



**Kikwau v Republic (Criminal Appeal 32 of 2024)
[2024] KEHC 14363 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 32 OF 2024
DR KAVEDZA, J
NOVEMBER 19, 2024**

BETWEEN

MUTANGILI MARTIN KIKWAU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. N. Thuku on 25th April 2024 at JKIA Chief Magistrates' Court
Criminal Case No. 36 of 2020 Republic vs Mutangili Martin Kikwau)*

JUDGMENT

1. The appellant Mutangili Martin Kikwau was charged and after a full trial convicted for the following offences: two counts of personation contrary to section 382 of the Penal Code; one count of obtaining money by false pretence contrary to section 313 of the Penal Code and one count of forgery contrary to section 342 of the Penal Code. He was sentenced to serve 6 months imprisonment in each of the two counts of personation; 12 months imprisonment for obtaining money by false pretence and 12 months imprisonment for the offence of forgery. The sentences were to run concurrently.
2. Aggrieved, he filed a petition of appeal challenging his conviction and sentence. He raised grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.
3. This being the first appellate court, we are guided by the ruling in *Okeno v. R* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and in an exhaustive manner, so as to come up with its own conclusions without overlooking the conclusions of the trial court, bearing in mind that it never saw the witnesses testify.
4. The prosecution's case was as follows: On 11th August 2020, a team of officers from the Directorate of Criminal Investigations (DCI), led by Chief Inspector Walter Marunga, arrived at Prissy Apartments



- in Syokimau to apprehend a suspect accused of fraud, forgery, and personation. Corporal George Murunga (PW7), Police Constable Stephen Kikai (PW1), and Police Constable Mary Mwangi (PW9), all members of the Transnational Organized Crime Unit (TOCU), were part of the operation. Guided by the estate chairman, they knocked on door F2. A woman answered, denying anyone else was present. Undeterred, the officers conducted a search, eventually finding the suspect, later identified as the appellant, hiding in one of the bedrooms.
5. The search of the house uncovered an array of suspicious documents: delivery notes bearing Kenya Defence Forces (KDF) stamp impressions, local purchase orders, a delivery notebook, and three KDF-related stamps. Other items included a civilian firearm certificate and financial records. The officers extended their search to the appellant's vehicle, a Subaru, where they found a black pistol holder. An inventory of the seized items was prepared and signed by the appellant and a witness. The suspect was then taken into custody at Muthaiga Police Station.
 6. Further investigations revealed the extent of the appellant's fraudulent activities. One victim, Chetankumar Sureshandra Vekaria (PW2), recounted his dealings with the appellant. In 2018, after lending Kshs. 200,000 to a friend, Kepha Abuogi, who failed to repay, Vekaria sought assistance from the appellant, who claimed to be a senior KDF officer. The appellant confiscated a motorcycle from Kepha as partial repayment but later proposed a more lucrative opportunity: a cereal supply contract with the KDF. Trusting the appellant's purported credentials, Vekaria paid Kshs. 10,000 for documentation and an additional Kshs. 55,500 for the venture. However, no contract materialised, and the appellant offered endless excuses, prompting Vekaria to demand a refund.
 7. Meanwhile, Corporal Ivy Wangila (PW3) testified about an encounter with the appellant, who falsely identified himself as an officer from the National Intelligence Service (NIS). The appellant requested cash bail for a suspect in a case Wangila was investigating. Although Wangila declined to process the bail, she later discovered call data linking the appellant's phone number to this fraudulent interaction.
 8. Additional evidence of forgery emerged from the Ministry of Interior and Coordination of National Government, where Benson Kibunja (PW4), Director of Human Resource Management, confirmed that the appellant was neither an employee of the Ministry nor the authorised user of the official stamp found in his possession. Similarly, Inspector Paul Mwangi (PW5) of the Firearm Licensing Board testified that the firearm certificate held by the appellant was counterfeit, with no matching record in their database.
 9. The forgery allegations extended to the KDF, as Major Amos Kipchirchir Tuitoek (PW6), a legal officer, revealed that documents attributed to the appellant were fraudulent. The tender documents, delivery notes, and stamps purportedly linked to the KDF were fabricated, with investigations confirming the appellant had no affiliation with the military.
 10. The financial trail provided by Police Constable Quito Odeke (PW8), who worked at Safaricom's Law Enforcement Liaison Office, corroborated the fraudulent transactions. Acting on a court order, Odeke produced M-Pesa statements that showed transfers from Vekaria to the appellant, including payments of Kshs. 10,000 and Kshs. 35,000.
 11. As the investigation progressed, Police Constable Mary Mwangi (PW9) confirmed the appellant's systematic use of forged documents and impersonation to defraud individuals. Correspondence with institutions such as the Ministry of Interior and the NIS debunked the appellant's claims of employment or affiliation. Furthermore, complaints from defrauded members of the public highlighted the financial harm caused by the appellant's schemes.



12. In his defence, the appellant, denied ever obtaining money from anyone, claiming no interaction with Chatani other than being members of the same bikers' forum. He also denied ownership of a vehicle containing suspicious documents and stated that he did not own a gun or have a license for one. The appellant described an incident where seventeen men arrived at his home late at night, during which he was signing documents past midnight while his pregnant wife was present.
13. He admitted using a Subaru Forester but denied ownership, as well as any connection to the red bag found in the vehicle. The appellant denied working with the National Intelligence Service or being involved in the release of a robbery suspect. He rejected the charges presented against him, expressing confusion over the case and questioning the officers' lack of a search warrant. The appellant confirmed that Chatani had sent him money via MPesa, but his lawyer later raised doubts about the uncertified nature of the statements. However, this point was not raised during cross-examination, and the court had already accepted the statements as evidence.
14. The appellant acknowledged collecting money for Chatani's debt but denied any involvement in securing a tender with the Kenya Defence Forces (KDF). He claimed not to know the contents of the inventory and rejected claims about his signature, noting that the inventory had already been accepted as evidence. Regarding the KDF-related documents found in his possession, the appellant stated it was a coincidence and that the vehicles in question were not his but belonged to his wife and friend, with no NTSA records to verify ownership.
15. In counts II and IV, the appellant was charged with the offence of personation contrary to section 382 of the Penal Code which provides that:
 - “ 382. Personation in general
 1. Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanor.
 2. If the representation is that the offender is a person entitled by will or operation of law to any specific property and he commits the offence to obtain such property or possession thereof, he is liable to imprisonment for seven years.”
16. Section 382 creates two offences (1) where the offender only "falsely represents himself to be some other person" and (2) where the offender represents that he is "entitled by will or operation of law to any specific property and he commits the offence to obtain such property or possession thereof". In the former case, he is liable to be punished under the general penalty for a misdemeanour. In the latter special category, the offender is liable to be punished by imprisonment for seven years.
17. The prosecution's evidence was that the appellant contacted a police officer, claiming to be affiliated with the National Intelligence Service (NIS). The appellant falsely presented himself as a member of a government agency, intending to use that false identity to influence the release of a suspect. The police officer, PW3, confirmed this interaction, and investigations corroborated that the appellant was not affiliated with NIS.
18. Secondly, the appellant was found in possession of documents bearing forged stamps and seals related to the Kenya Defence Forces (KDF). This included tender documents and delivery notes that had KDF-related markings. The appellant falsely represented himself as having official connections to the KDF, using these forged documents to create a false impression of legitimacy. The KDF investigation revealed that the appellant was not a member of the military, and the documents were identified as fraudulent.



19. Thirdly, the appellant falsely promised to help secure a business tender with the KDF, claiming to have connections and the ability to facilitate the deal. He requested payments from PW2 for the procurement of cereals, which was later found to be a fraudulent scheme. The appellant did not have any authority to represent or facilitate KDF tenders, making this another form of personation, as he falsely presented himself as capable of securing government contracts. In addition to impersonating government officials, the appellant was found with a forged firearm certificate, further evidence of his attempt to present himself as possessing legitimate government authorization, which he did not have.
20. These actions collectively demonstrate how the appellant used false identities, forged documents, and impersonation to deceive others for financial gain, all of which constitute the offence of personation. The appellant's conviction in counts II and IV is therefore affirmed.
21. In count III, the appellant was charged with the offence of obtaining money by false pretence contrary to section 313 of the Penal Code. He was accused of obtaining Kshs. 55,000 from PW2 by falsely pretending he was in a position to secure a cereals tender by KDF.
22. Section 313 of the Penal Code provides as follows:

“ Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”
23. The prosecution is required to establish that the appellant obtained something capable of being stolen; obtained it through a false pretence; and with the intention to defraud. The prosecution argued that the appellant promised PW2, Chetankumar Sureshandra Vekaria, that he could help secure a KDF cereal supply contract. The appellant requested Kshs. 10,000 for documentation, and PW2 paid a total of Kshs. 55,500 between April and May 2019. Despite repeated excuses from the appellant, no tangible proof or business dealings with KDF materialised. The appellant also received additional payments from PW2 via M-Pesa, totalling Kshs. 3,000, Kshs. 10,000, and Kshs. 7,000, for a fraudulent business venture, which never provided any services or goods. The appellant's actions were based on false pretences, as the promised opportunities and tender were entirely fabricated.
24. On whether the defence offered by the appellant raised doubts as to his guilt, in my view, the explanation given by the appellant was in my view not reasonable nor did it rebut the clear evidence adduced by the prosecution. The appellant's conviction in count III is therefore affirmed.
25. In count VI, the appellant was charged with forgery contrary to section 345 as read with section 349 of the Penal Code. The prosecution's evidence was that the appellant was found in possession of a forged civilian firearm certificate no. 005869 in his name purporting to have been issued by the Chief Firearm Licensing Officer.
26. The offence of forgery is created and declared by section 349 of the Penal Code in the following terms –

Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.
27. Forgery is defined in section 345, as “the making of a false document with intent to defraud or deceive.” Section 347 deals with making a document while section 348 defines intent to defraud. The prosecution was required to prove beyond reasonable doubt that the appellants forged the civilian firearm certificate; that it was false and that it was intended to defraud.



28. The prosecution led evidence to the effect that the appellant was found in possession of a civilian firearm certificate. PW5, Inspector Paul Mwangi testified that the appellant was not registered as a civilian firearm holder with the Firearm Licensing Board. The certificate the appellant presented was forged, as it did not appear in the Board's records. A search of the Board's database showed no record of the appellant, and the serial number on the firearm certificate did not match any legitimate documents issued by the Board. The Board's findings were further documented in a letter confirming the certificate was not authentic and therefore forged. The investigations revealed that the certificate was not genuine and therefore a forgery. This forged document was used by the appellant in an attempt to falsely establish himself as a legitimate firearm holder, a clear violation of the law. The appellant's conviction in count VI is therefore affirmed.
29. On sentence, the appellant was sentenced to serve 6 months each for the two counts of personation; 12 months imprisonment for the offence of obtaining money by false pretences and 12 months for the offence of forgery. The sentences were to run concurrently. Cumulatively, the appellant was sentenced to serve 1-year imprisonment.
30. In the sentencing proceedings, the trial court considered that the appellant was a first offender, the presentencing report and the appellant's mitigation before imposing the sentence. Section 329 of the Criminal Procedure Code, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed.
31. Upon careful review and consideration of the pre-sentence report, it is evident that the appellant, a young adult aged 30 years, stands to benefit more from a rehabilitative approach rather than a custodial sentence. While a term of one (1) year imprisonment may reflect the seriousness of the offenses for which the appellant was convicted, it is my considered view that probation would serve a dual purpose. It would facilitate the appellant's rehabilitation by providing structured support and supervision while simultaneously addressing the need to deter future offending. Such an order aligns with the principles of restorative justice and the long-term interests of both the appellant and society.
32. In the premises, I hereby make the following orders:
- I. I hereby substitute the cumulative sentence of one (1) year imposed by the trial court with an order of probation for a period of two (2) years under the supervision of the Kibera Probation Office.
 - II. The appellant is directed to reimburse the complainant Chetankumar Sureshandra Vekaria Kshs. 55,500 within 90 days from the date hereof.
 - III. In the event the appellant commits a related offence or fails to repay the complainant, he shall be re-arrested and required to complete the original sentence imposed by the trial court.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF NOVEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Onganda for the Appellant

Mburugu for the Respondent



