REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 1014 OF 1989

GEOFFREY NDUNG'U THEURI ……..……..…APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(From the original conviction and sentence of the Senior Resident Magistrate's Court at Nairobi, O Githinji Esq in Criminal Case No 4009 of 1988)

JUDGMENT

The appellant, Geoffrey Ndung'u Theuri, was convicted by the Senior Resident Magistrate (O. Githinji, Esq.) of six offences under the Advocates Act and sentenced to 13 months imprisonment. He has now appealed to this Court against both the conviction and sentence.

The appellant, though not a qualified advocate, is a well-known person in the legal circles of this country. He has waged a long and bruising war against the Law Society of Kenya and the office of the Attorney General in an effort to become an advocate of the High Court. In 1985 he won a memorable battle in that war when the Cour-t of Appeal ordered his admission to the Kenya School of Law to pursue studies there with a view to sitting the Council of Legal Education Examination the successful completion of which, would have seen him enrolled as an advocate. The appellant was undergoing at the Kenya School of Law, when, it is alleged, he committed offences of which he was convicted by the court below.

Two of the offences allege that the appellant drew documents to legal proceedings while not an advocate contrary to section 38(1)(a) of the Advocates Act while the other 4 charges allege that he acted as an advocate when not qualified contrary to section 36(1) of the Advocates Act. The facts of the case are not disputed and can be summarised as follows. In the course of his studies at the Kenya School of Law the appellant found himself in serious financial difficulties after having tried but failed to secure employment. As a result, he decided, as he put it, 'to use his intelligence and experience in the legal field to enable him earn a living and thus support himself, his family and other dependants.' He therefore started a business rendering 'general and consulting services' as well as

'general registration and secretariat services' and registered them, presumably as business names, at Sheria house.

As the appellant's volume of work increased, he came across people whom he claimed had complaints about the unsatisfactory services received from practising advocates or firms of advocates. He further said (in his inquiry statement) that he would refer such people to other advocates or firms of advocate whom he thought could do the job better, but most of such people ultimately came back to him, still complaining of poor services rendered by the advocate he had referred them to. Obviously dissatisfied by the poor work his 'clients' were generally receiving from all those advocates, he started wondering whether there

was a way he could do the job himself, without infringing the provisions of the Advocates Act. His research led him to order III rules 1 and 2(a) of the Civil Procedure Rules and section 85 of the Advocates' Act which he thought removed the bar placed on unqualified persons by the Advocates Act.

Order III rules 1 and 2(a) provides as follows:-

"1. Any application to or appearance or act in any court required or authorised by the law to be made or done by a party in such court may, except, where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by an advocate duly appointed to act on his behalf;

2. The recognised agents or parties by whom such appearances, applications and acts may be made or done are:-

(a) Persons holding powers of attorney authorising them to make such appearances and applications and do such acts on behalf of parties;"

Section 85 of the Advocate Act provides:-

"Nothing in this Act or any rule made thereunder shall affect the provisions of any other written law empowering unqualified persons to conduct, defend or otherwise act in relation to any legal proceedings."

And so in the belief that he was protected by the provisions of order III rules 1 and 2(a) and section 85 of the Advocates' Act, the appellant obtained from Wambui Kahuho a power of attorney, authorising him to act on her behalf and proceeded to act as such by drawing a notice of appointment of himself as Wambui's attorney in Nairobi High Court Civil Appeal No. 151 of 1987. In connection with the same Civil Appeal, he wrote a letter inviting another firm of advocates to send their representative to the High Court Registry for the purpose of fixing a hearing date. The two incidents are the substance of count 1 and 2 of the offences the appellant was convicted of. Similarly, in Nairobi High Court Civil Case No. 1966 of 1987, the appellant drew up a notice of appointment of himself as an attorney of a defendant in that case, Richard Kariuki (Count IV), issued a Chamber Summons in respect thereof (Count III) and appeared before Hon Mrs Justice Aluoch (Count V). And, lastly on 15th January, 1988 he filed on behalf of a Mr Julius Peter Ndungu, a civil case while not an advocate, thereby committing the offence alleged in count VI.

The two sections of the Advocates Act which the appellant is alleged to have infringed are as follows:-

"36(1) Subject to section 85, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceeding in the name of any other person in any court of civil or criminal jurisdiction."

"38(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument:-

(a) relating to the conveying of property or to any legal proceedings nor shall any person accept or receive, directly or indirectly, any fee gain or reward for the taking of any such instructions or for the drawing or preparation of any such legal document or instrument.

(b) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.

(c) Any person who contravenes sub-section (1) shall, unless he proves that the act was not done for or in expectation of, any fee, gain or reward, be guilty of an offence and liable to a fine not exceeding twenty – five thousand shillings or to imprisonment for a term exceeding two years or both.

With the provisions of the law, as set out above, in mind, we have evaluated the evidence on record and

we are fully satisfied that there was sufficint evidence to establish that the appellant did the acts alleged in the six counts facing him.

At the close of the prosecution case when the provisions of s 211 the Criminal Procedure Code (which the appellant said he knew anyway) had been explained the appellant elected to keep quiet and to offer no evidence in his defence and also to call no witness, Subsequently, however, he made very lengthy written submissions, in which he attempted, to no avail, to justify his actions. He claimed that the provisions of the Civil Procedure Rules (order III rules 1 and 2(a)) and section 85 of the Advocates Act permitted him to do the things he did. Put shortly, his argument was that he was not acting as an advocate but as a recognised agent and attorney of the parties he represented and, in any event, the restrictions imposed by section 36(1) and 38(1)(a) of the Advocates Act, were, as far as he was concerned, dislodged by the provisions of section 85 of the same Act, the latter section limiting the effect of the penal sections with respect to other laws empowering unqualified persons to conduct, defend or otherwise act in relation to legal proceedings.

The above is the argument advanced by the appellant to counter the charges levelled against him and, save for a few points of a technical nature raised by his learned counsel (Dr Khaminwa) in this appeal, as to which we shall revert later, the basic argument urged on his behalf before us is to the same effect. Accordingly the issue we have to resolve is whether the position taken by the appellant in the court below, and also advanced by his learned counsel before us, is tenable.

We think we had better start by stating that, in our view, the appellant's interpretation of order III rules 1 and 2(a) of the Civil Procedure Rules was quite wrong.

The Civil Procedure Rules are made by the Rules Committee created by section 81 of the Civil Procedure Act 'to make rules not inconsistent with the Act and, subject thereto, to provide for any matters relating to the procedure of civil courts." (The emphasis is ours). Posing there for the moment, to consider the full meaning of section 81 of the Act, if the rules made thereunder, are required 'not to be inconsistent' with the Act, how can one justify an argument supporting an interpretation of a rule made there under which, as we shall see below stultifies entirely the provisions of another Act.

Sections 31(b) of the interpretation and General Provisions Act (Cap 2) states:-

"No subsidiary legislation shall be inconsistent with the provision of an Act."

The Civil Procedure Rules are subsidiary legislation and as such they are caught by section 31(b) of the Interpretation and General Provisions Act. The rules cannot and do not purport, to confer upon any person any substantive legal rights, which he otherwise does not have or such rights as are denied such person by other laws. If the Civil Procedure Rules purported to confer such rights, the rules themselves would not only be *ultra vires* section 81 of the Civil Procedure Rules which clearly delimits what the Rules Committee can do but would also be of no effect because

a subordinate law – making body is bound by the terms of its delegated or derived authority, and courts of law, as a general rule, will not give effect to the rules, thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled. (See *Crailes on statute law* 6th Edition page 297).

The second point we wish to make is that order III rules 1 and 2 (a) which the appellant relies on as authorising him to do the acts he did, does not in fact permit the doing of such acts by unqualified persons.

The appellant relied on his appointment as the attorney of the persons he represented to justify his drawing of documents in legal proceedings and to make appearances in court. He described himself as an attorney and recognised agent of the persons he represented. The words 'recognised agent' is not a term of art in fact the term does not exist outside order III rules 1 and 2(a) of the Civil Procedure Rules. Accordingly, to describe oneself as an 'attorney and recognized agent' may sound big but means nothing,

for a holder of a power of attorney is no more than a recognized agent as defined by rule 2a of the Civil Procedure Rules.

Mulla on the Code of Civil Procedure at page 668, in a commentary on order III rule 1 of the Indian Code of Civil Procedure, which is similar to our order III rule 1 says:-

"The right of audience in court, the right to address the court, the right to examine and cross-examine witnesses are all parts of pleading and that is not included in the expression "appearance, application or act in or to any court." The word 'act' in juxt a position with the words

'appearance' and 'application' is used in a technical sense and not in its ordinary sense as being referable to any action by any party."

With respect we would agree with the above interpretation. It could never be the intention of the Rules Committee by making order III rule 1 to authorise holders of powers of attorney to appear or make applications or act in court otherwise than in the technical sense. Quite clearly therefore the appellants drawing of legal documents and appearances in court are not protected by order III rule 1.

As for his drawing of documents in relation to legal proceedings under the alleged power of attorney – *Atkins – Court Forms* Second Edition Volume 4 page 79 (under the heading civil proceedings under power of attorney) states:-

"In the simple case where a power of attorney is given to someone to bring or defend an action in the name and on behalf of the donor, the proceedings should be in the name of the principal and the title of the proceedings will not indicate that another person has been empowered to act on his behalf; the action proceeds as if the principal had not delegated to an attorney the taking or defending of the proceedings. An attorney entering appearance on behalf of a defendant or respondent should do so by solicitor (say advocate in this country); appearance by the attorney on behalf of the defendant or respondent will not be accepted."

So our view of the matter is that the appointment of a person as an attorney of another does not confer upon the donee of the power of attorney the right to appear in court and plead the donors case and the restrictions created by sections 36(1) and 38(1)(a) apply to donee of powers of attorney as they do to all unqualified persons. To interpret order III rules 1 and 2 (a) in the manner the appellant did would render ineffective the whole of Advocates Act. Such an interpretation would not only be against the express provisions of section 31 (b) of the Interpretation and General provisions Act but would also be *ultra vires* section 81 of the Civil Procedure Act. We venture to think that the rules Committee in making the Rules cannot have intended to create the absurdity that would result from interpreting Order III rules 1 and 2(a) in the manner urged by the appellant.

In this respect we are unable to agree with the view expressed by Mbito J in *Marietta Muthemba vs The Director of Housing and Social Services* (HCC No 293 of 1988 unreported) regarding the interpretation of order III rules 1 and 2(a) of the Civil Procedure Rules. As already explained, the order does not permit an unqualified person to appear or plead a case on behalf of a donor of a power of attorney.

Such an interpretation would apart from the reasons given above, defeat the very purpose of the Advocates Act. As stated by Porter J in Nairobi High Court Civil Case No 1574 of 1988 (another case involving this appellant against the Law Society of Kenya)-

"if order III has to be interpreted in the way in which the appellant interprets it, it would be difficult to understand why anybody would bother to qualify in the law in the first place."

The upshot of the matter is that the appellant was not protected by the provisions of O III rules 1 and 2(a) or by section 85 of the Advocates Act and his activities were an infrigment of the sections of the Advocates Act under which he was charged, namely sections 36(1) and 38(1)(a).

The appellant also complains in his petition of appeal that there were grave misdirections in the lower court's judgment particularly with regard to the burden of proof, which his learned counsel submitted had been shifted. Mr Khaminwa singled out for criticism the learned trial magistrate's statement that the appellant had admitted all the facts; he also criticised the failure of the prosecution to call as witnesses the persons the appellant had acted for.

We think the passage in the judgment about the admission of the facts by the appellant was erroneous bearing in mind the fact that the appellant gave no evidence in his defence and called no witnesses. However this was a minor error, as quite clearly what the learned trial magistrate had in mind was the fact that the facts as put forward by the prosecution were not challenged or disputed. In our view no miscarriage of justice was occasioned and the error, is curable under section 382 of the Criminal Procedure Code.

As for the claim that the burden of proof was shifted we would observe that the appellants position in the court below, as shown by the inquiry statement he made, which was admitted in evidence without any objection, and also as confirmed by the appellant's written submissions was that his activities were fully protected by the law. That was presumably the reason why he decided to adduce no evidence in his defence, electing instead to rely on the law. The prosecution having established the facts constituting the offences alleged against the appellant, the entire case depended on the correct interpretation of the law applicable to the matter. That is the approach the learned trial magistrate adopted and we can see no error in it.

On our careful analysis and evaluation of the evidence on record we have come to the same conclusion as the learned trial magistrate. We are satisfied that the appellants' conviction on the six counts was justified and his appeal against conviction has no merit.

As for sentence, there are two observations which we wish to make. In passing sentence Mr Githinji exaggerated the seriousness of the offences committed by the appellant. We do not share the learned trial magistrate's view that the appellants actions were likely to interfere with the very existence of the orderly society. There was also no evidence contrary to what the learned trial magistrate said, to show that the appellant 'took' a lot of money illegally from anybody. It is therefore clear that in passing sentence, the learned trial magistrate took into consideration matters which were not relevant to the case.

In his submissions before us Mr Khaminwa, also stated that there was a difference of opinion in the High Court as to the correct interpretation of Order III rules 1 and 2(a). That this is so can be gleaned from the two judgments of this court referred to above.

For the above reasons we are of the view that the sentence meted out by the learned trial magistrate was excessive. Bearing in mind the fact that the appellant has already served over eight months out of the 13 month prison sentence imposed we think he has been punished enough for the offences he committed. Accordingly the sentence is reduced to such term as will result in his immediate release.

The result therefore is that the appeal against conviction is dismissed and the appeal against sentence succeeds to the above extent.

Dated and Delivered at Nairobi this 10th Day of May, 1990

T. MBALUTO

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JUDGE

J.L. OSIEMO

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JUDGE