



**Mibei v Republic (Criminal Appeal 123 of 2018)
[2021] KECA 245 (KLR) (3 December 2021) (Judgment)**

Neutral citation: [2021] KECA 245 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 123 OF 2018
HM OKWENGU, SG KAIRU & J MOHAMMED, JJA
DECEMBER 3, 2021**

BETWEEN

SAMUEL KIBET MIBEI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi, (L. Kimaru, J.) dated the 1st of February, 2017 in HC.CR.A NO. 332 OF 2011)

JUDGMENT

1. Samuel Kibet Mibei (appellant) was tried and convicted by the Principal Magistrate’s Court at Nairobi on two counts of the offence of making a document without authority contrary to section 357(a) of the Penal code, two counts of the offence of uttering a document with intent to defraud contrary to section 353 of the *Penal Code*, one count of handling stolen goods contrary to section 322(2) of the Penal Code, and one count of obtaining money by false pretenses contrary to section 313 of the Penal Code. He was sentenced to serve one-year imprisonment in respect of each count, which sentences were to run concurrently.
2. The appellant’s first appeal to the High Court was dismissed by Kimaru, J. who upheld the findings of the trial court. The appellant is now before us in this second appeal in which he has raised 6 grounds. In a nutshell the appellant faults the learned Judge of the first appellate court for: failing to consider the provisions of section 357 of the Penal Code and upholding the conviction of the appellant; failing to note the error made by the trial magistrate in equating the offence of making a document without lawful authority under section 357(1) of the Penal Code with the offence of forgery or making a false document under section 349 of the Penal Code; upholding the conviction of the appellant for the offence of uttering false documents contrary to section 353 of the Penal Code when the prosecution had not proved knowledge or fraud on the part of the appellant or the falsity of the documents allegedly uttered; ignoring the provisions of section 322 of the Penal Code and upholding the conviction of the



appellant for the offence of handling stolen property; failing to consider what constitutes obtaining by false pretenses contrary to section 313 of the Penal Code; failing to find that the facts did not meet the offence as stipulated; and failing to re-evaluate afresh the evidence tendered before the trial court, the findings of the trial magistrate and the concession made by the State on first appeal.

3. In his submissions, the appellant faulted the trial magistrate in finding that the appellant forged the pin certificate, national ID card and transfer forms when there was no evidence that the same were made without lawful authority. The appellant drew a distinction between the offence of making a document without authority under section 357(a) of the Penal Code, and the offence of forgery/making a false document under section 345/347 of the Penal Code. He noted that while the main ingredient under section 357 is that the document was made or signed without lawful authority, the main ingredient under section 345/347 is the falsity of the document which must be proved.
4. Referring to the evidence, the appellant submitted that it was actually proved that the documents, that is, the PIN certificate and the Identity Card belonged to Jeremiah Agira Ongonga, and were actually lawfully made by Kenya Revenue Authority (KRA) and The National Registration Bureau respectively.
5. *Joseph Mukuba Kimani vs Republic* [1984] eKLR was cited for the proposition that in order to succeed in a charge of uttering a false document under Section 353 of the Penal Code, the prosecution must prove: that the document was false; that the accused knew it was false; and that he uttered it with intent to defraud. The appellant maintained that the count of uttering forged documents was not established as the documents were not forged, nor was there any evidence that the appellant knew of any forgery or fraudulent transaction. To the contrary, the evidence showed that the appellant bought the motor vehicle which he sold to Kipchirchir from one Wainaina, and that the CID confirmed that this vehicle has no issues.
6. In regard to the offence of handling stolen goods, the appellant submitted that the prosecution had to prove that Motor Vehicle No. KAL 571P was stolen; that the appellant knew or had reason to believe the vehicle to be stolen goods; and that having such knowledge, the appellant dishonestly undertook its disposal by, or for the benefit of another person, but no such evidence was before the trial court.
7. The respondent did not file submissions. During the hearing, Mr. Gitonga Muriuki who appeared for the State conceded the appeal agreeing with the grounds and submissions that were made by the appellant. He noted that the State had in fact conceded the first appeal. [8] We have considered the record of appeal, the submissions made by the appellant, the authorities cited, and the applicable law. In accordance with Section 361 of the Criminal Procedure Code, this being a second appeal, our mandate is limited to consideration of matters of law only. (*Chemagong v Republic* [1984] KLR 213 and *Rueben Karari s/o Karanja v Republic* [1950] 17 EACA 146). As stated in *Karani vs. R* [2010] 1 KLR 73}: -

“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.”

8. One of the grounds of appeal raised before us, is that the High Court sitting on a first appeal failed to execute its duty of re-evaluating the evidence tendered. This is a point of law which requires us to look into the duty of a first appellate court and determine whether the High Court properly discharged the said duty. *Peters –V- Sunday Post Ltd* (1958) EA 424, is the locus classicus laying the principle that a first appellate court is required to re-assess the entire evidence that was adduced before the trial



court and make its own independent findings, and that if the finding of the trial court is supported by evidence and the law, then such a finding should not be interfered with.

9. We also bear in mind the caution given by this Court in *Dickson Mwangi Munene & Another -vs- R* – Criminal Appeal No. 314 of 2011 that: -

“This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court’s decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge’s finding of fact unless it is not supported by the evidence on record.”

10. A look at the judgment of the first appellate court shows that the learned Judge considered the evidence that was adduced in the trial court and made several findings. The evidence reveals that one Kiptoo was spotted driving motor vehicle KAL 571P whose number plates appeared suspicious. The motor vehicle (herein referred to as Motor Vehicle ‘A’) was impounded by the police and examined by Cpl. Evans Mose, a scenes of crime officer who upon examining the chassis of Motor Vehicle ‘A’ noted that numbers had been tampered with, and on examining the engine, also noted grinding marks and observed that the numbers were faint and evenly spaced. Cpl. Mose concluded that the engine number of the Motor vehicle ‘A’ was falsified. Kiptoo led the police officers to one Kipchirchir who had sold Motor Vehicle ‘A’ to him at a price of Kshs. 285,000/-. Kiptoo produced the written sale agreement between him and Kipchirchir. Kipchirchir had not transferred Motor Vehicle ‘A’ into his name so it was still in the name of the previous owner, but Kipchirchir gave Mose a logbook S/No. 596297 as the original logbook. It showed the owner as Jeremiah Agira Ongonga and a blank transfer form duly signed by the previous registered owner indicating his Identity Card (ID) as 82xxxxx and his Pin No. as A00xxxxxxxM. Kipchirchir also gave Kiptoo a copy of a search certificate showing the registered owner as Jeremiah Agira Ongonga (Jeremiah).
11. Kipchirchir stated on interrogation, that he purchased Motor Vehicle ‘A’ which he sold to Kiptoo, from the appellant who operates a motor dealership business. The appellant showed him the documents of ownership and he took possession of the Motor Vehicle ‘A’ but was advised to go back later for the logbook. Upon selling Motor Vehicle ‘A’ to Kiptoo, Kipchirchir went back to the appellant who took him to the office of the DCIO Kericho and he was given the logbook and the other documents which he handed over to Kiptoo.
12. During the course of investigation, the investigating officer Benedict Kioko traced another vehicle which also had the same registration number (i.e. KAL 571P) as Motor Vehicle ‘A’ that was recovered from Kiptoo. The second vehicle (herein referred to as Motor Vehicle ‘B’), was recovered from Bosweti who was able to produce the original logbook which was in his name. Bosweti explained that he had bought Motor Vehicle ‘B’ from Adam Gichuhi Mwangi (Mwangi) a car dealer who had bought the vehicle from Jeremiah, the original owner. Jeremiah confirmed that he had sold Motor Vehicle ‘B’ to Mwangi. He identified a duplicate copy of the logbook which was in his name and produced his ID card which was No. 82xxxxx and his Pin Certificate which was A00xxxxxxxM (note same details as reflected in the transfer document given to Kiptoo).
13. Cpl. Mose examined Motor Vehicle ‘B’ and confirmed that the details on the engine and chassis number of Motor Vehicle ‘B’ correlated with that on the original logbook that Bosweti had. He therefore concluded that Motor Vehicle ‘B’ was the genuine KAL 571P.



15. In his defence, the appellant explained that he was a second hand motor vehicle dealer. On 20.8.2007 one Wainaina whom he had known since 1999 delivered Motor Vehicle 'A' to his yard and asked him to sell the vehicle. Wainaina had the original logbook for the vehicle which showed the owner as Jeremiah Agira Ongonga. He also had a copy of the owner's ID card and PIN number, and a signed transfer form. The appellant was unable to get a buyer for Motor Vehicle 'A' within 3 weeks and since Wainaina was in a hurry to sell the vehicle, he agreed to sell motor vehicle 'A' to the appellant at Kshs. 250,000/-. Before buying Vehicle 'A' the appellant took the documents to Kericho police station for verification and also obtained a certificate of official search confirming the ownership. In December 2007, the appellant sold motor vehicle 'A' to Kipchirchir. He denied any knowledge that Motor Vehicle 'A' was stolen.
16. From the evidence adduced, it was not disputed that the appellant sold Motor Vehicle 'A' to Kipchirchir, who sold it to Kiptoo from whom Motor Vehicle 'A' was recovered by the police. It is apparent that the learned Judge reevaluated the evidence and made similar findings as the trial magistrate, that Motor Vehicle 'A' and Motor Vehicle 'B' bore the same registration number plates; that the engine and chassis number of Motor Vehicle 'A' were tampered with; that the logbook for Motor Vehicle 'A' that was given to Kipchirchir by the appellant was a forgery as the details contained therein were not genuine; that the transfer document was also a forgery as it was not signed by Jeremiah who was purported to be the original owner; and that Motor Vehicle 'B' was not tampered with and the logbook and transfer documents produced in regard to this vehicle were genuine. To this extent, the two lower courts made concurrent findings that we have no reason to interfere with. The question is whether in light of those findings the charges against the appellant of making a document without authority and uttering a false document could be sustained.
17. The particulars in the charges brought against the appellant relating to making a document without authority and uttering a false document, showed the documents allegedly made and uttered to be ID card No. 82xxxxx and Pin Certificate No. A00xxxxxxxM. However, the evidence adduced in the trial court revealed that the ID card and the Pin Certificate were copies of genuine ID card and Pin Certificate belonging to Jeremiah, issued by the National Registration Bureau and the Kenya Revenue Authority respectively. What was in fact falsified were the documents of ownership for Motor Vehicle 'A' given to Kipchirchir by the appellant and later handed over to Kiptoo. These were the logbook for Motor Vehicle 'A' purported to be in the name of Jeremiah and the transfer document that was purported to be signed by Jeremiah, who denied having signed the transfer document or having owned or sold Motor Vehicle 'A' to the appellant or Wainaina. Unfortunately, the appellant was not charged with making or uttering the log book or the transfer form.
18. In light of the evidence that was adduced before the trial court, the finding of the trial court and the first appellate court that the charges of making a document without authority and uttering a false document in regard to ID card No. 82xxxxx and Pin Certificate No. A00xxxxxxxM, were proved against the appellant, was plainly wrong as ID card No. 82xxxxx and Pin Certificate No. A00xxxxxxxM were established to have been properly made and issued by the appropriate authorities, and the copies produced in evidence were genuine copies of the original documents. The appellant's conviction on counts 1 to 4 cannot therefore stand.
19. As regards count 5 of handling stolen goods it was alleged that contrary to section 322(2) of the Penal Code, the appellant otherwise than in the course of stealing, dishonestly undertook the disposal of motor vehicle registration No. KAL 571 Toyota Corolla by selling it to Kipchichir knowing or having reason to believe it to be stolen property.



20. In *Eddie Odongo vs Republic*, [1983] eKLR, this Court identified the elements of the offence of handling stolen goods under section 322(1) of the Penal Code as follows:

- “(i) proof that the goods were stolen goods;
- (ii) proof that the appellant knew or had reason to believe that the goods were stolen goods;
- (iii) proof that the appellant undertook the retention or disposal of the goods.”

21. The appellant did not deny selling Motor Vehicle ‘A’ to Kipchirchir, but maintained that he bought Motor Vehicle ‘A’ from one Wainaina whom he believed to be the owner of the motor vehicle. In other words, the appellant while admitting having sold motor vehicle ‘A’ to Kipchirchir, denied knowing or having reason to believe that motor vehicle ‘A’ was stolen. The appellant was not able to produce the said Wainaina, even though he claimed to have known him for a long time.

22. Both the trial court and the first appellate court rejected the appellant’s defence, holding that the appellant was an experienced motor dealer who ought to have known how to verify the particulars of Motor Vehicle ‘A’. On our part we have no reason to interfere with the concurrent findings of the two lower courts that the appellant had reason to believe that motor vehicle ‘A’ was stolen property, and dishonestly undertook its disposal. Indeed, it is telling that the appellant purported to have consulted the Criminal Investigation Department on the ownership of the vehicle, but was unable to produce any confirmation of ownership from the Registrar of Motor Vehicles.

23. We find that the appellant knew or had reason to believe that the motor vehicle was stolen or unlawfully obtained, and that is why he attempted to use the CID office in an attempt to cover up and/or remove suspicion. That said, we note with concern that the prosecution did not establish one critical element for an offence of handling stolen goods, which is, that motor vehicle ‘A’ was actually stolen goods. The evidence adduced raised suspicion that motor vehicle ‘A’ may have been stolen or unlawfully obtained as the engine and chassis numbers were interfered with, and the Vehicle bore registration number plates of another vehicle, but beyond mere suspicion, there was no evidence in proof of the theft of motor vehicle ‘A’ from any person, nor was there any person who claimed ownership of motor vehicle ‘A’. Unlike a charge under section 323 of the Penal Code, where a person may be convicted of having in his possession or conveying “suspected” stolen goods, a charge under section 322 of the Penal Code requires actual proof that the goods handled were stolen property or property unlawfully obtained. For this reason, the charge of handling stolen property under section 322 of the Penal Code cannot be sustained against the appellant.

24. Coming to the charge of obtaining money by false pretence contrary to section 313 of the Penal Code, the particulars of the charge against the appellant stated that “with intent to defraud he obtained Kshs 275,000/- from Kipchirchir by falsely pretending that he was in a position to sell him a genuine motor vehicle, Registration No. KAL 571P”. False pretence is defined 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 pretence.”

25. In this case, the appellant who was a motor dealer purported to sell motor vehicle ‘A’ to Kipchirchir and obtained Kshs. 275,000/- from him. The appellant gave Kipchirchir documents and made representation to Kipchirchir that motor vehicle ‘A’ was the vehicle genuinely registered as KAL 571P.



The representations were false as it was established that motor vehicle 'A' was not the vehicle genuinely registered as motor vehicle KAL 571P. The appellant knew or ought to have known that the particulars of motor vehicle KAL 571P were not genuine and that he was not in a position to sell motor vehicle 'A' to Kipchirchir as the registration of the vehicle was in issue. We find that there was ample evidence to support the appellant's conviction for this offence.

26. The appellant was sentenced to serve one (1) year imprisonment for the charge of obtaining money by false pretences. The learned Judge of the High Court upheld the sentence. Under section 361(1) of the Criminal Procedure Code, it is not open to this Court on second appeal to entertain an appeal on sentence unless the sentence was enhanced by the High Court or the subordinate court had no power to impose the sentence that was meted out on the appellant. As neither of these circumstances are applicable, we uphold the sentence of one (1) year imprisonment that was imposed on the appellant
27. The upshot of the above is that, we partially allow the appellant's appeal to the extent of quashing his conviction and setting aside the concurrent sentences of one (1) year imprisonment, for the two counts of making a document without authority contrary to section 357(a) of the Penal Code, two counts uttering a document with intent to defraud contrary to section 353 of the Penal Code, and one count of handling stolen goods contrary to section 322(2) of the Penal Code. We uphold the appellant's conviction and sentence of one (1) year for the offence of obtaining money by false pretences contrary to section 313 of the Penal Code.

Those shall be the orders of this Court.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb.

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

