REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 282 OF 1992

ANTONY KAHIHU KABAGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in PM's Criminal Case No 92 of 1991 at Nyeri)

JUDGMENT

Two accused persons were charged with the offence of attempting to obtain money by false pretence contrary to section 313 as read with section 389 of the Penal Code.

The first accused had a debt at the bar of Kshs 59/- or thereabouts. He had no Kenyan currency so he approached the hotel receptionist to change the moneys. He had a passport and $500. It transpired that the moneys were fake and the passport did not belong to him but to the 2nd accused. The 2nd accused stated that the 1st accused took his passport without knowing his intention. He left him to go to the toilet and on his return found the appellant / 1st accused duly apprehended.

The trial magistrate acquitted the 2nd accused but convicted the appellant who was duly fined Kshs 3,000/- in default 6 months imprisonment. Through his counsel the appellant now appeals against both conviction and sentence. The grounds being;

(a) The appellant had no knowledge that the foreign currency of the dollars were fake.

(b) The particulars of the charge did not disclose that he tried to obtain the money by false pretences.

(c) The fact that he presented the dollars the magistrate was wrong in finding that he had knowledge that the dollars were fake.

(d) All the ingridients were not proved.

(e) The misapprehension of the meaning of false pretence and defraud under section 313 of the Penal Code was a miscarriage of justice.

Counsel for the appellant stated that they ought to have amended the charge sheet under section 214 of the Criminal Procedure Code when it was obvious.

The document examiner – the maker of the document to prove the falseness of the dollars was never

called to give evidence. Thus the falseness was never established within reasonable doubt.

There also must be a knowledge on the appellant's part of such fraud.

From the evidence before the Court and the submission used – the petition of appeal does not question the fakeness of the dollars. This in fact is not disputed. If it is disputed it is on the aspect that the maker of the report that proved the dollars were fake was never called to give evidence. One must look to the Miscellaneous Amendment Act No 11 of 1991 in which the law has exempted technical witnesses to be called to give evidence before Court and documents so produced by then can be done without calling the maker thereof. It is only where the accused challenges such reports during his trial that the prosecution would and should seek leave to call the maker thereof in order that he may be subjected to cross-examination. The appellant never challenged the report nor the fact that the dollars were fake.

In the petition of appeal he relied on lack of *mens rea*. Namely he was unaware that the dollars were fake. If this is true, it is hard to understand why he produced another persons passport and not his own? He did not have 59/- odd shillings to pay for his drink yet he was with his co-accused whom he would have easily asked for money to pay for his drink. He instead attempted to change $500. It was later when the police came that $160 was recovered. The appellant further only needed less than 100/-. He should have changed one of the $100. Instead he informed the front of office manager that he wished to change $500. This amount at the then exchange rate was Kshs 11,000/-.

There was the aspect that the charge sheet ought to have been amended. The Court notes that this was not necessary. The charge as laid down was what the prosecution were called to prove. The trial magistrate found that the 2nd accused had no *mens rea* and acquitted him. In fact there was quite a considerable evidence against 2nd accused under the doctrine of aiding and abetting the appellant. The trial magistrate used his discretion and this Court is not permitted to interfere with the acquittal of the 2nd accused.

Counsel for the appellant also relied on the case of *Mwaula & Muthoka versus The Republic* [1980] KLR 127 in which it held that the facts which have to be proved to establish guilt must be proved beyond all reasonable doubt on the evidence considered as a whole. Further an explanation for possession which was reasonable and which might possibly be true could be rebutted by the appellant.

The Court supports the conviction. The sentence is very lenient. This Court would sentence the appellant to 18 months imprisonment.

On the Court's own motion, it orders that the fine of Kshs 3,000/- be refunded to the appellant if already paid.

Dated and Delivered at Nyeri this 29th day of June 1994.

M.A.ANG'AWA

JUDGE