



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 1014 OF 2002

(From Original Conviction and Sentence in Criminal Case No. 5462 of 2001
of the PMS Magistrate's court at Kibera

MARTYN DAVID HEINSTRIDGE APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

On 1st October, 2002, I allowed the appeal herein and reserved the reasons thereof

The appellant had an account with Barclays Bank Muthaiga Branch which was dormant. He moved to re-activate the same and made provision for some money to be deposited therein by cheque. At the same time he introduced a third party one, Moses Kimani Gichuhi to be operating the account to run his business (Kimani) provided withdrawals did not exceed Kshs.2 million. There is evidence that soon thereafter the appellant left the country and did not return until after four months.

On his return he was arrested and subsequently charged with three offences. In count one he was charged with the offence of making a document without authority C/s 357 of the Penal Code.

In count two the charge was that of uttering a false document C/s 353 of the Penal Code and finally in counts 3 he faced the charge of obtaining money by false pretences C/s 313 of the Penal Code.

At the end of the trial the appellant was convicted of the offences of uttering a false document and obtaining by false pretences and sentenced to two years imprisonment on each of the two counts. The sentences were ordered to run concurrently.

There was no evidence that when the appellant processed to forms to re-activate his account he ever deposited any money either in cash or by cheque. If anything, the entries reflected a deposit when he had already left the country. The cheque number and the amount also was not proved beyond doubt such that even if it were to be proved any cheque was indeed uttered doubts would still exist as to what the subject matter was.

It was also conceded that at no time did the appellant make any withdrawals. All were made by the said Moses Kimani Gichuhi. Other than introducing Kimani to the bank officials to use his account, there was no evidence that Kimani was withdrawing the money for the benefit of or use by the appellant. In any case all the withdrawals were made in the absence of the appellant.

One glaring omission was that the particulars of Moses Kimani Gichuhi were not recorded on all occasions he withdrew the money leave alone when he was introduced to the bank by the appellant. That requirement was mandatory and the omission was not explained. The wife of the appellant offered to lead the police to show them where to find this third party but instead she was locked up. The evidence adduced could not sustain the charge of obtaining by false pretences. Both actus reus and mens rea were lacking and a conviction could not be sustained.

For the foregoing reasons the appeal was allowed. Nairobi Signed

3rd December, 2002

Mr. Oyatta

I apply for the release of the passport of the appellant.

ORDER

Principal Deputy Registrar – cause the appellant’s passport held by the court to be released to him.

MBOGHOLI MSAGHA

JUDGE

3.12.2002