

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURST

Criminal Appeal No 51 of 1986

MachariaAPPELLANTS

VERSUS

Republic.....RESPONDENT

JUDGMENT.

Stephen Wainaina Macharia, the appellant, was convicted by a Resident Magistrate, Nairobi (Miss A Angawa) of three counts: Viz:

1. Forgery contrary to section 349 of the Penal Code.
2. Uttering false documents contrary to section 353 of the Penal code.
3. Obtaining by false pretences contrary to section 313 of the Penal Code.

He was sentenced to three years imprisonment on each count to run concurrently. His appeal is against both conviction and sentence. The appellant did not wish to be present during the hearing of this appeal. In his petition of appeal the main grounds of complaint are that the learned trial magistrate disregarded his defence; that she convicted him on the basis of conflicting prosecution evidence; that the police officer who arrested him was not called to testify and that the sentences passed on him were manifestly excessive.

Learned Senior State counsel, Mar Harwood did not support convictions on the forgery and utterings, counts, properly so in view, for the simple reason that they were defective having changed the forging and uttering of three separate documents purportedly made on those two counts are quashed and sentence passed on the appellant in them are at ast aside. Mr Harwood, however, supported conviction on the last count of obtaining money by false pretences. It will perhaps be appropriate to set out a summary of the prosecution case as it emerged in the court below.

The appellant, who was an employee of the Ministry of Home Affairs and who was stationed in Nairobi submitted to his Ministry's Personnel department a claim for the refund of medical expenses which claim was based on three receipts, Nos 142907 dated June 26, 1985 for Kshs 913: 142961 dated July 10, 1985 for Kshs 770.40 and 142997 dated July 30th July, 1985 for Kshs 800 (All produced and marked as Exhibits 5, 4 and 3 respectively). The receipts were purportedly forged and on the basis of them the appellant was paid, the amounts of money reflected on each receipt. When the genuineness of the three receipts was doubted, Erastus Njane Kangethe, (PW 5) a personnel officer of that Ministry contacted, Mater Misericordiae Hospital which purportedly originated the three receipts. The hospital, however, denied the receipts were theirs. It is then that police were contacted and the appellant was arrested and subsequently charged.

The appellant's defence in the court below was that Erastus Njane Kangethe (PW 5) framed him because the latter had refused to pay a bribe of Kshs 400 to the former, even though he had initially agreed to pay it, for the purpose of making PW 5 speed up processing of the appellant's claim. The appellant contended in the court below and it appears to be a ground of appeal (missing words) the case against him. We agree with Mr Harwood that the third count was based on one obtaining of Kshs 2,433.40 and the obtaining of the money was properly made the subject matter of a single count. The payment was made against one voucher (Exhibit 1) the amounts of money in the three receipts (Exhibits 3,4 and 5) having been consolidated. The issue which Mr Harwood grappled with before us is whether or not the trial magistrate's findings, that the appellant obtained the money by false pretences was supported by evidence adduced before her. We agree with him that the testimony of Susan Oyuma (PW 4) clearly demonstrated that the receipts the appellant used to back his claim did not originate from Mater Misericordiae Hospital. Only the appellant could explain how he obtained them and from whom. He admitted in the court below that he submitted the three receipts to back his claim. The dates on the three receipts agreed with the dates the appellant said he visited Mater Misericordiae hospital for treatment. The document examiner, Napoleon Bett, testified that the specimen handwriting of the appellant (Exhibit 9) and the handwriting on the three receipts had a common origin. This evidence coupled with the fact that the appellant voluntarily took steps to refund the money he is alleged to have unlawfully received demonstrate beyond reasonable doubt that he was aware he was not entitled to make the claim of reimbursement of any medical expenses.

The appellant's defence was that he was framed in this matter. We would have been inclined to agree with him on that were it not for the clear testimony of PW 4 who demonstrated that the print of the words "Mater Misericordiae hospital" on exhibits 3, 4 and 5 were more thickly written than their genuine ones and that the serial numbers on them were not reflected in any of their receipt books and in any event their receipts had serial numbers with four digit numbers. There was also the testimony of Sister Anasanon, who also came from Mater Misericordiae hospital who corroborated the testimony of PW 4. Both these witnesses were at no time under the control and direction of Erastus Njane Kangethe who the appellant alleged had framed this matter against him so as to be influenced by him to let against the appellant. The learned Resident Magistrate, in our view, fully dealt with the appellant's defence and properly rejected it. Her failure to consider in her judgment the fact that the appellant had refunded the money, he allegedly unlawfully obtained long before the case came for a hearing did not in our view cause any prejudice to the appellant and we are satisfied no failure of justice was thereby occasioned. We are also satisfied that the prosecution evidence did not conflict on material particulars. The conviction of the appellant on the third count was safe and we accordingly affirm it.

Learned Senior State Counsel concedes, with justification in our view, that the sentences of three years passed on the appellant, a first offender, was manifestly excessive in the circumstances. The appellant had refunded all the money he unlawfully took. He stood to lose this job by his conviction and in his mitigation he indicated he had many responsibilities. The circumstances of this case did not justify the maximum sentence. We are compelled to interfere with it. The appellant has already served at least eight months of the three years imposed on him. We feel he has been sufficiently punished. Accordingly we set aside the sentence of three years and in its place substitute such terms of imprisonment as will ensure his immediate release from prison.