



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 43 OF 2016

YAKUB ABDILLE.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

(From the original conviction and sentence in Criminal case No. 935 of 2015 of the Chief Magistrate's Court at Busia by Hon. Hannah Ndung'u- Chief Magistrate)

JUDGMENT

1. **YAKUB ABDILLE**, the appellant was convicted for the offence of giving false information contrary to section 129(a) of the Penal Code.
2. The particulars of the offence were that on the 2nd March 2006 at the Chief's office, **ANGOROM** Location of **BUSIA** County, he informed **ANTONY OMALA EJAKAIT** a person employed in public service as Chief **ANGOROM** Location that one **HUSSEIN SALAT** was a resident of **ANGOROM** Location **OMERI** estate and that his family background was well known to him information he knew to be false.
3. He was sentenced to pay a fine of Kshs. 50,000/= or in default to serve six months imprisonment.
4. The appellant was represented Mr. Ouma Okutta, learned counsel. He raised the following grounds of appeal:
 - a) That the learned trial magistrate erred in law and in fact by failing to appreciate that the particulars of the charge did not disclose the offence against the appellant.
 - b) That the learned trial magistrate erred in law and in fact by failing to appreciate that there was no evidence against the appellant.
 - c) That the learned trial magistrate erred in law and in fact by shifting the burden of proof to the appellant.
5. **The state opposed the appeal through Mr. Omayo, the learned counsel.**
6. The facts of the prosecution case were briefly as follows:

When Hussein Salat applied for a Kenyan identity card, the appellant introduced him as a resident of Omeri Estate in Angorom Location. The prosecution maintained that this was false information.
7. The appellant in his defence denied the charge.
8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.
9. Section 129(a) of the Penal Code provides as follows:

Whoever gives to any person employed in the public service any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, the person employed in the public service—

(a) to do or omit anything which the person employed in the public service ought not to do or omit if the true state of facts

respecting which such information is given were known to him; or

(b) ...

is guilty of a misdemeanour and is liable to imprisonment for three years.

We are able to discern the following four ingredients under this paragraph:

- i) There must be some false information;
- ii) This false information must be given to a person employed in public service;
- iii) The giver must know or believe it to be false; and
- iv) The intention must be to cause or knowing it to be likely that he will thereby cause the person employed in public service to do or omit anything which he is employed to do or omit if the true state of facts respecting the information given were known to him.

10. The first test the learned trial magistrate ought to have subjected the information that came from the appellant is whether such information was true or false. It would only be necessary to subject it to further tests if it emerged that indeed it was false. In evaluating the evidence, I will take the steps that the learned trial magistrate ought to have taken.

11. **Antony Omala Ejakait (PW1)**, the chief of Angorom Location that the appellant went and introduced Hussein Salat as a resident of Omeri estate and that he wanted to be registered to acquire a national identity card. This was confirmed by the **Osman Ahmed Isaack (PW3)** who testified that the said Hussein was raised by his **(PW3's)** mother at Omeri estate since when he was a day old. This was because his mother died while giving birth to him. This is what **Fatuma Bitow Osman (DW1)** testified to. She identified Hussein Salat's mother as Lukia Bitow Osman. She brought up Hussein Salat at Omeri estate.

12. The evidence of sergeant **Joseph Mbaya (PW5)** was the only evidence that indicated that Hussein Salat originated from Somalia. He said this was from reliable sources. He however did not produce anything to show that indeed the information he had about Hussein Salat was true and reliable. The evidence of this witness tended to shift the onus of proof to the said Hussein Salat.

13. The evidence on record is that the information the appellant gave to chief of Angorom Location was not false. Had the learned trial magistrate found the information was factual, she would not have gone any further but to acquit. Likewise, I will not go any further.

14. I accordingly find that the conviction of the appellant was not supported by any facts. I quash the conviction and set aside the sentence. The money paid as fine by the appellant to be refunded to him.

DELIVERED and SIGNED at BUSIA this 15th day of March, 2018

KIARIE WAWERU KIARIE

JUDGE