



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NUMBER 54 OF 2017

SAMUEL MUGENDI KAHIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This appeal is conceded.

The appellant was charged with the offence of procuring registration of national identity card by false pretence contrary to section 320 of the Penal Code. It was alleged that on the 4th day of April 2010 at Manyatta Registration of person's office within Embu county in the Republic of Kenya, jointly with others not before court willfully and unlawfully procured registration of Kenya national identity card number 2889 4973 in the names of SAMUEL MUGENDI KATHIGA yet he had previously obtained registration of Kenya national identity card number 2391 0535 in the same names.

The matter was heard by the honourable and R. Kefa SRM.

The prosecution called four witnesses, after which the appellant was put on his defence, testified on oath and did not call any witness.

In her judgement delivered on 23rd August 2017 the learned trial magistrate found that the charge had been proved against the appellant, found him guilty, convicted him accordingly and sentenced him to pay a fine of Kenya shillings 20,000 shillings in default of which he was to serve 6 months in prison.

He was aggrieved by the findings and filed this appeal on the grounds that the learned trial magistrate erred in fact and law;

- 1. in passing judgement convicting the appellant when the prosecution had not proved the case by discharging the required burden of proof*
- 2. by shifting the burden of proof from the prosecution to the appellant*
- 3. in relying on evidence of the prosecution witnesses that was insufficient and contradictory*
- 4. In disregarding the evidence of the appellant and in reaching an erroneous finding from the defence and the evidence of the appellant as well as his submissions*
- 5. in failing to find and rule that the evidence adduced by the prosecution was insufficient to sustain the conviction and sentence of the appellant and in convicting the appellant herein against the weight of evidence*
- 6. in failing to find and hold that there was no cogent, substantial credible, and direct evidence connecting the appellant to the offence of obtaining of a national identity using false pretences*
- 7. In convicting the appellant on highly contradictory, misleading inconsistent, and unreliable evidence presented by the prosecution*
- 8. In convicting the appellant on the uncorroborated and or insufficiently corroborated evidence of a minor*

9. *In placing reliance on the incredible evidence of the prosecution and is in failing to accord due weight of the Evidence the appellant*

He urged the court to allow his appeal, quash the conviction and set-aside the sentence meted against him.

Brief facts

On the 29th April 2016, the appellant was admitted to Kiganjo Police College as a recruit. He had submitted all the requisite documents including his National Identity Card and Certificate of Birth which he had applied for on 10th October 2014, and which indicated that his date of birth was 12th October 1990.

On the 5th October 2016, PW4 no. 43740 CPL Thomas Opondo was detailed to investigate a case of forgery of a National Identity Card. The allegation was that the appellant had obtained recruitment into the police college using a forged National Identity Card.

Upon investigations he established in the data base that there existed two identity cards with different numbers, bearing the same Name, but with different birth dates, one 12th October 1990 and the other 9th October 1982.

He also found that the registration forms no. 136A for both identity cards had photos of the same individual. He established through forensic examination that the forms were identical and contained the same finger prints.

On 25th January 2017 he met the appellant at Kiganjo college and found him in possession of ID no. 22889473. He charged him with this offence.

In his defence the appellant denied the offence. He told the court that he had obtained only one National Identity card using his certificate of birth certificate. That he had only made a second application to change his gender mark which had erroneously been indicated as female, to male, and that the identity card containing the said mistake had been destroyed. He produced his certificate of birth which had the same names and date of birth as the National Identity card found in his possession.

Mr. Kiboi for the appellant argued that the prosecution had failed to prove the charge. That the key operative word for the offence facing the appellant was 'false pretences' as provided for under s. 312 of the Penal Code. That no evidence was led by the prosecution to establish the alleged false pretence. That the prosecution witnesses in their testimonies especially the area Chief PW1 and the Immigration officer PW2 had confirmed that the appellant had made an application on 7th April 2010 for the national identity card in the normal manner, supported by the requisite documents and had done so only once.

Secondly his certificate of birth, which was obtained in 2014 corroborated his defence with regard to his names and date of birth. PW4 conceded that he never conducted any investigations with regard to the certificate of birth and there was no evidence that the appellant could have changed his date of birth in 2016 when his birth certificate was obtained in 2014.

Ms. Jebet in conceding the appeal submitted that there was not enough evidence as no other document e.g. the birth certificate was produced to prove that the appellant had obtained two certificates of birth to support the alleged forgery. That the Investigation Officer conceded during the trial that the certificate of birth produced by the appellant was the original and it confirmed the appellants date of birth. That the appellant's defence that the only other application he had made was to correct his gender mark had not been displaced. The prosecution was of the view that the conviction was unsafe.,

The duty of a 1st appellate court is to reevaluate the evidence on record and to arrive at its own independent findings, even where the appeal is conceded to confirm that it is conceded on the correct principles.

I have considered the evidence on record, the submissions by each counsel and the submissions made in the lower court . Section 320 of the Penal Code provides; Obtaining registration, etc., by false pretence

Any person who willfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.

Under Section 312 of the same Code self pretences is defined:

Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.

It was expected that the prosecution would prove beyond a reasonable doubt that the appellant had on 4th April 2010, procured double registration for two identity cards and in the process had indeed made representations, which were false and which he knew to be false at the time he made the alleged applications.

No evidence was led by the prosecution to show that the appellant did any of the alleged things on 4th April 2010 . None of the alleged applications was alleged to have been made on that date. None of the witnesses testified that the appellant was at the Manyatta Registration Centre on the 4th April 2010 obtaining the alleged registrations. And on the outset, no evidence of any representation that was false was led against the appellant. The National Registration Bureau suspected him of double registration. The police were expected to investigate, and obtain evidence to prove the suspicions.

It appears to me from the line of evidence the police presumed that the appellant had obtained a forged ID to change his age to an age suitable for police recruitment, hence the emphasis on the dates of birth. Nevertheless, they did not prove this.

The Exhibit Memo Form dated 11th October 2016 requested that the ascertainment as to whether the two identity card numbers were issued to the same individual.

PW3 Gladys Naliaka Soita, fingerprints expert working with the National Registration Bureau Headquarters in Nairobi testified and produced the report. She indicated in the report that the finger prints in the two forms belonged to the same person, the two identity cards were issued to the same individual and drew the following conclusion:

“On studying the two exhibits A and B it is suspected that the applicant after being issued with an identity card number 2391 0535 with the date of birth as 9th October 1982, on 6th August 2003 presented himself a 2nd time without disclosing the previous registration and made another application with the year of birth as 1990”

Even with the above findings, this expert witness raised a suspicion that the appellant applied for registration twice. The investigating officer and the learned trial magistrate appear to have taken this as proof that the appellant had obtained double registration. The key word in the conclusion is ‘suspect’.

The Investigating Officer was expected to establish that suspicion to the standard of proof beyond a reasonable doubt. He was to establish that indeed the appellant had obtained the registration in 2003, and subsequently obtained another in 2010. He ought to have retrieved and produced any of the documents alleged to have been used to obtain the alleged registration in 2003 to establish that the appellant had indeed made the application in 2003. He said there was the appellant’s father’s identity card, a religious baptism card. These he did not produce. There is a whole 8 years between 1982 and 1990. The investigating officer needed to establish that this was the same person in reality.

The Investigating Officer did not subject the only available evidence that could have tipped his case, appellant’s certificate of birth to scrutiny. It was not suspect. There was no evidence of a second one. The appellant produced his original certificate of birth which clearly corroborated the National Identity card with which he was recruited to the police college. His KCSE certificate ought to have guided further investigations as to his school registration details which would have either corroborated or disputed the date of birth on his Identity card.

The Investigating officer also conceded that the ‘second’ identity card was not produced as evidence.

I have also perused the submissions that were made in the lower court and the authorities cited by the appellant see Wangai Ndirangu Gitari v R [2016] eKLR and Irene Rose Wanjira Mararo v R [2016] eKLR.

Had the learned trial magistrate considered them, the outcome of the case would have been different as the judge therein in great detail makes an exposition of what is expected as proof in a charge of this nature.

I am persuaded from the foregoing that the appeal is properly conceded.

The conviction is quashed, the sentence is set aside, and the fine paid by the appellant be refunded to him.

Dated at Nyeri this 24th Day of May 2018.

Mumbua T Matheka

Judge

In the presence of:

24th May 2018

Before Mumbua T. Matheka J

C/A Atelu

S/C Magoma

N/A for Mr. Kiboi for appellant

N/A for Appellant

Judgment ready. Mention of 5th June 2018. Mention Notice to Issue to Mr. Kiboi to produce his client.

5th June 2018

Before Mumbua T. Matheka J

C/A Atelu

S/C Magoma

Ms . Mwai holding brief for Mr. Kiboi for appellant

Appellant absent

Ms. Mwai- we request for the judgment to be deferred to another date for the appellant to appear.

Court: Judgment on 8th June 2018.

Mumbua T. Matheka J

8th June 2018

Coram:

Mumbua T. Matheka J

C/A Atelu

Appellant present

Kiboi for appellant

Magoma for state

Judgment delivered, dated and signed.

Mr. Kiboi- We pray that the original ID for the appellant be returned to him.

Court: Application granted.