



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRA NO. 22 OF 2020**

**ZAKAYO OJUOK .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[Being an appeal from the Judgment of Hon. R. K. Ondieki (SPM) delivered on 1<sup>st</sup> September 2020*

*in CM's Court in Kisumu CMCR EACC No. 3 of 2018)*

**JUDGMENT**

The Appellant, **ZAKAYO OJUOK**, was the 2<sup>nd</sup> accused during the trial in **KISUMU CHIEF MAGISTRATE'S CRIMINAL CASE NO. 3 OF 2018**. He was convicted on Count 5, which was for the offence of **Forgery** contrary to **Section 347 (a)** as read with **Section 349** of the **Penal Code**.

1. Following the conviction, the Appellant was sentenced to a Fine of Kshs 1,000,000/= or in default 3 Years imprisonment.
2. Being dissatisfied with both the conviction and the sentence, the Appellant mounted an appeal before this Court. He listed 9 Grounds of Appeal, which can be summarized as follows;

- (i) The case was not proved beyond reasonable doubt, as there was a glaring lack of evidence.*
- (ii) The trial court wrongly dismissed the evidence tendered by the defence.*
- (iii) The Tender Committee Meeting of 16<sup>th</sup> May 2014 was not a hoax, as held by the trial court.*
- (iv) There was no evidence of any forgery of the Minutes of the Tender Committee Meeting of 16<sup>th</sup> May 2014.*
- (v) The trial court erred by shifting the burden to the appellant to prove attendance at the Tender Committee Meeting.*
- (vi) The prosecution evidence was contradictory and uncorroborated.*
- (vii) The trial court relied on extraneous matters, to convict the appellant.*
- (viii) The trial court proceeded on a wrong principle, thereby arriving at a wrong decision.*
- (ix) The charges were incompetent and unconstitutional and were therefore a nullity.*

3. In his written submissions before this Court, the Appellant summarized the Issues arising from the Grounds of Appeal, compacting them into the following 4 issues;

**“1. Whether the prosecution proved beyond reasonable doubt that the meeting of 16.5.2014 was hoax?**

**2. Whether the evidentiary burden of proving that the meeting occurred was on the appellant?**

**3. Whether the prosecution established and proved the elements of the offence of forgery?**

**4. Whether the Appellant is entitled to the prayers sought?"**

4. When canvassing the appeal the Appellant pointed out that the case which the prosecution had set out to prove was that those who attend any meeting of the Tender Committee must sign the tender register to signify attendance.
5. In this case the prosecution had called witnesses who had been reflected as having attended the meeting on 16<sup>th</sup> May 2014. However, the said witnesses testified that they could not recall having attended the said meeting.
6. However, the Appellant pointed out that during cross-examination, the prosecution witnesses admitted that they could not sure that they did not attend the meeting.
7. It was the Appellant's position that the prosecution witnesses told the trial Court that there were instances in which they failed to sign the tender register, even though they had attended meetings. Therefore in his considered view, the absence of the signatures of such witnesses was not proof that they had not attended the particular meeting, which is in contention.
8. As a first appellate Court, I am obliged to re-evaluate all the evidence on record.
9. In this case **PW1, KENNETH OMONDI OCHIENG**, testified that he was a member of the Tender Committee, whilst the Appellant was the Secretary to that Committee.
10. **PW1** testified that the minutes of meetings were prepared by the Appellant.
11. He said that he did not attend the meeting allegedly held on 16<sup>th</sup> May 2014.
12. Although he said that there were instances when a member of the Tender Committee would record his attendance on a piece of paper, **PW1** said that he did not recall doing so in this instance.
13. **PW2, DR. SAMUEL OMONDI OWINO**, was a member of the Tender Committee for Siaya County. He said that each committee meeting had minutes thereof, and also that there was a register in which the details of those who had attended meetings, were recorded.
14. **PW2** testified that there was no record in the register, for a meeting allegedly held on 16<sup>th</sup> May 2014.
15. However, there were minutes signed by the Appellant, in his capacity as secretary, which covered a meeting allegedly held on 16<sup>th</sup> May 2014.
16. **PW3, CHRISTINE JENNIFER AKINYI**, was a County Executive Member for Education, Cultural Affairs and Youth. However, she did not play any role in the role of tendering for the supply of Sports Gender Installation Procurement.
17. **PW4, DOROTHY AKINYI OWINO**, was the County Executive Officer for Health and Sanitation, in Siaya County. She was, therefore, the Accounting Officer of the Department.
18. She was involved in the process of payment to Samco Traders Limited, who had been awarded the tender for sports equipment. The payment was authorized in June 2015.
19. **PW4** was not involved at the stage of procurement.
20. **PW5, GEORGE WILFRED OKOTH** was the Supply Chain Management Officer, County Government of Siaya.
21. He testified that between January 2014 and May 2014 he was not a member of the Tender Committee.
22. **PW6, SOLOMON MULINDI**, was a member of the County Tender Committee. He testified that the names of the members who attended meetings of the committee were entered into the Attendance Register.
23. From the register which was in Court, it was clear that **PW6** did not attend a meeting on 16<sup>th</sup> May 2014.
24. He said that although there were no records for the meeting of 16<sup>th</sup> May 2014, there were minutes for the said meeting.
25. It was the evidence of **PW6** that whenever he attended meetings, he would sign the attendance register.
26. During cross-examination **PW6** said that, on his part, it was a must to sign. However, he also clarified that there were instances when the Secretary would have the members sign on a paper.
27. In the circumstances, **PW6** testified thus;

***“I cannot say with finality that there was no meeting on 16/5/2014.”***

28. However, he also said that on 16<sup>th</sup> May 2014, he does not recall signing any paper.
29. **PW7, NICOLAS KIRWA KOECH**, was a Forensic Investigator/Civil Engineer, who was working with the **EACC**.
30. His role was to assess the quality and scope of the work that had been done, pursuant to the contract that had been awarded to Samco Traders.
31. **PW8, KENNETH ODHIAMBO**, was the Principal Sports Officer in the National Government, as at the date when he testified in the case. Previously, he had been the In-Charge of the Sports docket at the Siaya County.
32. His responsibilities included checking that procured goods were delivered and that they were installed.
33. **PW8** was not a member of the Tender Committee.
34. **PW9, PHILIP ODUNDO**, was an Accountant at the County Government of Siaya. His primary role was the preparation of vouchers.
35. Therefore, as the witness said, his role came at the tail-end of the process.
36. He categorically stated that he had no issues with the process of procurement.
37. **PW10, MOSES OKOTH KEYA**, was an Accountant at Siaya County Government.
38. Once payment vouchers had been fully approved, payment would be made through **IFMIS** and **G-Pay**.
39. In this instance, all the departments had signed the requisite vouchers.
40. **PW11, SILVESTER OLUK**, was the Vice-Chairman of the Tender Committee. In the absence of the Chair, **PW11** would chair meetings.
41. He said that there was a Tender Attendance Register, in which those who attended meetings would be recorded.
42. After looking through the Register, **PW11** said that there was no meeting. He went on to state that if he had attended the meeting on 16<sup>th</sup> May 2014;

***“..... it must have been in the register.”***

43. However, when he was being cross-examined by Mr. Madialo Advocate, **PW11** conceded that although he had chaired the meeting held on 24<sup>th</sup> March 2014, he did not sign the register.
44. **PW12** was not involved in the process of procurement.
45. **PW13** was a businessman, who put in a bid for the tender.
46. **PW14, PW15, PW16** and **PW17** were teachers at the schools that were beneficiaries of the items which were the subject matter of the procurement. None of them was involved in the process for the said procurement.
47. **PW18** was a businessman. He put in a bid for the tender, but was not successful. Nonetheless, **PW18** described the tendering process as having been fair.
48. **PW19, STEPHEN YOGO** was a Forensic Document Examiner. He verified that the Appellant had appended his signature on the minutes of the meeting allegedly held on 16<sup>th</sup> May 2014.
49. **PW20, DANSTEN CHIBOLE AURA** was a Forensic Investigator, Procurement Specialist at the material time. One of the tasks he undertook was to record statements of the persons who allegedly attended the meeting of 16<sup>th</sup> May 2014.
50. **PW20** testified that all the said persons denied having attended the meeting.
51. Ultimately, **PW20** recommended that action be taken against the Appellant for making a false document, to wit the minutes of the County Tender Award Committee purportedly held on 16<sup>th</sup> May 2014. He did so because his investigations revealed that there had been no meeting on 16<sup>th</sup> May 2014.
52. After the accused persons were put to their defences, the 1<sup>st</sup> Accused noted, inter alia, that he signed the minutes of the meeting held on

16<sup>th</sup> May 2014.

53. The Appellant emphasized that those minutes were not forged. He said that the minutes were true.

54. It was the considered view of the Appellant that if there had been an issue with the minutes, they ought to have been submitted back to the Tender Committee.

55. During cross-examination the Appellant confirmed that the members of the Committee would sign the Tender Committee Register whenever they attended meetings of the committee. But in relation to the meeting of 16<sup>th</sup> May 2014, the Appellant conceded that there was no Attendance Register.

56. And whereas the Appellant also said that in some instances members would sign some pieces of paper, in the absence of the register, he said;

***“I was interrogated by EACC but I did not give them any sheet of papers to them; nor have I presented to court.***

***I have not called any witness to confirm that there was a meeting on 16/5/2014.***

***I drafted the minutes and they were typed.”***

57. Having re-evaluated all the evidence on record, I find that the Appellant confirmed having “made” the minutes. It is he who drafted them. He was thus the author of the minutes.

58. The minutes indicate that there was a meeting of the Tender Committee. However, as the persons who allegedly attended the said meeting have denied doing so, I find that the minutes are not a reflection of the facts in reality.

59. I appreciate that not all attendees sign the register every single time when they attend meetings. Indeed, it is common ground that there were instances when attendees would sign pieces of paper.

60. In my considered opinion, once the prosecution had proved that the attendees had not signed the register; and because the persons who had allegedly attended the meeting of 16<sup>th</sup> May 2014 had denied doing so, the evidentiary burden shifted to the Appellant, to disprove the available evidence. He could have done so by making available the pieces of paper which the attendees had signed.

61. The prosecution had proved that there was no tender committee meeting on 16<sup>th</sup> May 2014. Therefore, as the Appellant drafted minutes which indicated that the alleged meeting was actually held, the actions of the Appellant were a forgery.

62. In my considered opinion, the judgment of the learned trial magistrate was not based on any extraneous matters. Secondly, the Appellant has failed to show how the trial court proceeded on a wrong principle.

63. Thirdly, the evidence tendered by the prosecution has not been shown to have been either contradictory or uncorroborated.

64. If anything, the Appellant’s defence provided corroboration to the prosecution case.

65. I find that the Appellant failed to show that the charges preferred against him were incompetent or unconstitutional.

66. It was also not shown by the Appellant, that the charges that he was tried and convicted in respect of, were a nullity.

67. It is my considered opinion that the appeal lacks merit. It is, therefore, dismissed; and I uphold both the conviction and the sentence.

**DATED, SIGNED AND DELIVERED AT KISUMU**

**THIS 20TH DAY OF DECEMBER 2021**

**FRED A. OCHIENG**

**JUDGE**