



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 95 OF 2016

(An Appeal arising out of the conviction and sentence of Nyongesa Nafula Emily –

SRM delivered on 13th May 2016 in Makadara CMC. CR. Case No.1474 of 2010)

BERNARD KIONGO NJAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Bernard Kiongo Njau was charged with ten (10) counts of **forgery** contrary to **Section 350** of the **Penal Code**. The particulars of the offence were that on 27th November 2009 at Kimathi Estate in Nairobi County, the Appellant jointly with others not before court, with the intent to defraud forged the signatures of ten individuals in a document annexed to a further amended plaint in Civil Suit No.495 of 2009 purporting it to be the genuine signatures of ten individuals. He was further charged with the offence of **false swearing** contrary to **Section 114** of the **Penal Code**. The particulars of the offence were that on the same 27th November 2009 at Nairobi Central District, before Albert O. Seneti, a Commissioner for Oath, swore falsely upon a matter of public concern to the effect that the residents of Kimathi Estate Welfare Association had authorized him to file Civil Suit No.495 of 2009 on their behalf at the High Court of Kenya in Nairobi. The Appellant was further charged with **uttering a false document** contrary to **Section 353** of the **Penal Code**. The particulars of the offence were that on 3rd December 2009 at the High Court of Kenya in Nairobi, the Appellant knowingly and fraudulently uttered a forged document annexed to a further amended plaint in Civil Suit No.495 of 2009 purporting it to have been signed by residents of Kimathi Estate Welfare Association. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted of the ten counts of **forgery** and the one count of **uttering a false document**. He was however acquitted on the charge of **false swearing**. He was sentenced to pay a fine of Kshs.30,000/- in each of the eleven (11) counts or in default serve one (1) year imprisonment. The sentences were ordered to run consecutively if the Appellant failed to pay the fine. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court challenging the said conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the counts of forgery yet the document examiner had concluded that the signatures on the alleged forged documents were not made by the Appellant. He was aggrieved that he was convicted on the counts of forgery without adduction of the evidence of the document examiner. He faulted the trial magistrate for relying on the produced documentary evidence which did not have a court stamp establishing that indeed the said document had been uttered. He took issue with the fact that the trial magistrate failed to consider the fact that the case number referred to was different from the one where he was actually a party. The Appellant opined that the judgment that was rendered by the trial court was against the weight of evidence. He was finally aggrieved that he had been sentenced to pay a fine that was excessive in the circumstances and ordered to serve a custodial sentence that ran consecutively instead of concurrently. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, Mr. Njau for the Appellant urged the court to allow the appeal. He submitted that the case which formed the basis of the conviction on the charges brought against the Appellant was a case in which the Appellant was not a party. He stated that whereas the prosecution cited **High Court Civil Case No.495 of 2009**, the actual case in which the Appellant was a party was **ELC.No.495 of 2009**. He explained that the thrust of the evidence adduced by the prosecution referred to **High Court Civil Case No.495 of 2009** in which the Appellant was not party to and therefore he could not have been convicted for filing alleged documents in a case that he was not party to. He submitted that the complainant in the criminal case was a defendant in another case where the Appellant had made allegations that the complainant had fraudulently obtained a title document. The title document that was issued to the complainant was actually revoked.

Learned counsel submitted that the prosecution failed to establish to the required standard of proof that the Appellant had indeed forged

signatures of the persons in the particular document since no document examiner was called to testify in the case. Indeed, from the evidence adduced by prosecution witnesses, it was clear that the Appellant was not the author of the said acts of forgery that he was accused of. As regard the offence of uttering a false document, learned counsel submitted that no evidence was adduced by the prosecution witnesses to establish that indeed the Appellant uttered the particular forged documents. In the premises therefore, learned counsel submitted that the prosecution had failed to establish to the required standard of proof that the Appellant committed the acts of forgery or uttered the forged documents. As regards sentence, learned counsel urged the court to take into account the age of the Appellant. The Appellant was 76 years old and should have been sentenced to serve a concurrent sentence instead of a consecutive custodial sentence.

Ms. Sigei for the State opposed the appeal. She submitted that the prosecution had established to the required standard of proof the charges of forgery and uttering a false document that was brought against the Appellant. She explained that the Appellant filed a civil suit before the High Court and obtained an injunction seeking to restrain certain persons from undertaking construction in a certain property. The Appellant filed the suit in a representative capacity claiming that he had the authority of residents of Kimathi Estate to file the suit. Investigations established that the purported signatures in the letter of authority were forgeries and further that the identity card numbers cited in the said document belonged to other persons other than those purported to have given the authority. Learned State counsel submitted that the prosecution was able to establish that indeed the Appellant filed the said letter of authority for the sole purpose of duping the court into granting the order of injunction that the Appellant sought. The prosecution therefore established that the Appellant uttered a false document. She urged the court to dismiss the appeal as it lacked merit.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (**see Njoroge – vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charges of **forgery** contrary to **Section 350** of the **Penal Code** and **Uttering a false document** contrary to **Section 353** of the **Penal Code**.

This court has re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the rival submission made by counsel in this appeal in light of the grounds put forward in the petition of appeal. It was the prosecution's case that the Appellant filed a representative suit being **High Court Civil Case No. 495 of 2009** and in the suit, included names and signatures of persons who were non-existent. The prosecution further argued that the Appellant presented the forged names and signatures in an amended plaint to court thereby uttering the same. According to the prosecution witnesses led by the complainant, PW1 George Kiarie Ng'ang'a, the Appellant had a long running complaint against the complainant in regard to a parcel of land known as LR No.209/7383/356. The Appellant claimed to represent a group of thirty-four (34) members of an association referred to as Kimathi Estate Welfare Association. The complainant testified that he was a registered owner of the suit parcel of land.

The Appellant claimed the parcel of land on behalf of himself and members of his group. There was an ongoing civil case at the material time in regard to the suit parcel of land before the High Court. The complainant testified that in 2009, the Appellant caused to be amended the plaint in the suit. He included names of thirty-two (32) persons whom he claimed to have filed the suit on behalf of. The Appellant obtained an interim injunction restraining the complainant from undertaking construction on the suit parcel of land. On learning of the order, PW1 informed his lawyer PW2 Stephen Ng'ang'a Njoroge who went to court and perused the court file. According to PW2, when he perused the court file, he saw an anomaly in the way the persons purported to have authorized the Appellant to file suit on their behalf had signed the document. He became suspicious. He thought that the signatures and the identity card numbers appearing therein were forgeries. He advised his client (PW1) to report the matter to the police.

PW5 Cpl. Charambo then based at Buruburu CID Office was instructed to investigate the case. He took the names and the identity card numbers in the filed document to the Registrar of Persons to verify if indeed the identity card numbers belonged to the persons who were purported to have signed the instrument authorizing the Appellant to file suit on their behalf. PW3 Evans Mang'aa Onyiri, a fingerprints officer based at the Registrar of Persons confirmed that the identity card numbers appearing next to the names of persons who are purported to have authorized the Appellant to file suit did not belong to those persons. Indeed, the identity card numbers belonged to other persons. PW4 Seneti Ongwae Albert, an Advocate of the High Court denied that he signed or stamped the affidavit that was sworn to verify the amended plaint that was filed by the Appellant. PW3 and PW5 produced into evidence all the documents indicating the identity card numbers and the persons the said identity card numbers belonged to. PW5 also produced a report from the document examiner which showed that the persons who are purported to have signed the document authorizing the Appellant to file the amended plaint did not sign the said document.

When the Appellant was put on his defence, he denied committing the offences that he was charged with. He attributed his travails to the stand that he had taken to protect public land from land grabbers. In particular, he stated that the complainant had grabbed the land belonging to a primary school at Kimathi Estate. The complainant had commenced construction of flats on the disputed parcel of land. He filed suit to protect public interest when he realized that other agencies were not keen on pursuing the same. He denied the assertion that he had forged the signatures and the identity card numbers in the document authorizing him to file the amended plaint. He was of the view that the criminal charges were lodged against him to intimidate him from pursuing the land case against the complainant. He particularly stated that the document examiner had exonerated him and recognized that he was not the person who had appended signatures on the document authorizing him to file suit in the amended plaint.

From this court's re-evaluation of the evidence, it was clear to this court that indeed the prosecution had established to the required standard of proof beyond any reasonable doubt that the Appellant forged the document purportedly authorizing him to file suit on behalf of the residents of Kimathi Estate. The prosecution was able to establish that the names in the document purportedly authorizing the Appellant to file suit were fictitious and did not correspond to the identity card numbers that were said to belong to the said persons. PW3 a fingerprints officer based at the Registrar of Persons produced documentary evidence which established that thirty-two (32) of the thirty-four (34) names in the document contained identity card numbers of persons other than those whose names appeared in the authorizing document.

Whereas it was established that the Appellant did not sign himself the authorizing document, the prosecution was able to prove that it was the Appellant himself who filed the amended plaint in **ELC Suit No.495 of 2009**. He was the one who annexed the document purporting to contain the names of persons who had purportedly authorized him to file the said amended plaint. The Appellant cannot rely on the document

examiner's report to exonerate himself from the charges of forgery that were brought against him. In the amended plaint, the Appellant averred that he had the authority of the persons contained in the document that he had annexed to the plaint. Presumably, the Appellant physically met with the thirty-four (34) persons before he lodged the amended plaint in court. When it was later established that the names in the document annexed to the amended plaint were fictitious and a forgery, the Appellant cannot be allowed to disown the document on the basis that he did not append his signature on the said document.

Taking into consideration the totality of the evidence adduced before the trial court, this court holds that the prosecution did indeed establish to the required standard of proof beyond any reasonable doubt the ten (10) counts of **forgery** contrary to **Section 350** of the **Penal Code**. The prosecution further established that the Appellant uttered the said forged documents to the High Court with a view to misleading the court into believing that he had filed a representative suit on behalf of thirty-four (34) members of Kimathi Estate. The Appellant's defence to the effect that he was a public spirited person who's only interest was to protect the suit parcel of land (a public land) from land grabbers, and who was being intimidated from pursuing the case is neither here nor there. The charges that were brought against the Appellant were not in respect of the civil case that is pending before the High Court. The charges were in respect of a document which the Appellant presented to court knowing that the same was a forgery. That is the issue that the Appellant was supposed to respond to in his defence and not raise a red herring to justify his actions.

In his petition of appeal, the Appellant stated that the entire charges against him ought to fail because the prosecution cited a non-existent case before the High Court. Specifically, the Appellant stated that the civil suit that was the subject of the amended plaint was **ELC No.495 of 2009** and not **High Court Civil Case No.495 of 2009**. While conceding to the fact that the wrong court was mentioned in the charge sheet, this court has no doubt that the Appellant was aware of the case that was being referred to. Indeed, there was no doubt in the Appellant's mind that the prosecution was referring to the amended plaint that he had filed in **ELC Case No.495 of 2009** and not **High Court Civil Case No.495 of 2009**. In any event, upon re-evaluating the evidence adduced before the trial court, this court holds that the Appellant was not prejudiced by the naming of the wrong court. Such mistake is clerical and is amenable to amendment under **Section 382** of the **Criminal Procedure Code**. Nothing turns on that ground of appeal that would make this court reach a different conclusion than it has reached in determining this appeal.

The upshot of the above reasons is that the appeal lacks merit and is hereby dismissed. On sentence, this court calls for a probation report before it can sentence the Appellant. The bail pending appeal is extended to 18th September 2019 when the case shall be mentioned to receive the probation report.

DATED AT NAIROBI THIS 24TH DAY OF JULY 2019

L. KIMARU

JUDGE