



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO E053 OF 2021

DANIEL LOPEYOK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence in Maralal Criminal Case No 118 of 2019 – J L Tamar, SPM)

J U D G M E N T

1. The Appellant herein, **DANIEL LOPEYOK**, was convicted after trial, of two offences as follows –

(i) “Forgery contrary to section 345 of the Penal Code”

The particulars were that on an unknown date at an unknown place within the Republic of Kenya, with others not before court, and with intent to deceive, he forged allotment letter Ref: MTC/LG.2/48 for Plot Number 656, Loikas area, purporting it to be (a genuine) allotment letter issued by the County Council of Samburu.

(ii) “Making a document without authority contrary to section 357(a) of the Penal Code.”

The particulars here were that on an unknown date and at an unknown place within the Republic of Kenya, and with others not before court, without lawful authority and with intent to deceive, he made the document mentioned in Count I, “*purporting it to have been issued by the County Council of Samburu.*”

2. On 31/08/2021 the Appellant was sentenced to 2 years imprisonment on each count, to run concurrently. He has appealed against both conviction and sentence.

3. Learned counsels appearing chose to argue the appeal by way of written submissions, which I have read and considered. The Respondent does not support the convictions for the main reason that the charges were fatally defective.

4. The charge sheet is not only very inelegantly drawn, but the charges in it were indeed fatally defective. In Count I the offence charged is forgery “**contrary to section 345 of the Penal Code**”. That section does not create the offence of forgery; it merely defines the offence in the following terms –

“Forgery is the making of a false document with intent to defraud or to deceive.”

The offence of forgery is created and declared by **section 349** of the Penal Code in the following terms –

“Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.”

5. The Appellant was thus charged under the wrong section of the Penal Code. This was not a mere technicality curable under **section 382** of the **Criminal Procedure Code, Cap 75**. In our jurisdiction a criminal offence in the context of this appeal, must be created by a specific section of a specific statute. The statute here is the Penal Code. The section thereof alleged to have been breached did not create the offence charged.

6. As for Counts II and III (he was acquitted of Count III), the alleged offence charged –

“Making a document without authority contrary to section 357(a) of the Penal Code”

is not of itself an offence. It is merely the ***actus reus*** of the offence of forgery defined in that section 357. The ***mens rea*** is the **intent to defraud or deceive** mentioned in the definition of forgery under section 345 aforesaid. Intent to defraud is more particularly explained in **section 348** of the Penal Code. It is axiomatic that ***mens rea*** of itself does not constitute an offence. The offence is completed when there is also the ***actus reus***!

7. The charge sheet was also defective for other reasons that I need not go into now. Suffice it to say that the Appellant was convicted upon fatally defective charges. The convictions cannot stand. They are hereby set aside.

8. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 20TH DAY OF APRIL 2022

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 21ST DAY OF APRIL 2022