



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 96 of 2006

GEOFFREY LAARIA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from the judgment of Hon. Mr. G. Oyugi R.M. in Maua

Criminal Case No. 3174 of 2003 delivered on 6th July 2006)

JUDGMENT

The appellant was charged in the lower court with 3 counts. On the first count he was charged with forgery contrary to section 349 of the Penal Code. For the 2nd count he was charged with making a document without authority contrary to section 357 (a) of the Penal Code. On the 3rd count he was charged with the offence of obtaining money by force pretences contrary to section 313 of the Penal Code. After trial at the lower court, the appellant was convicted as charged and was sentenced in respect of count 1 and 3 to 2 years imprisonment and in respect of count 2 to 3 years imprisonment. Those sentences were to run concurrently. The appellant was aggrieved by the conviction and sentence and has filed this appeal. I shall consider grounds number 2 – 7 together. As the first appellant court, I am expected to submit the whole evidence of the lower court to a fresh and exhaustive examination. In so doing, I must weigh the conflicting evidence and draw my own conclusion. In so doing, I should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. See the case of **Okeno Vrs. R.** (1972) EA 32. The grounds of appeal attack the lower courts conviction on the evidence adduced by the prosecution. That evidence was as follows:-

PWI stated that he was at the time of giving evidence the chairman of Mbaranga Co-operative Society Ltd. The appellant was the chairman from the 26th June 2003. At that time, the other officials were Kithera who was the Honorary Secretary, David Thiringi who was the treasurer, Patrick Maingi who was the vice chairman, Nathan Murungi and Andrew Kaumbuthu who were members of the management committee. At some point, the appellant was suspected of mismanaging the society's finances. As a result of that suspicion, he was ousted out of his position and that decision was ratified at the AGM. They also contacted the Registrar of Co-operative Society with a view to carry out inquiries on how the finances were being managed. The Registrar communicated and advised the society that he required to be paid Kshs. 90,000/= by way of banker's cheque to enable him carry out the inquiry. The appellant had the duty of sending the bankers cheque. It was however discovered later on that the Registrar did not receive the banker's cheque. A follow-up was made with the society's banker where they were told that the banker's cheque which had been issued had been cashed. The bank confirmed that the cheque was cashed by the appellant on 29th September 2003. PWI stated that the banker's cheque was taken to the

bank and was cashed by the appellant using a counter-cheque. This witness further stated that the mandate given to the bank was that for in cashing of cheques it was required that 5 signatures be appended. Those were the signatures of the chairman, vice chairman, treasurer, honorary secretary and secretary to the management committee. He stated that the signatures appearing on the counter cheque were all forgeries except the signature of the appellant. That they all had given their specimen signatures to the CID Meru North District. On being cross examined by the accused, this witness stated that it was the appellant who had the custody of the banker's cheque which was payable to the Registrar of Co-operative Society. That was the only question put to this witness pertinence to the charges the appellant faced. PWII was at the material time the vice chairman of the society. The appellant was at that time the chairman. He too confirmed that there was an inquiry which was to be spear headed by the Registrar of Co-operative Society. For that inquiry they were required to pay Kshs. 90,000/=. The appellant was the one mandated to send the cheque to the Registrar. The appellant showed the other officials a photocopy of the banker's cheque payable to the Registrar of Co-operative Society. That cheque was never received by the Registrar. They later realized that the banker's cheque had been cashed by the appellant using forged signatures. This witness said that the signature appearing on the counter cheque was not his signature. The banker's cheque was cashed after the appellant was removed from the position of chairmanship. PWIII stated that he was the treasurer of the society at the material time. He confirmed that the counter cheque did not bear his signature. He said that the society's banker had sent them the bank statements which showed that the banker's cheque of Kshs. 90,000/= was banked on the same day and then withdrawn. As a society he said that they do not have counter cheques. PWIV was the honorary secretary of the society at the material time. He too stated that the signature appearing on the counter cheque was not his signature. PWV was the manager of the society when the appellant was the chairman. He also stated that his signature was not on the counter cheque. PWVI was the bank teller of the Co-operative Bank Meru Branch. She confirmed that the counter cheque for Kshs. 90,000/= dated 29th September 2003 was cashed at the Co-operative Bank Meru Branch. That it was the appellant who cashed the cheque. The National Identity card of the appellant was noted by her at the back of the cheque. That the appellant when he first presented the said cheque, she dishonoured it because it was missing the 5th signature. The appellant returned with the cheque on the same day and cashed it. On cross examination she stated that the cheque was payable to the bearer and when she allowed the appellant to cash it, it had all the signatures. She then stated,

“I saw the accused (appellant) person sign the cheque upon cashing the cheque. The accused person used to cash cheques at the bank.”

PWVII was the hand writing expert based at CID Headquarters at Nairobi. He examined the counter cheque for Kshs. 90,000/= dated 29th September 2003. He noted that it had 5 signatures. He had received specimen signatures from all the officials who included the appellant. He did the analysis and found that all the signatures except the appellant signature had no agreement with the specimen's signatures. In respect of the appellant signature in comparison with the specimen signatures, he concluded that the said signature was made by the same hand. He however concluded that the other signatures were forged. PWVIII was the police officer who investigated this matter. He confirmed that he obtained the original cheque from the Co-operative Bank. He thereafter obtained the specimen signatures of the authorized signatories. It is those signatures that were forwarded to PWVII. The learned magistrate found that the appellant had a case to answer. In his defence in a sworn statement the appellant began by saying that the criminal case was maliciously brought to pre-empt a civil case that he had instituted. In his view, the prosecution's case had not adduced sufficient evidence against him. He faulted the production of a photocopy of the banker's cheque rather than the original. That the society had 3 cheque books one for the operations account, farmers account and counter cheque current account. He stated that the prosecution had failed to show by delivery book that he had obtained possession of the banker's cheque. He denied that he was seen withdrawing the money. That his position of an administrator and not a treasurer did not allow him to cash a cheque. The learned trial magistrate in his considered judgment had this to say:-

“Now having carefully gone through and considered the prosecution witnesses evidence and that of the accused person together with the accused person's counsel submission, the issue that must first be determined is whether all the signatures on the cheque No. 000357 were made by the

accused person. This is an issue that affects all the three counts. With the evidence on record, the accused person must be the one who wrote all those five signatures armed one to five on the face of the cheque.

PWII to V evidence that they never appended their signatures on that cheque is fully confirmed by the document examiner's (PWVII) evidence. I have no doubt about that."

The trial court found the appellant's defence of frame-up not to be substantiated. In respect of the first count, what I need to consider is whether there is evidence that the appellant forged the cheque. The co-signatories of that cheque in evidence all denied that they signed the said cheque. The evidence of the hand writing expert was to the effect that he could not find any agreement between the specimens given by the prosecution witnesses and the signatures appearing on the cheque. The only signature that he found was in agreement was that made by the appellant. The bank teller confirmed that the appellant personally went and cashed the cheque. Even after referring the cheque to the drawer, the appellant returned to cash the cheque having obtained the missing signature. The bank teller was very categorical that it was the appellant, whom, she seemed to be familiar with, who cashed the cheque. With that evidence, I find that I am in agreement with the finding of the trial magistrate. The prosecution did prove count 1 under the required standard of prove. I find that the evidence clearly points to the appellant having forged the signatures of the society's officials. On count 2, I need to determine whether the appellant intended to deceive or to defraud without lawfully skills in the making of the counter cheque. The evidence adduced by the prosecution was that a banker's cheque was drawn payable to the Registrar of Societies. It was further the evidence of the prosecution that the appellant presented to the management committee a photocopy of that bankers cheque with the intention of giving the impression that the same had been sent to the Registrar of societies. It was that cheque however which he rebanked and cashed having forged the other signatures. Having found that count 1 was proved beyond reasonable doubt, it follows that count 2 will also be proved by similar evidence. The evidence of the bank teller and the evidence that the appellant by photocopying the banker's cheque gave the impression of having sent it sufficiently proves the ingredients of the offence in this count. In respect of count 3 the prosecution did prove that the appellant obtained the payment of the counter cheque. The evidence of the teller was very categorical that the appellant did cash the cheque and was paid the amount of that cheque. The finding of guilt by the magistrate court cannot be in my view be faulted. There was credible evidence establishing guilt on all counts. On sentence, although it was submitted that it is now academic since the appellant had served the sentence, I will consider whether the sentence was correct as per law since in ground 8 of the appeal, the appellant raised the same. Section 349 of the Penal Code provides a maximum sentence of 3 years. In respect of section 357 of the Penal Code, the maximum sentence is 7 years. In respect of section 313 of the Penal Code, the maximum sentence is 3 years. The learned magistrate in respect of count 1 and 3 sentenced the appellant to 2 years. That sentence was not harsh or excessive. I would therefore not interfere with it. Similarly, on the sentence of 3 years on count 2, I find that that sentence was not excessive because the maximum sentence was 7 years. The appeal therefore against sentence is dismissed. The last issue I wish to consider was raised in ground number 1. It was as follows:-

"1. The learned trial magistrate erred in law and fact in purporting to try matter instituted in Maua Principal Magistrate's Court and purportedly transferred by the principal magistrate to Tigania Court without any legal authority to do so therefore proceedings a nullity ab initio."

The learned counsel for the appellant argued that the learned principal magistrate at Maua had no jurisdiction to transfer this case to Tigania court for hearing. The learned principal magistrate made the order on 24th November 2004. That order is in the following terms:-

"COURT

Court has considered the application by the prosecutor and the reasons thereto as well as the response by the defence counsel. The court note that this is an old case and the trial magistrate who is the one who is presiding here is overwhelmed by the work load. As the prosecution has stated the end of justice conveniently be served for the case is heard out at Tigania Law Courts where they can easily access. The presiding magistrate at Tigania has jurisdiction to hear

such a matter and this court has transferred such other matters to the said court with the consent of the presiding magistrate who is not as busy. As P.M. I therefore transfer this case to Tigania Law Courts for hearing and determination. Case to be mentioned at Tigania law Courts on 1.12.2004 before Mr. Oyugi – RM for the orders.

R.N. KIMINGI

P.M. 24.11.2004”

The learned principal magistrate transferred this file to Tigania Law Courts for hearing under the provisions of section 79(a) Criminal Procedure Code. That section provides as follows:-

“(a) may transfer a case of which he has taken cognizance to any magistrate holding a subordinate court empowered to try that case within the local limits of the first class subordinate courts’ jurisdiction”

The learned advocate for the appellant argued that the local limits within which a magistrate can transfer a case under section 79 is within the limits of the same court where the magistrate sits. In other words, the principal magistrate could only transfer the case to another magistrate within Maua court. The learned counsel for the appellant did not advance any authority to prove that argument. I must say on my part that it is an issue that led me to examine the definition of local limits. I could not find that definition in either Criminal Procedure Code or Penal Code. I also did not get assistance from the Magistrates Court Act Cap 10. However, in my quest to find a definition, I became convinced that the local limits mentioned in section 79 are the limits that are established under the Judicial Administrative District. These Administrative Districts are gazetted by the Hon. The Chief Justice the latest one being Gazette Notice No. 1756. The Hon. The Chief Justice gazetted the Eastern Province under the supervision of the High Court Meru to include both the Maua magistrate court and Tigania magistrate court amongst others. According to me, the local limit within which a magistrate can transfer a case is within that judicial administrative district. The principal magistrate at Maua therefore correctly transferred the case to Tigania Court. That transfer was within the provisions of section 79. The argument advanced by the appellant must be wrong in my view because if a magistrate under section 79 is restricted in taking a file to another magistrate in the same station that cannot be considered as a transfer of a case. The word “*transfer*” in my view connotes the removal of a file from one station to another. To place a file before another magistrate in the same station cannot be regarded as transfer. Ground 1 is therefore rejected. On the whole, the finding of this court is that the appellant’s appeal against conviction and sentence has no merit and is dismissed.

Dated and delivered at Meru this 2nd day of October 2009.

MARY KASANGO

JUDGE