



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 7 OF 2017**

**MATHEW KINGORI GITAHU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an Appeal from both against both the Judgement and the sentence of Hon. J. Nthuku (Senior Resident Magistrate) delivered on 16th January 2017 in Nakuru Chief Magistrate's Court case No. 6816 of 2008)

**JUDGMENT**

1. The Appellant was charged, together with two others, before the Chief Magistrate's Court in Nakuru with four counts as follows:

a. The first count was making a document without authority contrary to Section 357(A) of the Penal Code. The particulars of the charge as contained in the charge sheet were as follows

On the 25th day of June 2008 in Nakuru Township of Nakuru District within the Rift Valley Province, jointly with others not before Court, with intention to deceive and without lawful authority made a false document namely a confirmation letter of Director of Nakuru Kiamunyeki Company Limited from the department of Registrar General, purporting it to be genuine and valid letter from the said Department of Registrar General.

b. The second count was forgery contrary to section 349 of the Penal Code. The particulars were as follows:

On the 25th day of June 2008 in Nakuru Township of Nakuru District within the Rift Valley Province, jointly with others not before Court, forged a confirmation letter for Directors of Nakuru Kiamunyeki Company Limited purporting to be issued and signed by Assistant Registrar of Companies.

c. The third count was of false swearing contrary to section 114 of the Penal Code. The particulars were as follows:

On the 11th day of June 2008 at George Mbiyu Advocates Office in Nakuru Township in Nakuru District within the Rift Valley Province, before George Mbiyu a person authorised to administer an oath swore falsely upon a matter of Judicial proceedings that a confirmation letter of directors of Nakuru Kiamunyeki Company Limited from the Registrar General reference C51/73 originated from the Registrar General.

d. The fourth count was one of fabricating evidence contrary to section 113 (a) of the Penal Code. The particulars were as follows:

On the 14th day of July 2008 at Nakuru High Court in Nakuru District within Rift Valley Province with intent to mislead a tribunal in Judicial proceedings namely civil suit number 124 of 2008 knowingly made use of fabricated evidence by attaching a forged document namely a confirmation letter of director of Nakuru *Kiamunyeki Company Limited* referenced C51/73 to his supporting affidavit purporting it to have been issued and originated from the office of the Registrar General

2. After a fully-fledged trial, the Trial Court convicted the Appellant and one other Co-Accused Person on count 1. The Trial Court also convicted the Appellants on Counts 3 and 4. The Trial Court that Count 2 "and the one for making the said letter should be a single count in

an inducement (sic)" and dismissed count 2 "for duplicity." The Trial Court sentenced the Appellant to pay a fine of Kshs. 100,000/- or to serve one year imprisonment for each of the convicted counts. The 1st Accused Person died before the Case was heard and the case against him was withdrawn.

3. The Appellant, who was the 2nd Accused Person during the trial is aggrieved and has filed the present Appeal. The grounds of appeal filed on the 11th of October 2018 are that:-

a. The Learned Trial Magistrate erred in law and in facts by failing to appreciate that the prosecution did not avail vital witnesses during prosecution as stipulated in the Evidence Act and in this case was not proved beyond reasonable doubts.

b. The Learned Trial Magistrate erred in law and fact by failing to appreciate that the prosecution did not produce any independent witness to corroborate the evidence adduced by the two prosecution witnesses

c. The Learned Trial Magistrate erred in law and fact in convicting the Appellant on the doctrine of identification *which was based on evidence that was marred by discrepancies*

d. The Learned Trial Magistrate erred in law and in fact in failing to note that the no identification parade was undertaken as provided for in law and in this case therefore the evidence on identification lacked probative values

e. The Learned Trial Magistrate erred in law and in fact in treating the prosecution case in isolation of defence case

f. The Learned Trial Magistrate erred in law and in fact in dismissing the Appellant's plausible defence without offering any cogent reason for the same

g. The Learned Trial Magistrate erred in law and in fact in convicting the Appellant of the basis of evidence that was inconsistent with the truth and was not adequately corroborated

4. The Appeal was argued by way of both written submissions by the Appellant and oral representations by Mr. Kahiga, Counsel for the Appellant, and Mr. Chigiti, the Prosecuting Counsel.

5. This being a first appeal, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See **Okeno v R [1972] EA 32** and **Kariuki Karanja v R [1986] KLR 190**.

6. Although the Trial took a long time to complete, the evidence adduced was pretty straightforward. It was as follows.

7. Davason Karomo and John Mwaura testified as PW1 and PW2 respectively. They testified that they had been directors of Nakuru Kiamunyeki Company (the "Company") and that no elections were held on 21/06/2008 electing the Appellant and his Co-Accused as directors or at all. Indeed, both PW1 and PW2 testified that the elections were held sometime on 17/07/2008 even though there was a restraining order injuncting the holding of the elections. Both PW1 and PW2 testified that they were shocked to learn that the Appellant and his Co-Accused had a letter dated 25/06/2008 purporting to be from the Registrar of Companies saying that the Appellant and his Co-Accused Persons were directors of the Company.

8. PW3, Patrick Mbogo's testimony was much to the same effect.

His only differed to the extent that he was not a former official of the Company but his name had been included as a director in the letter dated 25/06/2008. He said that he had learnt of the matter and went to the DCIO to report that his name had been fraudulently included in the letter.

9. The letter at the centre of the charges and the trial is a letter dated 25/06/2008. It is on the letterhead of the Registrar of Companies and bears the signature of an Assistant Registrar of Companies. It states that as far as the records of held by the Registrar of Companies were concerned, the directors of the Company were those named in the letter. The name of the Appellant and that of his Co-Accused Persons appear as directors.

10. The signature on that letter is purported to be the signature of one Wilson Gikonyo, an Assistant Registrar in the Registrar of Companies. Mr. Gikonyo testified as PW6. He denied that he wrote the letter; and that the signature was his. He testified that he had received a letter from the DC Nakuru North asking him about the authenticity of the letter dated 25/06/2008 and that when he counter-checked with the Company file at the Registrar's Office, he had written back confirming that the letter was a forgery. He further testified that in the Registrar's office, he is the one who is authorized to sign any such letter confirming directors of any company; and that he had not signed the impugned letter.

11. David Kenja, a Government Documents Examiner in the Directorate of Criminal Investigations, testified as PW4. He testified that he

was given the impugned letter together with specimen signatures from Mr. Gikonyo and was asked to examine if the two matched. He concluded that the signature on the impugned letter was a forgery; it was not Mr. Gikonyo's signature.

12. The Nakuru North DC who had written to the Registrar of Companies was Julius Mutula. He testified as PW5. He told the Court that he was aware about the wrangles in the leadership of the Company and that he was involved in planning for elections. However, after he had interested both warring factions in forthcoming elections, he says that one group brought to him the letter dated 25/06/2008 purporting to declare that they were the duly elected officials. That group went ahead to get Court orders stopping elections using the same letter. Mr. Mutula testified that he became suspicious that the letter was not genuine and wrote to the Registrar of Companies a letter dated 29/07/2008 for verification. As he had suspected, he received a letter confirming that the impugned letter was, indeed, a forgery.

13. In cross-examination, Mr. Mutula was asked who took to him the impugned letter. He responded as follows:

The 2 Accused Persons are among the ones who came and gave me the letter a copy [of which] in the Prosecutor's file. I suspected the letter because we had agreed that elections to be in a month's time and they brought the letter in 2 weeks' time.

14. The final witness was the Investigating Officer, PC John Wainaina, who explained the course of the investigations – including receiving a complaint that the impugned letter was a forgery and a letter from the DC, Nakuru North. He said that after investigations, he summoned the Accused Persons (Appellant and his Co-Accused Person) to prove that they were the proper directors of the Company and when they failed to do so, he charged them with the offences they faced. It is instructive that the Investigating Office was not specific as to who gave him the impugned letter.

15. The other witness to testify was Maryanne Mucheru of the Registrar's Office. She confirmed that she wrote a letter dated 24/12/2008 stating that the office had received two sets of directors for the Company and that between 25/06/2008 and 11/08/2008 any search done at the Companies' Registry would have shown that the list of directors given in the impugned letter was the correct one. She insisted that the file at the registry was incomplete and that therefore she was unable to give an accurate account.

16. In her judgment, the Learned Trial Magistrate was not overall impressed with the evidence brought before her – especially evidence from the Companies' Registry. She analysed it thus:

All through [her] evidence, I could deduce that there was serious corruption in this office of the registrar of companies: there was collusion between someone in that office and some members of the company to vandalize their company file. She [Maryanne Mucheru] claims it is poor record management but what I see is clear corruption and mischief.

17. Despite this grim view of some of the witnesses who testified for the Prosecution, the Learned Trial Magistrate was persuaded that the three counts were proved beyond reasonable doubt as against the Appellant.

18. The Learned Trial Magistrate, in my view, correctly identified the elements that needed to be proved for either count 1 (making a document without authority) or count 2 (forgery) to be established. She cited, with approval, *Caroline Wanjiku Ngugi v R [2016] eKLR* in identifying five elements:

- a. Either the false making or material alteration of a document: the person charged must have taken paper and ink and authored a false document from scratch or materially altered an existing document.
- b. Ability to defraud: the document or writing has to look genuine enough to qualify as having the ability to mislead others to think it is genuine;
- c. Legal efficacy: the document has to have some legal significance to be capable of being forged or made without authority; and
- d. Intend to defraud: the person must have intended that other people treat the forged or uttered document as genuine while it was, in fact, not.

19. In my view, the main question in this trial was whether it was established beyond reasonable doubt that it was the Appellant who either made the impugned letter without authority or forged it. In his testimony, the Appellant testified that they, in fact, held elections for directors on 21/06/2008. He produced Notice of the Annual General Meeting to that effect. He further testified that after the meeting, they dispatched Henry Mwachhi Mbugua to Nairobi to pay for and register the newly elected directors. He testified that Mr. Mbugua returned from Nairobi with the impugned letter and receipts showing that he had, in fact, paid for the registration. The receipts for the returns were produced as evidence. The Appellant further testified that it was on the basis of this that he swore an affidavit in the civil case (what was the basis for Counts 3 and 4).

20. Throughout the trial, the Appellant was categorical that he was not involved in the uttering of any false document or a forgery. However, the Learned Trial Magistrate was not persuaded that the Appellant and his Co-Accused were, in fact, innocent of the allegations made against them. She reasoned that whereas there was no direct evidence linking them to the offences, the circumstantial evidence was strong enough to establish the charges beyond reasonable doubt.

21. So what circumstantial evidence was available to support the charges? One glean two pieces of evidence which would tend to support the guilt of the Appellant. First, is the obvious fact that the Appellant relied on the impugned letter for his benefit and swore an affidavit in two civil cases attaching the impugned letter. This would tend to show that he was probably involved in its uttering. Second, there is the evidence of PW5 – the DC – who was testified that the Appellant was part of the group that went to his office and gave him the letter claiming that it was genuine.

22. Was this sufficient to link the Appellant with the making of the impugned letter without authority? In analysing the evidence adduced in the case, it is important to recall that the entirety of the Prosecution case here was based on circumstantial evidence. While circumstantial evidence is, often, the best evidence, it is only so when it satisfies certain stringent conditions. In **Joan Chebichi Sawe versus Republic [2003] eKLR** the principles that guide the Court in evaluating circumstantial evidence were laid out in three tests as follows:-

- a. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- b. Those circumstances should be of a definite tendency *unerringly pointing towards the guilt of the accused*;
- c. The circumstances taken cumulatively, should form a *chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else*.

23. Earlier on, **Kipkering Arap Koske versus R. [1949] 16 EACA 135**, long considered a *locus classicus* on this issue, had compressed the principles into two thus:

- (a) The inculpatory facts must be incompatible with the innocence of the accused.
- (b) The facts must be capable of no other conclusion or explanation except the guilt of the accused.

24. However, as several Courts have pointed out, even where the Court is satisfied that the above threshold has been met, the Court is enjoined to exercise caution before applying the above threshold to the facts before it. As the Court of Appeal remarked in **Simon Musoke versus Republic [1958] EA 715** while citing **Teper versus R. [1952] AC 480,489** before drawing the inference of an Accused Person's guilt from circumstantial evidence it is necessary for the court to be sure that there are no other existing circumstances which would weaken or destroy the inference.

25. Applying these principles to the present case, can we truly say that the “*circumstances taken cumulatively... form a chain so complete that there is no escape from the conclusion that within all human probability the impugned letter was made by the Appellant [in concert with others] and none else*”?

26. I am not persuaded that this is the case here. I say so for at least four chief reasons.

27. First, the defence by the Appellant that they dispatched Mr. Mbugua to travel to Nairobi to file the returns and apply for the letter from the Registrar was not contested at all either in cross-examination or through the use of other evidence. In the absence of other evidence, this defence narrative appears plausible enough to raise reasonable doubt: it tells the story that it was Mr. Mbugua who brought the impugned letter; and that given the official receipts he brought back, it was reasonable for the Appellant to assume that the impugned letter was, in fact, a genuine document from the Registrar's office and rely on it. For this defence theory to raise reasonable doubt, the onus on the Appellant was merely to demonstrate that its version of events or its theory of the case is reasonably possibly true in substance. The test is whether it can be said that the Defence narrative is so improbable that it cannot reasonably possibly be true (See **S v Shackell (4) SA 1 (SCA)**). In my view, in this case, it is possible to say that the Accused's Person's version of events has some reasonable inherent probability that it is true.

28. A second reason weakens the chain of circumstantial evidence: it is the letter dated 29/12/2008 from the Registrar's Office. That letter is consistent with the impugned letter of 25/06/2008 – giving the same list of directors. Additionally, in her testimony, Maryanne Mucheru of the Registrar's Office confirmed that had one done a search on the date the impugned letter was in fact written, one would have yielded the same results as the impugned letter lists. This is important because it points to a very strong possibility that the impugned letter is, in fact, not a forgery at all. There is a high probability that the letter was, in fact, authored at the Registrar's Office by officers in that office. For that letter to be linked to the Appellant, there was need to show that he was directly involved in its production.

29. Third, the existence of the official receipt for filing of returns is consistent with the Defence theory that the impugned letter was, in fact, generated by the Registrar's Office.

30. Fourth, none of the witnesses was able to testify with certainty that the Appellant gave them the letter and accounted for its authenticity. This is important because if the Appellant had made specific representations about how he got the letter which turned out to be inconsistent with the version he gave in his defence, one could discount his defence theory. As it turns out, neither the DC nor the Investigating Officer could state categorically that the Appellant, in fact, gave them the letter and purported it to be from the Registrar of Companies.

31. The upshot is that it is not possible to say, in the circumstances of this case that the Appellant, either singly or in concert with others either made the impugned letter without authority or forged it. There are too many gaps in the chain of circumstantial evidence creating too thick a shadow of doubt in the Prosecution case to sustain a conviction for Count 1 in this case. Since

Count 1 is the hinge that holds together Counts 3 and 4, as it falls, so must these Counts as well.

**32. The result is that the appeal herein succeeds. In the circumstances of this case, it is the duty of this Court to quash the conviction and set aside the sentence imposed which I hereby do. The Appellant shall be set at liberty unless otherwise lawfully held in custody.**

33. Orders accordingly.

**Dated and delivered at Nakuru this 30<sup>th</sup> day of April, 2020**

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**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Rita Rotich, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.