



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO.59 OF 2014**

**(From SPM's Court at Bungoma Cr.823 of 2015 by: Hon. J.T. Maisiba (PM))**

**GILBERT WEKESA WAPANGANA.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**Gilbert Wekesa Wapangana** was charged with the following offences:

**1. Forgery Contrary to Section 349 of the Penal Code.**

*The particulars of the charge are that on or before 3/3/2012 at unknown place with intent to defraud, jointly with others not before the court, forged a certain document namely: Motor Cycle Insurance Certificate No.D1559474 purporting it to be a genuine and valid certificate of insurance issued by Green Field Insurance Co. Ltd.*

**2. Obtaining money by false presences Contrary to Section 313 of the Penal Code.**

*The facts are that on 3/3/2012, at Western Cycle Mart Enterprise in Bungoma Town, with intent to defraud, obtained Kshs.2500/= from John Cyprian Opiyo, the owner of Motor Cycle Reg.No.KMCU 946G by falsely pretending that he was in a position to deliver a valid motor cycle insurance certificate a fact he knew to be false.*

**3. Carrying out a business of an agent without registration contrary to Section 150(1) and (4) of the insurance Act Cap 487 LoK.**

*It was alleged that on 3/3/2012 at Western Cycle Mart Enterprises in Bungoma Town, carried out business of an agent without registration by Commissioner of Insurance.*

The appellant was convicted on all the three charges and sentenced to 18 months imprisonment each on Count 1 and 2 and 6 months on Count 3 and the sentences were ordered to run consecutively.

Being dissatisfied with the conviction and sentence, the appellant lodged this appeal through the firm of C.K. Areba & Company Advocate. The grounds of appeal were condensed into four:

- (1) The trial magistrate erred in law and fact when he convicted the appellant when the prosecution had not proved their case to the requisite standards;***
- (2) The trial magistrate erred by shifting the burden of proof to the appellant;***
- (3) That the court erred in basing the conviction on contradictory evidence;***
- (4) That the sentence was excessive.***

The appellant also filed written submissions which were adopted by the appellant's counsel Mr. Ongangi. He urged that the charge of obtaining was not proved because the key witness, Opiyo was not called as a witness; that PW3 said the policy was taken to her by a rider who was never called as a witness; that no evidence was led to confirm whether Greenfield Insurance where the certificate in respect of PW4 emanated existed; that no evidence was called from UAP Insurance and that the machine used to type the certificate was never produced in evidence.

Learned counsel for the State, Ms. Njeru opposed the appeal except on the charge of obtaining, which she said the complainant was never called. Counsel submitted that PW1 received a letter from Fraud Department to confirm if the certificate was issued by Greenfield Insurance Company and he confirmed it was not issued by UAP; that it is the Association that issues certificates and are the only ones who could verify its authenticity; as to practicing without a license, the investigating officer wrote to the Association of Insurance to confirm if the appellant was registered and it was found he was not. It was confirmed from Khetila's Insurance Company that whenever people bought motor cycles, they knew the appellant to be an Insurance agent; that PW3 identified the appellant and admitted having typed for him Insurance Certificates and he did not deny; that in fact, the appellant admitted to selling insurance policies.

This is a first appeal and this court has the duty to assess all the evidence that was tendered before the trial court, evaluate it and arrive at its own determination. See *Kiilu v Republic (2005) KLR 174*.

***The prosecution case was as follows:***

**PW1 Andrew Wekesa Wabwile** who sales motor cycles at Khetias Super Market, told the court that he negotiates the price with the client and after agreeing, he refers him to the manager; that sometimes customers request him to get them insurance services and he knew Gilbert Wekesa the appellant who worked for Greenfield Insurance Company Ltd; that he sold a motor cycle to John Opiyo on 3/3/2012 who asked to be assisted to get insurance; that he called the appellant who came took the details of the motor cycle Registration No.KMCU 946E and that Opiyo gave the appellant Kshs.2,500/= for the insurance certificate and he issued policy No.70884022 from Greenfield Insurance Co. Ltd prepared by the appellant. Later, when Opiyo was arrested on allegation that the insurance was a forgery, he led them to the appellant.

**PW2 Sylvester Wahome Maina**, a salesman with Khetias super market corroborated PW1's evidence that the appellant is an insurance agent with Greenfield Insurance Ltd. He was present when the appellant issued a policy to one Opiyo.

**PW3 Grace Akinyi Awuor** stated that she knew the appellant as she had done for him some work of typing an insurance cover. She identified the certificate that she typed on 3/3/2012 which was brought to her by a rider who said he had been sent by the appellant. She admitted having typed the cover when the police went to her office on 22/3/2012.

**PW4 William Kyambia**, a manager of Motor Insurance with Association of Kenya Insurance said that their duties are to distribute insurance certificates to insurance companies which are procured from London; that the certificates have serial numbers; that on 12/11/2012, he was requested by Insurance Fraud Investigation Unit to confirm if a certificate D1559474 issued by Greenfields Insurance Company Ltd was genuine and he responded that the original certificate was issued to UAP Company Ltd and that Greenfields Insurance Ltd does not exist. He concluded that the certificate for policy No.70884022 was fraudulent.

**PW5, Ip. David Nzome** of Insurance Fraud CID Headquarters received information that some people were selling insurance under Greenfields Insurance Company though the company does not exist. They did a random inspection in Bungoma and found one Opiyo who had a motor cycle KMCC 946E with such insurance and enquired where he got it; that the said Opiyo led them to Western Cycle Mart and the appellant was identified as the insurance provider; that the appellant led them to an Advocate's Office where he said the certificate was typed and they seized the typewriter. The Secretary (PW3) admitted to typing the said certificates at a fee.

It was found that the appellant was not registered with Kenya Insurance Association (P.Ex.No.2).

The appellant denied the charges contending that he only used to sell motor cycles but not insurance certificates and that the person he allegedly sold the insurance certificate to did not come to court.

**DW2 Robert Juma** involved in transport business said that he was at Western Cycle Mart, his shop when a man and woman came there, asked for the accused and he was called and arrested.

I have considered the evidence tendered in the trial court and the submissions of both counsel.

The appellant complains that the trial court did not comply with Section 169 of the Criminal Procedure Code which provides that the judgment must contain points for determination, the decision thereon and reasons for the decision. I note that the magistrate summarized the evidence and summed up his decision in one paragraph. That judgment offends Section 169 Criminal Procedure Code. However, this court is required to re-assess all the evidence tendered before the lower court, re-evaluate it and make its own findings in terms of Section 169 of the Criminal Procedure Code. The appellant will not be prejudiced by the trial court's failure to evaluate the evidence.

PW1 and 2 who sell motor cycles testified that they knew the appellant well. PW1 and 2 sold motor cycles and the appellant used to sell insurance policies to some of their clients under the company of Greenfields Insurance Company Ltd and that they saw the appellant sell insurance policy to Cyprian Opiyo on 3/3/2012. PW3 admitted to having typed the certificate on the same day. I have no doubt that PW1 and 2 were truthful witnesses that they had witnessed the appellant sell insurance to some of their clients.

The appellant faced a charge of forgery contrary to Section 349 of the Penal Code. Section 345 of the Penal Code defines forgery as "***the making of a false document with intent to defraud or deceive.***"

In the Indian case of *Sukanti Choudry v State of Orisa* the court held that the following ingredients are necessary to prove an offence of forgery:

- (1) ***Document must be forged;***
- (2) ***Accused used the document as genuine;***

**(3) Accused knew or had reason to believe that it was forged document; and**

**(4) Accused used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document.**

A forgery is therefore intended that other people regard the document as genuine and can be committed by handwriting, typewritten or computer.

PW4 an officer from the Association of Kenya Insurance testified as to what their work entails. They procure certificates from London and issue to Insurance Companies in Kenya according to serial numbers. He confirmed that certificate No.D1559474 (P.Ex.No.1) purportedly issued by Greenfields Insurance Ltd was actually issued to UAP Company Ltd and that Greenfield Insurance Company Ltd did not exist. He confirmed it in his letter dated 13/11/2012 (P.Ex.No.3). PW4's evidence has not been dislodged at all. The certificate issued by the appellant to one Opiyo in the presence of PW1 & 2 was a forgery.

In this case, PW3 testified that a rider took to her a blank document to fill in on behalf of the appellant and that she did it for a fee. Unfortunately, the motor cycle rider who was allegedly sent by the appellant was not called as a witness. His evidence was necessary to confirm that the document was indeed prepared under the direction of the appellant. The typewriter that PW3 allegedly used was never produced in evidence though it was taken away by police. Even though PW1 and 2 saw the appellant sell insurance to Cyprian Opiyo, the question is who prepared the document – was it the appellant or PW3. Apart from the motor cycle rider, the evidence of Cyprian Opiyo was also necessary to confirm whether indeed it is the appellant who gave the document to the rider to go and have it typed for him.

In absence of the evidence of the two, I find that the prosecution did not prove, to the required standard, that it is the appellant who forged the said documents.

Whether the appellant sold insurance without being registered? I believe the evidence of PW1 & 2 that the appellant used to sell insurance to their clients under the company of Greenfields Insurance Ltd.

PW1 and PW2 witnessed the sale of insurance to one Cyprian Opiyo though he did not come to testify as a witness. It is the arrest of the said Opiyo that provoked the Insurance Fraud to swing into action to investigate what was happening in Bungoma. Upon his arrest, he led PW5 to the appellant who in turn led to PW3 who admitted that she typed the sticker in issue Ex.No.1.

The evidence of the witnesses was not dislodged. The appellants defence was a bare denial.

Under Section 150(1) and (4) of the Insurance Act, the appellant was required to be registered as an agent in order to sell insurance. He did not produce any certificate upon arrest. The prosecution proved the third count beyond any doubt.

PW5 testified that after investigating, the appellant was not able to produce a certificate authorizing him to act as an Insurance Agent. PW5 wrote to the Kenya Insurance Association to find out if the appellant was registered see letter P.Ex.2.

I have however read the said letter. It never enquired whether or not the appellant was a registered insurance agent. For that reason again, I find that the prosecution did not go further to establish whether or not the appellant was a registered agent. I find, therefore, that the third charge was not proved to the required standard.

In the end, I find that the prosecution did not prove the 1<sup>st</sup> and 3<sup>rd</sup> counts beyond reasonable doubt. The conviction was improper. It is hereby quashed. The sentence is set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**Signed and Dated at NYAHURURU this 7<sup>th</sup> day of May, 2019.**

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**R.P.V. Wendoh**

**JUDGE**

**Delivered by S. Riechi (J) at BUNGOMA this 20<sup>th</sup> day of May, 2019.**

**PRESENT:**

Ms. Nyakibia - Prosecution Counsel

Wilkister - Court Assistant

Appellant - present