



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 50 OF 2017

EDWIN OKARI NYAMBANE.....APPELLANT

=VRS=

STATE.....RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. J. Mwaniki (PM)

Keroka Law Courts dated 7th September 2017 in Keroka

Criminal Case No. 661 of 2017]

JUDGEMENT

The appellant was found guilty on two counts of Breach of Official Duty, contrary to Section 6 (j) of the Election Offences Act and sentenced to a fine of Kshs. 300,000/= or 18 months' imprisonment on the first count. The sentence on the second count was however held in abeyance.

The prosecution's case was that during the general elections held on 8th August 2017 the appellant who was a Polling Clerk employed by the Independent Electoral and Boundaries Commission at Chironge Primary School Polling Station gave extra ballot papers to a voter namely Davis Bosire. It was alleged that the extra ballots were in respect to the Senate and Member for County Assembly elections. The appellant denied the charges and in his defence stated that the voter took the papers himself. His witness (Dw2) however stated that whereas it was the appellant who gave the papers to the voter it was found not to be intentional and he was deployed to another section. The appellant has raised 9 grounds in his petition of appeal.

“1. The learned Trial Magistrate erred in law and fact by convicting the appellant without the prosecution proving the case by the standards required by law.

2. The learned Trial Magistrate erred in in Law and fact by convicting the appellant without any exhibit being presented or produced in court.

3. The Learned Trial Magistrate erred in Law and fact by misapplying the law and the principle of reasonableness based on the evidence presented.

4. The Learned Trial Magistrate erred in Law and fact by shifting the burden of proof to the appellant.

5. The Learned Trial Magistrate erred in Law and fact by failing to objectively evaluate the evidence before him.

6. The learned Trial Magistrate erred in law and fact by allowing himself to be carried away by extraneous matters while convicting the appellant.

7. The Learned Trial Magistrate erred in Law and fact by failing to make a finding that the investigations in the case were shoddy and not credible or reliable.

8. The learned Trial Magistrate erred in Law and fact by failing to find that the evidence tendered did not prove particulars of the charges facing the appellant.

9. The sentence mated out by the Learned Trial Magistrate was excessive in the circumstances.”

He has urged this court to allow the appeal, quash the conviction and set aside the sentence. The appeal was by consent of the parties canvassed by way of written submissions. Whereas the appellant was represented by Counsel, the appellant relied on submissions drawn by himself. He raised the following issues in his submissions: -

i. THAT the trial Court erred in convicting the Appellant in the absence of the material exhibits being produced.

ii. THAT the trial Court erred in misapplying the test of reasonableness or failure of the trial court being objective.

iii. THAT the trial Court failed to note that there was a problem in respect to credibility of PW1.

iv. THAT the trial Court erred in law in being carried away by extraneous issues and failure to establish that the IEBC was not interested prosecute an innocent person.

v. THAT the testimonies of the witnesses did not materialize to proof the charges that the appellant faced.

The State through Mr. Ochieng, Learned Principal Prosecution Counsel has conceded the appeal. However, as I am entitled to do as the first appellate court, I have reconsidered and evaluated the evidence before the trial court so as to arrive at my own conclusion. I have made provision for the fact that I neither saw nor heard the witnesses testify.

It is my finding that the charges against the appellant were proved beyond reasonable doubt. The appellant was employed by the Independent Electoral and Boundaries Commission as a Polling Clerk at Chironge Polling Station, a fact which he readily admitted. His duty was to issue ballot papers to the voters. Although he does not readily admit, it is clear from the evidence that it was him who gave the extra ballot papers to Davis (Pw1). Indeed, his own witness Charles Mokaba (Dw2) who was at the polling station as an agent for a member of parliament aspirant, testified that the appellant gave the ballot papers to the voter. In my view this fact having been proved by the prosecution and conceded by the defence the omission to produce the impugned ballot papers was not fatal. It was not even necessary. This is because it was the act of giving more than one ballot papers in an election to a voter that was in issue. The failure by the prosecution to produce the ballot papers does not therefore water down its evidence. I further find that it does not matter that the appellant did not intend to do so. Section 6 (i) of the Offences Act states: -

“6. Offences by members and staff of the Commission.

A member of the Commission, staff or other person having any duty to perform pursuant to any written law relating to any election who –

.....

(j) without reasonable cause does or omits to do anything in breach of his official duty;

.....

Commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or both.”

It is instructive that unlike in (d) (e) (f) and (c) where the word “*wilfully*” appears it is not the same for the offences facing the appellant. Mens rea or intention to commit the offence is therefore not an ingredient of the offence and need not have been proved. What needed to be proved was that the act of dereliction of duty was without reasonable cause. In his defence the accused conceded that the two extra papers were traced to his counterfoils and that the responsibility of issuing ballot papers was his. This is what he stated in cross examination: -

“.....voters would not pick any ballot papers. He would only be given by the clerk. The voter took when I was stamping on the counterfoil for the papers I had given earlier.”

It is clear from his own testimony that allowing a voter to pick the papers himself was dereliction of duty. He was reckless and his explanation does not establish a reasonable cause for giving extra ballot papers. Moreover, I doubt that given the elaborate procedure set out in regulation 69 of the ELECTIONS (GENERAL) REGULATIONS, 2012 a voter could have picked the ballot papers himself. Even were we to say that it was necessary to prove his state of mind, the appellant, though he admitted to have been present when the voter took the ballot papers did not demonstrate that he took reasonable precaution to ensure that the voter did not take more than one ballot paper. This was a general election and much was expected of him as an election official.

The appellant has also taken issue with the conviction on the ground that Independent Electoral and Boundaries Commission was not the complainant in this case. That does not hold any water. It is enough that he was arrested and charged by the police and later prosecuted by the office of the Director of Public Prosecutions whose mandate is to arrest, charge and prosecute offenders. The State did not require to call Independent Electoral and Boundaries Commission official to prove the offence. Both Pw1 and Pw2 sufficiently established the ingredients of the offence which even the appellant and his witness admitted. He was charged with an election offence under the Elections Act but not under the Independent Electoral and Boundaries Commission code of ethics and the charges were proved beyond reasonable doubt. I accordingly uphold the conviction on both sides.

On the sentence the trial magistrate took into account the appellant's plea in mitigation. He also considered the circumstances and seriousness of the offence and faulted the prosecution for preferring two counts for one offence. The offence attracts a fine of Kshs. 1 million but the appellant was fined Kshs. 300,000/= which in my view was excessive in the circumstances. Since he is a first offender I shall reduce the fine to Kshs. 50,000/= in default to serve 12 months' imprisonment. The appellant shall pay the fine or be taken into custody to serve the term of imprisonment.

It is so ordered.

Signed, dated and delivered at Nyamira this 18th day of October 2018.

E. N. MAINA

JUDGE