



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 163 OF 2014

EVANS MUTHEMBA CHEGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Msa CM CR. Case No. 2785 of 2014 (Hon. Odenyo SPM) delivered on 30/10/14)

J U D G M E N T

1. **Evans Muthemba Chege (“the Appellant”)** was charged with the offence of obtaining money by false pretenses contrary to **section 313 of the Penal Code**. It was alleged that on 1st July, 2009 at Swaleh Advocate’s office in Mombasa District within the Coast Province with intent to defraud, the appellant obtained Kshs.800,000/- from Alfeen Esmail by falsely pretending that he was in a position to sell him a plot number MN/1/3864 valued at Kshs.6.7 million situated at Nyali a fact he knew to be false.
2. He also faced a second count of forgery contrary to **section 349 of the Penal Code**. It was alleged against him that on 1st July, 2009, at Swaleh Advocate’s office in Mombasa District within Coast Province, he forged a signature of George Abaleka Dulu.
3. The appellant denied the charges and after trial, he was found guilty and convicted of both counts and sentenced to two and one year imprisonment, respectively. He has now appealed to this court against both the conviction and sentence.
4. This being a first appellate court, the court is enjoined to re-appraise and evaluate the evidence afresh and come to its own independent findings and conclusions. In so doing, the court must have in mind that it did not have the advantage of seeing the witnesses. **(See Okeno v. Republic [1972] EA)**.
5. **Justice George Abaleka Dulu (PW1)**, the complainant, bought L.R. No. 3864 (“the subject property”) in 2000. He obtained a loan from his then employer Kenya Ports Authority through Housing Finance Company of Kenya (HFCK) using the property as security. The property was duly charged.
6. On 4th August, 2009, he received a call from Nabhan Swaleh Advocate informing him that someone was trying to sell the subject property by impersonating him. That person had a national identity card bearing his name. The national Identity card showed that he was born in 1946 in Kakamega. The person also had a Pin Certificate in the name of George Abaleka Dulu dated 26/7/2004. He reported the matter to the police together with the said advocate and the prospective buyer **PW5 and 3**, respectively.
7. **PW2 Joseph Kamau Kanyia**, head of legal services at HFCK, recalled having received a letter from D. N. Omari Advocate requesting for the account details of **PW1** on 26/6/2009. The bank declined to release the said details referring the said advocate to **PW1** for authority. He later received a letter from **PW5** giving professional undertaking to settle the outstanding on **PW1’s** account whereby the bank released the title documents to **PW5**.
8. **Alfin Mehdir Mohamed Ismail (PW3)** recalled how he met the appellant, then pretending to be George Abaleka Dulu, and Omari Advocate at the offices of **Nabhan Swaleh (PW5)**. The appellant was to sell to him the subject property and gave him a copy of an Identity Card showing that he was George Abaleka Dulu and other documents. He paid Kshs.800,000/- as deposit to Omari Advocate, then representing the appellant. He later learnt that the appellant was a fake George Abaleka Dulu after he met **PW1**. He recorded his statement with police on the matter.
9. **PW4 Mary Kathungu**, a securities officer at the HFCK narrated to court how she had exchanged correspondence with **PW5** leading to the release of the title documents for the subject property to **PW5**.
10. **PW5 Nabhan Swaleh**, was the advocate acting for the purchaser. He recalled how the purchaser, the appellant and the latter’s advocate, one Omari came to his office and executed a sale agreement for the sale of the subject property. He paid over to the appellant’s advocate

Kshs.800,000/- as deposit while he gave his professional undertaking to HFCK to settle the balance of the mortgage upon completion. He later discovered that the property being sold belonged to **PW1** whom he knew and he informed him of the matter. He thereafter reported the matter to the police.

11. **PW6 Dennis Ouma** told the court that he was an advocate practicing under the name and style of D. N. Omari and Company Advocates. He was approached by someone who introduced himself as the George Abaleka Dulu on 14/6/2009 to act for him in a land transaction. **PW5** was the purchaser's advocate. He received Kshs.800,000/- from **PW5** which he paid over to the appellant after deducting his fees. The appellant had presented himself as George Abaleka Dulu.

12. **PW7 CIP Chrisantus Obwacha Omari** investigated the case. He told the court how **PW1** lodged a complaint with him. How he obtained the various documents from **PW5** and **PW6** which showed that the appellant had impersonated **PW1**. He sent documents to the document examiner which were confirmed to have been made by the appellant. He established that the appellant had received the Kshs.800,000/- paid by **PW5** to **PW6**.

13. **PW8 Antipas Nyanjwa**, a document examiner received documents from **PW7** to establish if they were made and or signed by the appellant. Upon examination, the result was in the positive. **PW9 CPL. Jackson Livyo** produced documents that **PW7** had not produced.

14. In his defence, the appellant denied the photograph appearing on the fake Identity card as being his. He also stated that he had not received any monies from **PW6**. He denied ever giving any advocate any instructions. He further denied the documents produced that were alleged to contain his signature. He denied ever meeting **PW5** and **6**.

15. The appellant set out 15 grounds of appeal in his amended petition of appeal. These can be summarized as follows; *that both counts were not proved to the required standard; that the proceedings were conducted in breach of Article 50(2) of the Constitution and section 198(1) by conducting the trial in a language the appellant was unfamiliar with; that the trial court failed to properly evaluate the evidence of PW5, PW6 and PW8; that the trial court failed to consider the appellant's defence; that the trial court failed to comply with the provisions of section 200 of the Criminal Procedure Code and that the sentence was excessive in the circumstances.*

16. Both parties filed their respective submissions which the court has carefully considered.

17. The first ground was that the evidence of **PW5**, **PW6** and **PW8** was not properly evaluated and that both counts were not proved to the required standard. That the role played by **PW5** and **PW6** in the whole transaction was not considered and that it was not proved that the appellant was the impersonator and that he had obtained the alleged Kshs.800,000/-.

18. The prosecution paraded a total of 9 witnesses. The complainant told the court how he had bought the subject property in 2000 and charged it to HFCK to secure the loan by which he had purchased the property. He narrated how he received a call from **PW5** who informed him that someone was trying to sell that property. He was shown documents that had been prepared to show that he intended to sell the said property.

19. **PW2** and **PW4** were managers from HFCK. They told the court how **PW6** made inquiries of **PW1's** account with them and how they ended up releasing the security documents for the subject property to **PW5**.

20. **PW5** and **PW6** were advocates acting for the purchaser and vendor respectively. They both identified the appellant as the person who attended the offices of **PW5** on 1/7/2009 with **PW6** and Alphim Ismail and executed the sale agreement for the sale of the subject property. When they testified, they identified the appellant as the person who gave instructions to **PW6** to act for him in the sale and as the person who appeared on the said 1/7/2009 before **PW5's** office and executed the sale agreement. That evidence was never challenged or displaced in cross-examination.

21. The fact that the two advocates may have acted flippantly or against the known rules of conveyance did not dent either their credibility or their evidence. There was no suggestion that they had any grudge with the appellant for them to collude and frame him. To my mind their evidence was properly evaluated and accepted by the trial court.

22. As regards **PW8**, he was a document examiner. He examined exhibits 25, 26, 27 (a) and 27(b), respectively. The submission that his examination of those documents was not in tandem with *section 70 of the Evidence Act Cap 80* cannot be far from the truth. It was argued that since the witness did not examine both the handwritings and the signatures in exhibit 25 and 26, his evidence was inconclusive.

23. The court has seen exhibit 25 and 26. These are the Acknowledgement dated 4/7/2009 and Letter of Instructions dated 14/6/2009, respectively. Both were typed. The only handwritings thereon were the signatures which did not resemble each other and the ID. No. 4554549. It is the writings of the Identity No. 4554549 which **PW7** questioned and requested **PW8** to compare with the appellant's known writings appearing in exhibit 27(a) and 27(b). **PW8** found them to have been by the same hand. His testimony cannot therefore be faulted. He could not have examined the signature when clearly the appellant never signed the documents as himself but as George Dulu. In my view, **PW8's** testimony was proper and in accordance with the law. It was properly accepted by the trial court.

24. Exhibit 26 was an Acknowledgement of receipt of Kshs.800,000/- by the Appellant from **PW6** on behalf of Alfeen Esmail. In view of the foregoing, I find that the first count was proved to the required standard.

25. As regards the second count, exhibit 25 and 26 were found to have been written by the appellant. The two documents had a signature purporting to be that of George Abaleka Dulu. Count 2 was also proved.

26. Accordingly, both counts were proved to the required standard and the trial court properly evaluated the evidence of **PW5**, **PW6** and

PW8. Those grounds fail.

27. The other ground was that the proceedings breached the law, to wit, Article **50(1), section 198(1) and section 200 of the CPC**. It was submitted that no proper plea was entered; that the substance of the charge was not explained to the appellant; that the proceedings proceeded in English, a language which the appellant was unfamiliar with. That the succeeding trial magistrate did not explain **section 200 of the CPC** to the appellant.

28. The record shows that, after the appellant had denied the charge, the court proceeded to fix the matter for hearing. The court failed to record the plea of 'not guilty'. In my view, the failure to record the plea of not guilty did not vitiate the proceedings. There was no prejudice that the appellant suffered by that failure.

29. It was submitted that the proceedings proceeded in English language which the appellant was not conversant with. The court notes that the appellant was represented by Counsel throughout the proceedings. At no time during the proceedings was there any complaint raised that the appellant was not following the proceedings.

30. It was submitted that when **PW1** testified the appellant was unrepresented; that he did not cross-examine the witness because he did not understand the proceedings. I note that the trial court erred in not recording whether there was any translation of the proceedings. However, although the witness was not cross-examined, I do not think the appellant suffered any prejudice. The evidence of **PW1** related only to his ownership of the subject property. It was never the case of the appellant that **PW1** was not the true George Abaleka Dulu. See the cases of **Mugo & others -v- Republic [2008] KLR**, **Joseph Kamau -vs- Republic [20130 eKLR** and **Joseph Ahonya Makokha -vs- Republic [2014] eKLR**.

31. It was submitted that, since **section 200** was only explained to the appellant by an allocating court and not a trial court, that that was an irregularity. The purpose of **section 200 of the CPC** is to inform an accused of his right to choose if a new court taking over his case from a previous court should re-hear the case a fresh. The purpose is met once an accused is given a chance to either have the proceedings commence afresh, either have certain witnesses who have testified recalled or the case proceeds from where it has reached.

32. To my mind, once an accused has been afforded that opportunity by having the section and the import thereof explained to him, as happened in this case, it does not matter whether the court giving the accused the opportunity is the allocating court or the court that subsequently tries the case. It is the spirit of the section that matters not the letter. See the case of **John Gitau Gachiri -vs- Republic [2019] eKLR**.

33 In view of the foregoing, I reject that ground and hold that the proceedings were conducted in accordance with the law.

34. The other ground was that the appellants defence was not considered. The defence given by the appellant was a general denial. He denied the photograph appearing on the fake Identity card as being his. He also stated that he had not received any monies from **PW6** or having been to his office. He denied ever giving any advocate any instructions and further denied the documents produced that were alleged to contain his signature.

35. The trial court considered this defence before it dismissed it. To this court's mind, the defence of the appellant could not displace the evidence of the prosecution which was firm and consistent. That ground is as well rejected.

36. The last ground was that the sentence was excessive. I note that the sentences meted out were 2 and 1 years for count 1 and 2, respectively. The law provides for 3 years for both the counts. The trial court considered the appellant's mitigation before meting out the sentence. I see nothing untoward to upset the sentences.

37. The appellant may be of advanced age. He must have been aware of his age when he set out to engage in the commission of the offence. The appeal is without merit and the same is hereby dismissed.

DATED and **DELIVERED** at Mombasa this 6th day of September, 2019.

A. MABEYA

JUDGE