



**Kisorio alias George Jack Tobias v Republic (Criminal Appeal
109 of 2020) [2023] KECA 335 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 335 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 109 OF 2020
MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA
MARCH 17, 2023**

BETWEEN

JOSHUA KIPROP KISORIO ALIAS GEORGE JACK TOBIAS APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi
(Kimaru, J.) dated 22nd July, 2020. in Nairobi HCCRA No. 246 of 2019)*

JUDGMENT

1. This appeal emanates from the judgment of the High Court at Nairobi dated on 22nd July, 2020 by Kimaru, J. (as he then was) in Criminal Appeal No. 246 of 2019. The appellant together with another were charged and convicted on 6 counts as follows: count 1 - conspiracy to defraud contrary to section 317 of the [Penal Code](#). The particulars were that on or about 28th February, 2009 at CFC Stanbic Bank Chiromo Road Branch within Nairobi area jointly with others not before court conspired to defraud CFC Stanbic Bank of KShs. 13,700,000.00 the property of said bank.
2. On counts 2 – 5, he was charged with making documents without authority contrary to section 357(a) of the Penal Code. The particulars in count II were that on or before 11th February 2009, at an unknown place within the Republic of Kenya with intent to defraud and without lawful authority or excuse, made a certain document namely, certificate of title No. IR 67825(LR No. 7785/679) purporting it to be a genuine and valid document issued by registrar of titles. In count III, the particulars were that on the same day at an unknown place within the Republic of Kenya with intent to defraud and without lawful authority or excuse made a certain document namely National Identity Card Number [particulars withheld] in the names of George Jack Tobias.
3. In count IV, particulars were that on the very day, at an unknown place within the Republic of Kenya with intent to defraud and without lawful authority or excuse made a certain document namely pay



slip for the month of November 2018 in the name of George J. Tobias purporting it to be genuine and valid pay slip issued by the Livingstone Registrars Limited. In count V, the particulars were that on the same day, at an unknown place within the Republic of Kenya with intent to defraud and without lawful authority or excuse, made a certain document namely, pay slip for the month of December, January 2009 in the name of George J. Tobias purporting it to be genuine and valid pay slip issued by the Livingstone Registrars Limited.

4. In count VI he was charged with obtaining money by false pretenses contrary to section 313 of the *Penal Code*. The particulars were that on 6th March, 2009 at CFC Stanbic Bank Chiromo Branch in Nairobi area jointly with others not before court, with intent to defraud, obtained from CFC Stanbic Limited a loan of KShs. 13,700,000.00 by falsely pretending that title No. IR 67825 (LR No 7785/679) which was surrendered to the said bank as security, was a genuine and valid document, a fact he knew to be false and untrue.
5. The appellant denied the charges, was tried, convicted on all six counts and was sentenced to 3, 7, 7, 7, 7 and 3 years for the respective counts with the sentences running concurrently.
6. Aggrieved by the conviction and sentence, the appellant preferred a first appeal to the High Court at Nairobi. The High Court after considering the appeal dismissed the same and upheld both the conviction and sentence, hence this second and perhaps last appeal.
7. During trial, the prosecution called 19 witnesses to prove their case that the appellant used forged documents being title documents, pay slips, employment letter, ID card, pin certificate, previous bank statements and posed himself as the registered owner of a property LR No 7785/679 in Runda Estate so as to get a mortgage facility of KShs. 13,700,000. Among the witnesses were CFC Stanbic Bank employees who processed the loan, and opened his bank account, the law firm employees who prepared and registered the charge, the land valuer who valued the property, Land Registrars, Forensic Analyst and the Officer attached to the Banking Fraud Unit. It was their evidence that the appellant allegedly opened an account at CFC Stanbic Bank in the name of Tobias George Jack, attaching a copy of a forged ID and Pin Certificate in that name, made a home loan application in the said name, which application was approved to the tune of KShs. 13,700,000.00 and credited into the account in that name from which he proceeded to withdraw.
8. The trial court placed the appellant on his defence who gave sworn testimony. He stated that he met his co-accused who told him that he worked at CFC Bank as a marketing agent. The co-accused persuaded him to open an account and asked him to bring along copies of his National Identity Card, utility bills, Kenya Revenue Authority pin, and passport photographs. He gave him the said documents and an account was opened. On 15th June 2009, he was arrested on suspicion that he colluded with CFC Bank staff to defraud the bank KShs. 13,700,000.00 He averred that he simply opened an account but never took any loan and that he did not know a George Jack Tobias in whose name the account was opened. He tried calling his co-accused to ask about the passport photos he had given him, but he could not reach him; that the witnesses lied that he was the one who opened the account and withdrew the money, as he never signed any account opening forms.
9. The trial court eventually convicted the appellant and sentenced him as aforestated.
10. Being aggrieved again by the finding of the High Court, the appellant has now approached this Court for a contra finding, complaining that both courts below misinterpreted and misapplied the evidence of the document examiner which was exculpatory; that the fundamental elements of the offence had not been established; and lastly, that the court erred by finding that the evidence adduced had proved the charges against him beyond reasonable doubt.



11. The matter proceeded by way of written submissions with limited oral highlighting. On the first issue, the appellant submitted that the prosecution did not prove the case beyond reasonable doubt. That the evidence of all the witnesses who identified the appellant as George Jack Tobias, the loan applicant, was contradicted by the evidence of the forensic document examiner, PW3, who gave evidence that there was no agreement between the appellant's specimen signature and the signature on the loan application forms, account opening forms, the cheques and cash withdrawal receipts. This meant that the person who signed the loan charge was not the person who entered into a loan agreement with CFC Bank as he never signed the documents in question.
12. The two courts below relied on his identification as the perpetrator and ignored corroborated material evidence which exonerated him. An identification parade was not conducted and his dock identification was a case of mistaken identity. The trial court misinterpreted the evidence by holding that his signature matched the signature on the said documents when that was not the expert witness's testimony. Further, the High Court although noting this error, went ahead and drew its own conclusions which were erroneous. He therefore urged for the appeal to be allowed.
13. The appeal was opposed by the respondent who submitted that the appellant's grounds of appeal raised no issues of law. That the issues raised as grounds of appeal were matters of fact that were ably and conclusively determined by the two courts below. We were therefore urged to dismiss the appeal.
14. Our role as the second appellate court was succinctly set out in *Karani v R*. [2010] 1 KLR 73 wherein this Court expressed itself as follows:

“This is a second appeal. By dint of the provisions of section 361 of the [Criminal Procedure Code](#), we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

Further, in *David Njoroge v Republic*, [2011] eKLR, this Court stated that under section 361 of the [Criminal Procedure Code](#):

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* [1984] KLR 213”.

15. Bearing the above in mind, the principal question in this appeal for our consideration is whether the prosecution established its case against the appellant to the required standard. Related to that, is the question whether the first appellate court discharged its duty of re-evaluation and reappraisal of the evidence and reach its own independent conclusions.
16. On the question whether the prosecution discharged its burden of proof to the required standard, both courts below interrogated whether the ingredients of the offences of conspiracy to defraud, making false documents without authority, and obtaining money by false pretense were proved.



17. Having reconsidered the trial court and first appellate court's records, we are satisfied that the prosecution proved beyond reasonable doubt that the appellant was guilty of the offences charged. We say so for the following reasons. The offence of Conspiracy is set out in section 393 of the Penal Code as:

“Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.

18. In the case Christopher Wafula Makokha v Republic [2014] eKLR the court had this to say on what constitutes the offence of conspiracy.

“In Archibold: Writing on Criminal Pleadings, Evidence and Practice (*supra*), the learned writers observe at pages 2589 and 2590 that:

“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons so long as a design rests in intention only, it is not indictable; there must be agreement Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”

19. The dominant aspect of the offence of conspiracy is that there must be a common agreement and or, a meeting of the mind. Was it proved that there was a meeting of the mind of the appellant and his co-accused? In our view, there was. From the record, there was a concurrent finding of fact and law that indeed there was a connection between the appellant and the co-accused. The learned Judge while addressing the issue stated thus:

“The 2nd accused person was a loan processor and his duties did not include receiving loan applications from customers. The fact that the Appellant gave the loan application documents to the 2nd accused person who in turn presented them to the bank shows that they knew each other. Further, PW9 told the court that the 2nd accused person called the law firm to request a quotation of the legal fees for a client who wanted to apply for a loan from the bank. The said client turned out to be George Jack Tobias. Once the charge documents were registered, she stated that the 2nd accused person personally went to the law firm to pick them up. PW11 who worked in the same department as the 2nd accused person stated that most of the communication from the bank to George Jack Tobias was through the 2nd accused person. PW16 and PW17 stated that when they interrogated the 2nd accused person, he told them that the appellant had promised to give him Ksh.100,000/= if the loan was approved.

It is therefore clear to this court that the appellant and the 2nd Accused Person knew each other and acted in concert to defraud the bank. The 2nd accused person assisted the appellant fast track his loan application process which was fraudulent. This court is of the view that the prosecution established the appellant's guilt in Count I to the required standard of proof beyond any reasonable doubt.”



20. From the entire evidence, it was clear that there was a person who helped the appellant in the execution of the act within the bank. The summary of the learned Judge above puts it all in clear perspective of the conspiracy between the two, more so, with the promise that the co-accused will benefit with KShs.100,000.00 from the appellant, should the scheme go through. We see no reason to depart from the holding of the two courts below, on the same as there was a consensus between the appellant and the co-accused in the commission of the offences.
21. The appellant was charged in counts II, III, IV and V with the offence of making a document without authority contrary to section 357(a) of the *Penal Code*. The offence of making a document without authority is set out in section 357(a) as follows:

“ Any person who, with intent to defraud or to deceive:

- a. without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing.”

From the definition, the offence constitutes the following ingredients:

- i. proof of the making, signing or execution of a document and that the same was done by the accused; proof that the making, signing or execution was without lawful authority or excuse; and
- ii. proof that the making, signing and execution was with the intention to defraud or deceive.
22. The appellant was alleged to have made a certificate of title No. IR 67825 (LR No 7785/679) purporting it to be a genuine and valid document issued by the Registrar of Titles. PW4, Joseph Wangombe, PW5, Fredrick Libillala, and PW6, Betty Atieno were Land Registrars at the Ministry of Lands in Nairobi at the time of the commission of the offences. On 15th July 2009, they received a visit from a police officer from the Banking Fraud Investigation Unit. The police officer was in possession of a certificate of title IR 67825 for Land Registration No. 7785/679, which was purported to have been signed by the three witnesses. PW4, PW5 and PW6 stated that they did not append their signatures on the certificate of title and that the signatures bearing their names that appeared on the title were forgeries. They testified that they did not even know the appellant or the co-accused.
23. As to the National Identity Card No. [particulars withheld], in the names of George Jack Tobias purporting it to be a genuine and valid document issued by the Director of National Registration Bureau, PW15, Evans Oyori, who worked at the Department of Registration of Persons in Nairobi. On 22nd July 2009, he received a letter from the Banking Fraud Investigation Unit, requesting him to provide details of two national identity card numbers. The first identity card No. [particulars withheld] was registered and issued to Joshua Kiprop Kisorio . The 2nd identity card No. [particulars withheld] which bore serial number [particulars withheld] was registered and issued to GGT, and not George Jack Tobias. The serial number No. [particulars withheld] used in the fake identity card purported to be issued to George Jack Tobias, was the same serial number indicated in an identity card registered and issued to AAA.
24. As regards the payslips for the month of November and December, 2008 in the names of George Jack Tobias purporting to be genuine and valid payslips issued by Livingstone Registrars Ltd, PW12, Ngare Mugo, who was the Administration Manager at Livingstone Registrars Ltd addressed this issue. On 24th August 2009, two officers from the Banking Fraud Investigation Unit paid him a visit. They had in their possession a letter and two payslips that were purported to have originated from Livingstone Registrars Ltd. He stated that the said letter did not originate from the company since the letter head



was different from the one, they usually used. The two payslips were for an employee named George Jack Tobias. He checked the system but did not find an employee by that name. He informed the officers that the letter and the payslips were not genuine and did not originate from the said company. He gave the officers a sample of the company's letter head as well as a sample payslip. He produced the same into evidence. He told the court that the appellant was unknown to him.

25. As stated earlier in this judgment, the evidence of PW3, PW4, PW5, PW6, PW12 and PW15 established that all the above listed documents were not genuine. They were forgeries. The said documents were presented to the bank by the appellant with a view of defrauding the bank of KShs.13,700,000.00. The appellant was a beneficiary of these forged documents. The loan amount was credited to a bank account that was opened by the appellant. The prosecution also established that the appellant withdrew the said funds from the bank account. The forged documents were made and used as genuine documents to the advantage of the appellant. The forged documents could only have been made by the appellant who had no authority to make them. His guilt with regard to the offences in Count II, III, IV and V was therefore established by the prosecution to the required standard.
26. We agree with the concurrent finding of the two courts below that the offences were proved beyond reasonable doubt. These witnesses' evidence was not displaced by the defence offered by the appellant.
27. The appellant was further charged in Count VI with the offence of obtaining money by false pretenses contrary to section 313 of the *Penal Code*. The offence of obtaining by false pretenses in section 313 of the *Penal Code* is defined as follows:

“Any person who by any false pretense, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years.”

28. In *Francis Mwangi & Another v Republic* [2015] eKLR, the ingredients of the offence of obtaining by false pretenses were stated as follows:

“From the definition, the basic ingredients of the offence can be summarized as follows:

- 1) The act of obtaining something capable of being stolen.
- 2) Obtaining the thing by false pretenses.
- 3) Obtaining the thing with intent to defraud.

The definition of false pretense on the other hand is given under section 312 of the *Penal Code* as follows:

“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 pretense.”

The operative word under section 312 is representation which is applicable in the following circumstances:

- 1) A representation by words, writing or conduct.
- 2) A representation in either past or present.
- 3) A representation that is false.



4) A representation made knowing it to be false or believed not to be true.”

29. The money obtained by the appellant from the bank was a home loan facility and the appellant, whose real name is Joshua Kiprop Kisorio, disguised himself as George Jack Tobias. He presented forged documents to the bank with a view of defrauding the bank of the said sum of money. The appellant knew that the said documents were not genuine. He used a forged certificate of title to secure the loan facility, knowing very well that he was not the registered owner of the said property. This only leads to one conclusion that he made a false representation to the bank with intent to defraud the bank. His initial defence was that he did not apply for a loan facility at the bank in the name of George Jack Tobias. He however, changed the narrative in a bid to throw the ball, to the co-accused in the trial court that it was him, as a neighbor in Nyayo Estate in Embakasi who lured him to open an account at CFC Stanbic Bank Ltd and proceeded to use his passport size photo to pose as George Jack Tobias and defraud the bank of KShs.13.700,000.00.
30. From the record, it is clear that the forensic evidence established that the signatures on the account opening application form and home loan application form did not match the appellant’s specimen signature. The High Court while re- assessing the evidence was of the opinion that since the appellant was posing as a different person, the probability that his real specimen signature would be the same as that of George Jack Tobias was minimal. We equally agree with the said sentiments.
31. From the record, PW9, PW10 and PW14 all testified that the appellant did pay a visit to the law firm and introduced himself as the borrower, George Jack Tobias. In fact, PW10 told the court that the appellant accompanied him to the land registry to register the charge document and see if they could fast track the registration. The witnesses who were called by the prosecution testified to the effect that they had an interaction with the appellant, who told them that he was George Jack Tobias. To further nail the appellant, the forged identity card had the appellant’s photograph. The forged documents in question originated from the appellant but all he could say, rather casually, is that he did not apply for the loan facility.
32. We are therefore persuaded just like the two courts below that the said offence was proved as the appellant made a false representation to the bank and deliberately defrauded the bank of KShs.13.700,000.00 in form of a home loan facility. Just like the first appellate court, this Court finds that the evidence adduced by the prosecution against the appellant was overwhelming and his defence constituted a mere denial which did not dent the otherwise strong evidence adduced by the prosecution witnesses.
33. The upshot of the above is that there was proper evaluation of the evidence by the trial court, and equally, there was proper re-evaluation of the said evidence by the first appellate court contrary to the submissions of the appellant.
34. In view of what we have stated above, this appeal is devoid of merit and is accordingly dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....



JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

*I certify that this is a true copy of the original
signed*

DEPUTY REGISTRAR

