



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO 15 OF 2019**

**REPUBLIC.....APPELLANT**

**VERSUS**

**SUSAN ACHIENG AWUOR.....RESPONDENT**

**(Being an Appeal from the Judgment of Hon. C. N. Oruo (SRM))**

**delivered at Maseno in the Senior Resident Magistrate's Court**

**in Criminal Case No 594 of 2018 on 6<sup>th</sup> April 2019)**

**JUDGMENT**

**INTRODUCTION**

1. The Respondent herein was charged with the two (2) counts. The first count was forgery of an official document contrary to section 351 of the Penal Code and the second count was giving false information to a person employed in the public service contrary to Section 129 (a) of the Penal Code.
2. The particulars of Count I were that on the 11<sup>th</sup> January 2012 at Holo in Kisumu West Sub County of Kisumu County, the Respondent herein made a birth certificate No 6975508 a document purporting it to what it was in fact not.
3. The particulars of Count II were that on the 11<sup>th</sup> January 2012 at Holo in Kisumu West Sub county of Kisumu County, the Respondent herein a Mr. L.G Ng'ang'a, a person employed in the public service as the District Registrar that her son Mark Ochieng was born on the 31<sup>st</sup> March 2000 at Kajulu/Koker, information that she knew to be false intending thereby to cause Mr. L.G Ng'ang'a to issue a birth certificate which he ought not to have done if the true state of facts in respect in which such information was given had been known to him.
4. She was tried and acquitted by the Learned Trial Magistrate, Hon C.N. Oruo under Section 215 of the Criminal Procedure Code.
5. Being dissatisfied with the said Judgement, on 20<sup>th</sup> November 2019, the Appellant lodged this appeal. Its Petition of Appeal was undated and filed on 20<sup>th</sup> November 2019. It set out two (2) grounds of appeal challenging the acquittal.
6. On 7<sup>th</sup> February 2021, the Respondent filed a reply to the Petition of Appeal in opposition to the Appellant's Appeal.
7. The State's Written Submissions were dated 2<sup>nd</sup> November 2020 and filed on 3<sup>rd</sup> November 2020. Notably, the Respondent's Written Submissions were dated 22<sup>nd</sup> February 2021 and filed on 23<sup>rd</sup> February 2021 and to which she attached a Preliminary Objection dated 22<sup>nd</sup> February 2021.
8. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

9. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

10. This was aptly stated in the cases of Selle vs Associated Motor Boat Company Ltd [1968] EA 123 and [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”**

11. Having looked at the Appellant’s and State’s Submissions, it was this court’s considered view that the issues that had been placed before it for determination were:-

**a. Whether or not the court had jurisdiction to hear and determine the instant Appeal; and**

**b. Whether or not the Prosecution had proved its case beyond reasonable doubt.**

12. The court therefore dealt with the said issues under distinct and separate heads shown herein below.

## **I. JURISDICTION OF THE COURT**

13. The Appellant did not submit on this issue. On the other hand, the Respondent contended that this court had no jurisdiction to entertain the Appeal herein as the Petition of Appeal was defective and improperly on the court record having been filed out of time as provided under Section 349 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

14. She added that although the Appellant had a right of appeal in Criminal trials under Section 348A of the Criminal Procedure Code against an acquittal, an order for refusal or dismissal of charge, that right was not absolute and had to be exercised without unreasonable delay at the earliest opportunity for one to be content that there is a quest for justice before this court.

15. She argued that according to Section 349 of the Criminal Procedure Code, the Appeal herein ought to have been filed fourteen (14) days from the date of the order or sentence appealed against, which was on 6<sup>th</sup> April 2019. She submitted that that was not the case as the Appellant filed the Appeal herein on 20<sup>th</sup> November 2019 which was exactly seven (7) months and twelve (12) days after her acquittal on 9<sup>th</sup> April 2019. She added that the Record of Appeal did not also indicate whether the Appellant had sought leave of court to file this Appeal out of time.

16. She argued that the jurisdiction of this court to hear and determine this Appeal was determined by the appeal being filed within the statutory period or upon order of the court extending the period for filing of the Appeal. She added that the late filing of the Petition of Appeal rendered it a nullity and of no legal consequences as was held in the case of Samson Owiti Otambo vs Republic [2018] eKLR.

17. Notably, Section 349 of the Criminal Procedure Code provides as follows:-

**“An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:**

**Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefore.”**

18. Notably, the Petition of Appeal was filed on 24<sup>th</sup> April 2019. This was four (4) days outside the time stipulated in Section 349 of the Criminal Procedure Code for filing of appeals. The State did not apply for leave to file the appeal out of time. It did not seek to file Further Written Submissions to rebut the Respondent’s assertion in this regard.

19. In the absence of any evidence to the contrary, this court came to the firm conclusion that the Appeal herein was incompetent and defective and ought not to have been admitted for hearing.

## **II. PROOF OF THE PROSECUTION’S CASE**

20. Having said so, this court restrained itself from finding that it had no jurisdiction to hear and determine this matter as it would have been required to down its tools forthwith. It found it prudent to consider the merits or otherwise of the Appeal herein in the event it was to be found to have been found wrong on the question of its jurisdiction as aforesaid and/or found to have disallowed the Appeal herein on a ground of technicality.

21. Notably, the Appellant opposed the Respondent’s acquittal on the grounds that the Prosecution called five (5) witnesses who proved the case beyond reasonable doubt. It was its contention that irrespective of whether or not Tobias Obunga Odeny (hereinafter referred to as “PW 1”) who was the Respondent was not the father of Donald Mark Odeny, the Respondent ought not to have obtained a second birth certificate whilst the first Birth Certificate was still in existence.

22. In the Respondent’s Reply to Petition of Appeal dated 6<sup>th</sup> February 2020, she had argued that the Learned Trial Magistrate considered the charges that had been preferred by the Prosecution and the evidence that had been adduced and that the Trial Court was correct in finding that there was no cogent evidence to have warranted a conviction. This was superfluous pleading it was not a Cross-Appeal that is recognised

under the law. All that was required at the time of the hearing of the Appeal herein was the Record of Appeal herein. This court thus considered her Written Submissions and had no regard to the said Reply to the Petition.

23. This court noted the Respondent's submissions that the burden of proof was on the Appellant herein to prove to the required standard that Birth Certificate No 6975508 was forged and that she forged the same with intent to deceive. In this regard she relied on the case of **Elizabeth Achieng' Nyanya vs Republic [2018] eKLR** which cited with approval the case of **Sukanti Choudhury vs State of Orissa** where the court therein observed for the offence of forgery to be proved, the prosecution had to demonstrate that the document was forged, that the accused person had used the said document as a genuine document, that the accused person knew or had reason to believe that it was a forged document and that the accused person used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document.

24. She was categorical that all witnesses were unable to substantiate that the said birth certificate was fake. She added that based on Section 48 (1) and (2) of the Evidence Act Cap 80 Laws of Kenya, the Trial Court did not err in basing its finding on the evidence of Florence Awuor Oketch (hereinafter referred to as "PW 3") an expert witness who confirmed that both birth certificates were genuine.

25. She asserted that the evidence on record showed that all the information given in the application form for the second birth certificate were given by one Charles Odhiambo Ochieng and thus she submitted that she was wrongly charged.

26. Tobias Obunga Odeny (hereinafter referred to as "PW 1") and the Respondent were married in 1992 and were blessed with four (4) children, two (2) of whom passed away in 2017. One of the children, a son they named Donald Mark Odeny, was born at Guru Nanak Hospital on 14<sup>th</sup> March 1999. They were issued with a birth certificate No. 659516 on 25<sup>th</sup> February 2011.

27. His evidence was that he and the Respondent separated and later on divorced. He added that in July 2017, when he visited the school where his said son was attending, he learnt that his said son was now known as Mark Ochieng from the school records. He subsequently learnt that the said Mark Ochieng was issued with another Birth Certificate No 6975508 on 13<sup>th</sup> June 2017.

28. Tom Dullah Odeny (hereinafter referred to as "PW 2"), who was PW 1's brother supported his evidence. On being Cross-examined, he testified that he did not know whether it was the Respondent who applied for a second birth certificate for her son.

29. PW 3 was a Civil Registrar in the Ministry of Interior in the Civil Registration Department. In her testimony, she stated that the application for a second birth certificate was made by one Odhiambo Ochieng. When she was cross-examined, she stated that they were not issued a Notification of Birth. She further admitted that the impugned Birth Certificate was issued by her office and that the same was not a forgery. She added that the same was a genuine birth certificate and had a seal.

30. CPL Juliano Molla (hereinafter referred to as "PW 4") testified that his investigations showed that the application for the second Birth Certificate was made by Charles and that the said Birth Certificate was obtained for purposes of Mark Ochieng registering for Class Eight (8) exams.

31. CPL John Namulungu (hereinafter referred to as "PW 5") also confirmed that the application for the impugned Birth Certificate was made by the said Charles Odhiambo Ochieng. During his Cross-examination, he admitted that the Respondent was not the maker of the Birth Certificate.

32. On her part, the Respondent adduced sworn evidence. She stated that PW 1 was Mark Ochieng's father and that she was ready to undergo a DNA test to prove that fact. She was emphatic that he had never paid his school fees for him. It was her evidence that Mark Ochieng needed a birth certificate to sit for his KCPE examination and all information in the 2<sup>nd</sup> birth certificate was true.

33. Section 345 of the Penal Code defines forgery as:-

**“The making of a false document with intent to defraud or deceive.”**

34. In order to determine whether forgery in terms of Section 351 of the Penal Code had been proved in this case, one must answer the question as to whether the Prosecution proved the ingredients of the said offence.

35. This court also associated itself with the holding in the case of **Caroline Wanjiku Ngugi v Republic [2015] eKLR** where the court held that the elements of forgery were creating a document from scratch and it is limited to documents, in whatever form they are written, there must be material alteration of a genuine document, person must have taken a genuine document and changed it in some significant way, ability to mislead others to think its genuine, it must have ability to mislead others to think its genuine and it is intended to defraud.

36. Notably, with reference to the elements explained above **Caroline Wanjiku Ngugi v Republic** (Supra) and **Elizabeth Achieng' Nyanya vs Republic** (Supra), there is no evidence that was presented by the Prosecution to show the Respondent made a false birth certificate from scratch or by material alteration and or with an ability to defraud or intent to defraud. Further, there was no evidence that that she knew or had reason to believe that it was a forged document or that she used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document.

37. The Prosecution did not displace the Respondent's evidence that she was not the one who applied for the said Birth Certificate and/or that it was to be used to defraud any third party. The impugned second Birth Certificate was legally issued by the Registrar of Births and even bore a seal implying that it was genuine as was pointed out by PW 3.

38. Going further, it was clear from the Respondent's evidence and that of PW 3, PW 4 and PW 5, that the application for the said second Birth Certificate was made by another person other than the Respondent herein and that she did not make the same herself. It was made by an office that was mandated to make and issue certificates of births.

39. This court therefore found PW 3's, PW 4's and PW 5's evidence to have been in favour of the Respondent and outweighed the Appellant's submissions on guilt of the Respondent herein. As there was no nexus of forgery and/ or the elements of forgery with regards to the Respondent herein, the Prosecution thus failed to prove Count I to the required standard, which in criminal cases, is proof beyond reasonable doubt. Count II therefore failed as it was related to Count I.

40. The Learned Trial Magistrate properly applied the law as against the evidence that had been adduced and properly found that the elements of the offence of forgery of an official document had not been proved. As a result, this court was not persuaded that it should interfere with the conclusion that the Learned Trial Magistrate arrived at to acquit the Respondent herein as the same was correct and sound.

41. This Court having found that the Trial Court did not err in finding that the Prosecution had not proven its case beyond all reasonable doubt, found that the Respondent's acquittal to have been lawful.

#### **DISPOSITION**

42. For the foregoing reasons, the upshot of this Court's decision was that the Appellant's Appeal that was lodged on 20<sup>th</sup> November 2019 was not merited and the same be and is hereby dismissed.

43. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER 2021**

**J. KAMAU**

**JUDGE**