



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.19 OF 2019

REPUBLIC.....APPELLANT

VERSUS

CHARLES AYUGI OSIKU

JACOB DEDE OSIKU.....RESPONDENTS

MARTIN ODHIAMBO OSIKU

PAUL OTIENO AYUKI

(Being an appeal from original conviction and sentence in criminal case No.607 of 2015 of the SRM's court at Oyugis dated 14.5.2018 – Hon. J.P. Nandi, SRM)

JUDGMENT

[1] This appeal by the State is against the judgment of the Senior Resident Magistrate at Oyugis in which the four (4) respondents, **CHARLES AYUKI OSIKU, JACOB DEDE OSIKU, MARTIN ODHIAMBO OSIKU** and **PAUL OTIENO AYUKI**, were acquitted under **Section 215** of the **Criminal Procedure Code** on two counts of grievous harm, contrary to **Section 234** of the **Penal Code**.

[2] The particulars of the charge were that:-

- i. **On the 9th September 2015, at Kodhock sub-location, Rachuonyo South, Homa Bay County, the four respondents (accused) jointly with others not before court jointly and unlawfully did grievous harm to Jacob Omondi Owuor.**
- ii. **On the 3rd May 2015, at Kodhock Sub-location, Rachuonyo South, Homa Bay County, the first, second and third accused (respondents) jointly unlawfully did grievous harm to Jacob Omondi Owuor.**

These particulars are contained in the amended charge sheet signed on 11th October 2016 and presented in court for fresh plea on 17th October 2016.

[3] The previous charge sheet signed on 21st September 2015, containing a single count, in relation to the incident which allegedly occurred on 9th September 2015, was thus substituted for the amended charge sheet containing two counts in relation to the incident which allegedly occurred on the 9th September 2015 and 3rd May 2015.

[4] The respondents pleaded not guilty in respect of both counts and after a full trial they were found not guilty as charged on both counts and acquitted accordingly.

Being dissatisfied with the decision, the appellant preferred this appeal on the basis of the grounds in the petition of appeal dated 29th May 2018.

[5] At the hearing of the appeal, the learned Senior Assistant Deputy Public Prosecution, **MR. OLUOCH**, appeared for the appellant while the learned counsel, **MR. NGALA**, appeared for the respondents. It was the appellant's submissions that the trial court made a fundamental error by stating that the word "**unlawful**" was omitted from the charge sheet and gave its reasons for so stating at page fifty (50) of the record of appeal. Yet, the said word was on the record as duly inserted. That, the failure to countersign the insertion was merely a procedural technicality envisaged under **Article 159 (2) (d)** of the **Constitution**.

[6] Learned Public Prosecutor, submitted further that such omission was curable under **section 382** of the **Penal Code** if it did not occasion failure of justice and in the present circumstances such failure did not occur as the respondents who were represented by counsel participated fully in the trial. That, **Section 214** of the **Criminal Procedure Code** empowered the court to amend the charge but was never invoked by the trial court yet the word “**unlawful**” was in the charge sheet.

The Learned Public Prosecutor, urged this court to allow the appeal, convict and sentence the respondents for the offences.

[7] In response, the respondents submitted that an uncountersigned amendment in a charge sheet is presumed to be non-existent and as of now, nobody can tell when the word “**unlawful**” was inserted. That, it is not clear whether the insertion was done after or before plea. That, the failure to include the word “**unlawful**” in certain offences renders a charge sheet fatally defective and thus, the benefit of doubt goes to an accused person.

In that regard, the respondents relied on the decisions in **DANIEL NYARERU ACHOKI –VS- REPUBLIC [2000] e KLR**, **PETER MWAI KARIUKI –VS- REPUBLIC [2000] e KLR**, **HILLARY WAITITU MWERU –VS- REPUBLIC [2017] e KLR** and **PERIS WAIRIMU GICHURU –VS- REPUBLIC [2007] e KLR**.

The respondents contended that there is no amendment to a charge sheet which is not countersigned and urged this court to uphold the decision of the trial court.

[8] Upon due consideration of the appeal in the light of the rival submissions, the duty of this court was to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses.

This court in the premises considered the evidence led by the prosecution through the complainant, **JACOB OMONDI OWUOR (PW1)**, a Clinical Officer, **SAMUEL KOECH (PW2)**, the complainant’s mother, **FLORENCE OTIENO OWUOR (PW3)**, the complainant’s wife, **WILKISTA AWUOR (PW4)**, a villager, **SAMUEL OKOTH OGUNDA (PW5)**, the Investigating Officer, **P.C HENRY RONO (PW6)**, the second investigating officer, **P.C ROSEMARY NDIEMA (PW7)** and a villager, **SAMUEL OGOLA ONYISI (PW8)**.

[9] Also considered by this court, was the evidence given by each of the respondents in defence. They each denied the offences and implied that they were victims of the complainant’s unlawful acts of assault against them. They portrayed the complainant as the villain rather than the victim.

[10] All the evidence presented before the trial court was considered by the trial which unfortunately made no findings in respect thereof and instead concentrated on the emerging procedural technicality based on the amendment of the charge sheet to include an additional count and the word “**unlawful**”.

In the absence of the trial court’s findings on facts and evidence, this court does not think it would be proper in the circumstances to make its own findings on the case based on facts and evidence as this may pre-empt the findings of a trial court in that respect were a re-trial be ordered.

[11] Consequently, the issues to be considered in the determination of the appeal is whether or not the impugned charge sheet was fatally defective for failure to have it countersigned by the court for purposes of validating it.

It is instructive to note that in this case, the word “**unlawful**” was not missing but was inscribed or inserted by hand.

The respondents’ contention was that the failure to countersign the inscription or insertion was fatal. They thus implied that the failure to countersign the insertion was failure to countersign the charge sheet thereby rendering it ineffective and invalid for the purposes of the trial that followed.

[12] The appellant’s contention was that the aforesaid omission did not occur and if it occurred, that it was a mere procedural technicality which did not invalidate the amended charge sheet nor was it fatal to the prosecution case against the respondents.

[13] This court would agree with the appellant’s contention for reason that the error was in relation to formal and thus a mere procedural technicality which did not go to the substance of the case nor occasion any failure of justice, hence curable under **Section 382** of the **Criminal Procedure Code**. Further, **Article 159 (2) (d)** of the **Constitution** behoves upon the courts to administer justice without undue regard to procedural technicalities.

[14] Be that as it may, countersigning in actual sense means a second signature onto a document in order to verify authenticity and while it is definitely a good practice in ensuring authenticity, this court is of the opinion that a document may still be valid without it as long as it is a proper legal document with clear expression of its objective.

[15] In the present case, the impugned charge sheets was clear in its intent and purpose. It was meant to amend and did in fact amend the original charge sheet dated 21st September 2015 which had only one count and the word “**unlawful**” was clearly omitted.

The amended charge dated 11th October 2016 contained two counts of grievous harm contrary to **Section 234** of **Penal Code** whose particulars contained the word “**unlawful**” clearly inserted to avoid the repetition of the error made in the original charge sheet which become moribund following the amendment and actually lost its life at that moment.

[16] A perusal by this court of the amended charge sheet clearly revealed that it was neither invalid nor defective when it was presented

before the trial court for the first time on 17th October 2016. It was on that date that the trial court acknowledged its validity by accepting the amendment and informing the respondents the new charges to which they all pleaded not guilty and the trial effectively commenced on 19th January 2017.

[17] In fact, the amended charge sheet was clearly validated or authenticated by the trial court when it was countersigned by the trial court on 17th October 2016 after it had already been signed by the prosecution on the 11th October 2016. The countersignature or any signature did not have to be next to the inserted word **“unlawful”** for it to be valid. The signature and countersignature on the amended charge sheet was sufficient enough to authentic the new charges and particulars in respect thereof including the inserted word **“unlawful”**.

[18] It was therefore a fundamental error for the trial court to dismiss the prosecution case and acquit the four respondents on the basic ground that the amended charge sheet was incurably and fatally defective. In the premises, the respondents’ objection to the appeal is unsustainable. The authorities cited herein by them are clearly distinguishable from this case and could not apply in the circumstances. Unlike in this case, the word **“unlawful”** was completely lacking in the charge sheets presented in those cited cases.

[19] In sum, this appeal is allowed with the result that the judgment of the trial court dated 14th May 2018, be and is hereby set aside and in order to meet the ends of justice a re-trial of the case shall be conducted before a different magistrate of competent jurisdiction preferably at the magistrate’s courts in Homa Bay town.

Ordered accordingly.

J.R. KARANJAH

JUDGE

28.02.2019

[Delivered and signed this 28th day of **February, 2019**].