



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 41 OF 2017

JOEL OMINO ODODA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Judgment, Conviction and Sentence imposed in Criminal Case Number 507 of 2014 in the Chief Magistrate's Court at Kisumu on 27.7.17 by Hon. C.Yalwala(PM))

JUDGMENT

The Trial

1. The Appellant here in **Joel Omino Ododa** has filed this appeal against conviction sentence of 2 years imprisonment for the offence of uttering a false document contrary to section 353 as read with section 349 of the Penal Code Cap 63 Laws of Kenya.
2. The prosecution called a total of five (5) witnesses in support of their case. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charges. On 27.7.17, the learned trial magistrate delivered a judgment in which he convicted the appellant and sentenced him to serve 2 years imprisonment.

The Appeal

3. Aggrieved by this decision, the appellant lodged the instant appeal. In his Petition of Appeal filed on 8th September, 2017, the appellant set out 5 grounds of appeal which I have summarized into 3 grounds to wit:-

1. That the learned trial magistrate erred in law in failing to find that on the facts presented to the offence as charged was not proved beyond reasonable doubt as required by law

2. That the learned trial magistrate erred in fact and in law in failing to take into consideration the defence put forward by the appellant

3. That the learned trial magistrate erred in fact and in law in failing to note the fact that the sentence was too harsh the appellant being a first offender

4. When the appeal came up for hearing on 31.1.18; Mr. Odeny, learned counsel for the appellant and Ms. Wafula learned counsel for the state made oral submissions.

Appellant's submission

5. The appellant holds the view that the conviction was erroneous since there was no evidence that the statement of account produced as PEXH. 5 was false. He relied on *Joseph Mukuha Kimani v Republic [1984] eKLR* where the court of appeal held that in a case of uttering a false document under Section 353 of the Penal Code, the prosecution must prove that:

(a) the document was false; in the sense that, it was forged

(b) the accused knew it was forged

(c) the utterer intended to defraud.

6. He also relied on *Kepha Moses Mogoi v Republic [2014] eKLR* where the Court of Appeal held that:

“The offence of uttering a false document under section 353 of the Penal Code is proved if a person knowingly and fraudulently utters a false document

7. In the case of *Joseph Simiyu Mwando v Republic [2016] eKLR*, the court considered section 353 of the Penal Code and stated as follows:

According to the section and the definition above, it is an offence if one knowingly and with intent to defraud utters a false document, that is, uses, deals with, or attempts to use or deal with, or attempts to induce some other person to use, deal with or act upon the document or thing uttered to him. That is, the person to whom the document is uttered, is made to take action or steps, which save for the thing uttered to him, he would have not taken.

8. Appellant also contends that the sentence was excessive since the appellant was a first offender.

Respondent’s submission

9. Ms. Wafula, learned counsel for the respondent submitted that the prosecution case was proved beyond reasonable doubt. She however conceded that the sentence was harsh in view of the fact that appellant was a first offender and the complainant did not suffer any loss.

Analysis and Determination

10. This being a first appeal, this Court has a duty to evaluate the evidence, analyse it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial court, and give due allowance for that (see *Okeno v Republic [1972] EA 32*). This duty was aptly stated in the case of *Isaac Ng’ang’a Kahiga v Republic [2006] eKLR* where the Court of Appeal said:-

“A court hearing a first appeal (i.e. a first appellate court), also has to carefully examine and analyse a fresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour so the first appellate court would give allowance of the same.”

11. That duty was again restated in the case of *Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR* where again the Court of Appeal said:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court.”

12. From the evidence on record, **PEXH.1** which was the appellant’s genuine statement of account had as rightfully found by the trial magistrate a balance of Kshs. 1053/- while **PEXH.5** which is the false statement uttered by the appellant had a balance of Kshs. 33,870/- In his judgment, the learned trial magistrate observed as follows:

“...accused operated his account and hence knew his financial status with the said bank as at the material time i.e 18th August, 2014.”

13. I am in agreement with the learned trial magistrate that accused, although knowing that his account had a balance of Kshs. 1053/- presented a false a statement with a balance of Kshs. 33,870/-.

14. From the foregoing; I am convinced that the ingredients of uttering a false document stated in *Joseph Mukuha Kimani v Republic [1984] eKLR* were proved beyond any reasonable doubt and that the conviction was lawful.

15. On sentence, Section 349 of the Penal Code, which provides for punishment for forgery and uttering a false document provides:

“Any person who forges any document or electronic record guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years”.

16. Generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty. In particular, Section 26 (2) and (3) of the Penal Code provides:-

(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment.

17. I have considered Section 382 of the Criminal Procedure Code which provides as follows:-

”Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code unless the error, omission or irregularity has occasioned a failure of justice;

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

18. The trial court had the discretion to impose a term of 3 years or less in this case or to impose a fine in lieu of the prison term. The court imposed a 2 years imprisonment term in without an option of a fine.

Decision

19. This court has discretion under Section 354 (3) (b) of the Criminal Procedure Code to increase or reduce the sentence or alter the nature of the sentence. This is one such case where the court’s discretion can be exercised in favor of the appellant for the reason that the sentenced imposed though lawful, calls for consideration since appellant is a first offender and no loss was suffered.

20. The upshot of this is that the appeal is allowed, and the sentence imposed on the appellant is set aside and substituted with a fine of Kshs. 60,000/- in default 18 months imprisonment from date of sentence.

DATED AND DELIVERED THIS 8TH DAY OF MARCH 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants - Felix &Carolyne

Appellant - Present

For the State - Ms Wafula

Mr Omondi /Mr Odeny for appellant.