



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 88 OF 2017

MOSES OGUTU MUGEMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Appeal against conviction on 28th August 2018 and sentence passed on 11/9/2017 in Ukwala SRM Cr. Case No 107 of 2017 by Hon. G. Adhiambo SRM

JUDGMENT

1. The appellant herein **Moses Ogutu Mugema** was charged before the trial court in count one with the offence of conspiracy to defraud contrary to section 317 of the Penal Code. It was alleged that on the 1st day of July 2 and 30th July 2016 in Siaya County within Ugunja sub county, jointly with others not before court he did, with intent to defraud made forged contract document and falsified by pretending to offer a building contract by World Vision Organization to **Calvin Awuor Onyiego** pretending it to be a genuine contract.

2. The appellant also faced a second count of making a document without authority contrary to section 357 of the Penal Code. It was alleged that between the 1st July and 30th July 2016 the appellant while at Siaya County Ugunja Sub County, jointly with others not before the court conspired with intent to defraud without lawful authority made a contract document purporting it to be a genuine document issued by World Vision Organization based in Lodwar.

3. In count three, the appellant faced the charge of uttering a false document contrary to section 353 of the Penal Code in that on diverse dates between 1st July and 30th July 2016 in Siaya County Ugunja Sub county jointly with others not before court knowingly and fraudulently altered contract document to Calvin Owuor Onyiego purporting to be the contract document of World Vision Organization.

4. The appellant denied all the counts and the prosecution called five witnesses who testified against the appellant. The appellant gave an unsworn statement of defence and called no witness.

5. In her fairly long judgment, the trial magistrate found the appellant guilty of the counts one and two and acquitted him on counts three. She proceeded and sentenced him to serve eighteen (18) months imprisonment on count one and twelve (12) months imprisonment in count two. The sentences were to run consecutively. Dissatisfied with the said conviction and sentences imposed, the appellant filed this appeal contending:

i. That the trial court erred in law and fact in finding that the offences of conspiracy to defraud and making a document without authority were proved by the prosecution;

ii. That the trial court shifted the burden of proof to the appellant;

iii. That the trial court based her conviction of the appellant on inadmissible evidence and unproven facts to the detriment of the appellant;

iv. That the trial court misdirected itself on issues before it;

v. That the trial court erred in dismissing the appellant's defence without reasons;

vi. That the trial court erred in dismissing a presentencing report on the appellant and as a result meted out a harsher sentence contrary to law.

6. In determining this appeal, this Court is alive to the principles laid down in **Okeno Vs. Republic [1972] E.A. 32** that an Appellant on a

first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (**see also Pandya Versus Republic [1957] E.A. 336** and that the first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.

7. Further in **Shantilal M. Ruwala versus Republic [1957] East Africa 570** it was held that it is not the function of a first Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the Lower Court's findings and conclusions. Rather, it must make its own findings and draw its own conclusions, only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses as they testified. (**See Peters Versus Sunday Post [1958] East Africa 424.**

8. In my view, it is pointless to restate what each and every witness stated especially where I have found that the appeal must succeed. I will therefore proceed to determine this appeal and give reasons for my decision. I have carefully revisited the evidence before the trial court and the submissions for and against the appeal as argued by the appellant's counsel and the opposition thereto by the Respondent.

DETERMINATION

1. I have carefully considered the appeal herein, the grounds thereof, the submission by the Appellant and the trial record as a whole.
2. There is only one issue for determination in this appeal which is whether the Prosecution proved their case against the Appellant beyond reasonable doubt.
3. As correctly submitted by learned Counsel for the Appellant, the basis and foundation of the Appellant's conviction is the Mpesa mobile statements produced by the investigating officer as well as the mobile data communication between Rosemary Ombok and the Appellant herein.
4. What is striking about the said documentary evidence is that it was produced by the investigating officer and from the trial court's record, this court is unable to find a basis upon which the said mobile data was produced by a person who was not the author or who developed obtained said data from the mobile phones allegedly used in the commission of the crime.
5. It was expected that Safaricom Security or Liaison Officer would be called to produce the said exhibits. The investigating officer did not lay a basis upon which the makers of data could not be present in court to produce the documents, as required by law.
6. In addition, the court notes that the trial court proceeded to allow production and reliance on the said electronic evidence without the Prosecution fulfilling the conditions for production of such evidence as stipulated in Section 106 B of the Evidence Act. In my humble view, section 106B of the Evidence Act Cap 80 rendered the said document inadmissible as evidence before the Trial Court. The Section 106B of the Evidence Act provides:

1. Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible...

2.

3.

4. In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

1. identifying the electronic record containing the statement and describing the manner in which it was produced;

2. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

3. dealing with any matters to which conditions mentioned in subsection (2) relate; and

4. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

7. From the above provisions, electronic data material are inadmissible in evidence unless they meet the criteria stipulated in Section 106 B of the Evidence Act.

8. In this case it is clear that the convicting evidence was adduced by a person who was not the maker of the documents without any basis being laid before the Court and no certificate was produced before the Court identifying or authenticating the electronic records containing the mobile data statement and describing the manner in which it was produced.

9. For the above reason alone, I find and hold that the conviction of the appellant was not sound unsafe and therefore this appeal must succeed.

10. Accordingly, the conviction of the Appellant Moses Ogutu Mugenya for the offence of conspiracy to defraud contrary to Section 317 of the Penal Code and making a document without authority contrary to Section 357 (A) of the Penal Code is hereby quashed and the consecutive sentences imposed on the Appellant are hereby set aside and the Appellant is hereby set at liberty unless otherwise lawfully held.

11. I must however commend the investigators, the, prosecution and the trial Court in the manner in which they conducted the investigations and the trial save for that very fatal omission of not availing the certificate of electronic data and for not laying a basis for production of documents by a person other than the maker thereof. There was vigour and effort to nab the alleged fraudsters and to sustain the conviction which conviction, unfortunately, was not safe. And because this Court exists to do justice and to correct the mistakes of the trial Courts, I must play my role well and accord the benefit of doubt to the Accused/Appellant as the prosecution did not prove the charges against him beyond reasonable doubt. On the whole, this appeal is allowed as stated above.

12. Orders accordingly.

Dated, signed and Delivered at Siaya this 29th day of January, 2019.

R.E ABURILI

JUDGE

In the presence of:

Mr. Ochanyo Advocate for the appellant

Mr. Okachi SPPC

Appellant present

CA: Brenda and Modestar