appellant alone faced 2 counts of uttering a false document c/s 353 of the Penal Code. The appellants co-accused were acquitted under S. 210 of the Criminal Procedure Code. The appellant was convicted in the 2 counts of obtaining money by false pretences c/s 313 of the Penal Code and acquitted on the other 4 counts. The main point taken on appeal is that the trial magistrate having acquitted the appellant on the charges of forgery and uttering a false document for lack of evidence the conviction on the charges of obtaining by false pretences cannot stand. The learned Provincial State Counsel concurred with that line of argument by counsel for the appellant.

In his judgment the learned trial magistrate expressed his doubts that it was the appellant who wrote and signed the documents which were the subject matter of the charges against the appellant. He had this to say:

“The probability that it was another person who wrote and signed the documents cannot be ruled out.”

If the learned magistrate was doubtful that it was the appellant who uttered the documents he should have used the same argument that it may not have been the appellant who took the money. Both PW1 and PW2 testified that they were seeing the appellant for the first time when they allegedly served him on 8th April 1995 and 11th April 1995 respectively. They next say him on court. The purported identification of the appellant counted to dock identification. An identification procedure should have been conducted soon after the arrest of the appellant. No incriminating evidence was found on the appellant when he was arrested. PW4 testified that the document examination confirmed that the vouchers allegedly forged by the appellant were not filed by the appellant.

What was not established by the prosecution and what I find puzzling is who the bank Account holder was. If he is in existence why did he not testify at the trial? Who stood to lose through the fraud? These unanswered questions confirm that the investigation of the case were neither thorough not free from suspicion. The conviction is unsafe. I allow the appeal, quash the conviction and set aside sentence. The appellant be set at liberty.

Dated this 23rd day of October 2002.

J.K. MITEY

JUDGE