



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.193 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. F. Mwinyi (Ms.) – Ag. PM delivered on 25th September 2015 in Nairobi CMC. CR. Case No.1924 of 2010)

DAVID CHEBURET.....

.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, David Cheburet, was charged with the offence of **falsification of a register** contrary to **Section 361** of the **Penal Code**. The particulars of the offence was that on 15th November, 2009 at Kenya Revenue Authority, Namanga Customs Station in Kajiado County, the Appellant, having the actual custody of Inward Private Motor Vehicle Register, knowingly caused a rotation entry No.R/NMA/8953/11/09 to be made in the said Inward Private Motor Vehicle Register which in any material particular was to his knowledge false. When the Appellant was arraigned before the trial magistrate’s court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. The Appellant was sentenced to serve three (3) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal against the said decision to this court.

The Appellant’s appeal essentially touched on the credibility of the evidence adduced by the prosecution witnesses and whether the said evidence met the threshold as regards the standard of proof in criminal cases. The Appellant asserts that the evidence adduced against him by the prosecution witnesses did not establish that he had committed the alleged offence. The Appellant was aggrieved that the totality of the evidence adduced in the trial was not taken into consideration, particularly the evidence that he had adduced in his defence. In the premises therefore, the Appellant urged the court to allow his appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, Mr. Chebii for the Appellant told the court that the Appellant was abandoning his appeal on sentence. He would however proceed with his appeal against conviction. Learned counsel submitted that the prosecution failed to establish to the required standard of proof that the Appellant made the entry in the particular register knowing or having reason to believe that it was false. He explained that the Appellant testified in his defence that he made the entry in question in the course of his duty, and, taking into consideration the volume of work on the particular day, he accepted and entered the documents that were given to him by the person whom he believed was the owner of the

motor vehicle. The thrust of the Appellant's appeal was to the effect that he did what was required of him in the ordinary course of doing his work and could not therefore be faulted unless it was established that he had deliberately and falsely made the entry.

Atina for the State opposed the appeal. She submitted that the prosecution had established to the required standard of proof that the Appellant made false entries in the register to indicate that a suspected stolen motor vehicle had made a legal entry into Kenya from Tanzania through the Namanga border crossing. She submitted that, the Appellant, being a Custom Officer, was required to establish the particulars of the motor vehicle in question and match it with its documentation before making the necessary entry. In that regard, learned state counsel pointed the inconsistencies in the defence of the Appellant. In particular, she submitted that the Appellant deliberately made the entry in question when he knew or ought to have known that the motor vehicle was not within his sight at the time. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the appeal filed by the Appellant. In doing so, this court is required to keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any comment regarding the demeanour of the witnesses (see Njoroge –Vs- Republic [1987] KLR 19). In the present appeal, the issue for determination is whether the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant falsified the register contrary to **Section 361 of the Penal Code**.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the advocate for the Appellant and the response thereto made by Learned State Prosecutor. **Section 361 of the Penal Code** provides thus:

Any person who, having the actual custody of any register or record kept by lawful authority, knowingly permits any entry which in any material particular is to his knowledge false, to be made in the register of record, is guilty of a felony and is liable to imprisonment for seven years.

For the offence to be established under the Section of the Penal Code, the prosecution is required to prove the following ingredients: that the person charged had actual custody of the register; that the accused had authority to make entries into the register; that the accused permitted an entry, which to his knowledge is false, to be made in the register. An important aspect which must be established to the satisfaction of the court is the fact that the accused had knowledge that the entry he was making was false or untrue. In the present appeal, the prosecution proved the following facts to the required standard of proof beyond reasonable doubt:

- (i) That the Appellant was on the material date of 15th November, 2009 employed by Kenya Revenue Authority as a Customs Officer at the Namanga Customs Boarder Control.
- (ii) That the Appellant's duty included making entries of motor vehicle movement from Tanzania to Kenya and *vice versa*. The registers were (five) 5 in number. The register that is the subject of this appeal is the inward register *i.e.* it is used to register foreign registered motor vehicle entering Kenya from Tanzania. A driver of the motor vehicle is required to provide a copy of the Motor Vehicle's Log book and a document referred to as Appendix issued by the Tanzanian custom's authorities. Upon verification of these documents, the Appellant was required to issue a form known as C36. The driver of the motor vehicle will then pay USD 50 in order to be issued with a foreign permit to drive the motor vehicle into Kenya.
- (iii) That motor vehicle Registration No.TZX 9158 which was alleged to be the registration number of motor vehicle Toyota Mark II was actually formerly of motor cycle's which was later deregistered.

(iv) That the motor vehicle (Toyota Mark II) was impounded in Nairobi by the police, specifically the Anti-terrorism Police Unit, on 13th November, 2009. By the time the entries were made in the inward register on 15th November, 2009 at Namanga Customs Border Control, the motor vehicle was already in Kenya

(v) That although it was the prosecution's case that the Appellant, as the officer making the entry in the inward register, was required to physically see motor vehicle before making the entry, evidence placed on record clearly shows that the entries were primarily made on the basis of documents and not the physical examination of the motor vehicle unless the documents presented had discrepancies that necessitated such inspection.

(vi) That the basis that informed the decision by the prosecution to charge the Appellant is the entries that were made in the inward register on the particular day by the Appellant.

(vii) That the Appellant did not dispute that he made the entries in question but explained that he did so in the ordinary course of his duties on the particular day.

In his defence, the Appellant stated as follows:

(i) That he made the entries in question in the ordinary course of carrying out his duties.

(ii) That the entries made on any particular day in the five (5) registers were more than two hundred motor vehicles.

(iii) That due to demands of those that he served on any particular day, it was not possible to physically verify the documents and compare the particulars with the actual motor vehicle unless suspicion was raised in the documentation.

(iv) That he did not knowingly or deliberately make entries in the inward register with the knowledge that the same was false.

On re-evaluation of the facts of this case, this court makes the following findings:

(a) The prosecution was able to establish the motor vehicle with registration No.TZX 9158 (not its actual registration number) Toyota Mark II was actually imported into the country at a date earlier than 13th November, 2009.

(b) An attempt was made to falsify the inward entry at Namanga Customs Boarder Control to make it appear as if the said motor vehicle entered the country on 15th November, 2017.

(c) Documents which apparently appeared genuine were presented to the Appellant, who believing the documents to be authentic, made entries in the inward register with the particulars of the said motor vehicle.

(d) The prosecution was required to establish to the required standard of proof that the Appellant knowingly made the false entry and that in making the said entry the Appellant was not acting within the ordinary course of his duty. The trial court dismissed the Appellant's defence which was to the effect that he made the said entries in the ordinary course of his work. The trial court pointed out discrepancies which she held should have served as a pointer that the documents submitted to the Appellant for the particular motor vehicle were suspicious. The trial court did not take into consideration the explanation given by the Appellant that because he was dealing with motor vehicles that were entering and exiting the country, he could not possibly physically check and verify the particulars of every motor vehicle if he was satisfied that the documentation was in order.

(e) This court finds that the fact that the Appellant from the word go made admission that he

made the entries in question, and that the fact he gave a credible explanation for his actions on the particular day points to the fact that he did not deliberately or falsely made the said entries in question. It may well be that he made a honest mistake. In any event, the basis of the prosecution's decision to charge the Appellant is statements which were recorded nearly a year after the event. Statements were recorded from the Customs official nearly a year after the alleged offence was committed. It was not expected that the Appellant would remember all the details of what transpired on the particular day other than reliance being placed in what was actually recorded in the said registers.

(f) This court is not persuaded that the prosecution established an important plank in its case *i.e.* that the Appellant knowingly and falsely made the entry in the inward register. This court was persuaded that with the volume of motor vehicles that the Appellant dealt with in any particular day, it was not possible for physical verification to be made in regard to all the motor vehicles entering and exiting Kenya. This court discerned no inconsistency in the explanation given by the Appellant in his defence in respect to what he did on the particular day. Any gaps can be explained by the passage of time taking into consideration that the Appellant was being called to account nearly one year after the event.

The upshot of the above reason is that the appeal against conviction has merit. It is hereby allowed as a result of which the conviction is quashed. The Appellant is acquitted of the charge. Since he was not appealing against sentence, these are the orders of the court. It is ordered.

DATED AT NAIROBI THIS 24TH DAY OF MAY 2017

L. KIMARU

JUDGE