



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 77 OF 2015

(Consolidated with Criminal Appeal No. 78 OF 2015)

(Being an Appeal from the judgment of the Kitale Chief Magistrate V.W. Wandera

delivered on 19th June 2015 in Criminal Case No. 2431 of 2015)

BEN MESHACK KIBEBE.....1ST APPELLANT

EVERLINE NALIAKA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The 1st appellant **BEN MESHACK KIBEBE** and the 2nd appellant **EVERLINE NALIAKA** were charged with the offence of Forgery of Judicial Documents Contrary to Section 351 of the Penal Code.

The particulars of the offence are that on the 10th day of June, 2015 at unknown place within the Republic of Kenya jointly with others not before court made a surety release order dated 27/8/2015 vide Criminal Case number 49 of 2015 in respect of **ERICK SIMIYU WANYONYI** purporting it to be a genuine release order having been signed by **CAROLINE MUGO** Resident Magistrate in Kitale Law Court.

2. When the charge was read out to the appellants in court, both the 1st and the 2nd appellants pleaded guilty. The facts of the case were read out and each of the appellants admitted the same as correct. Briefly stated, the facts were that on 10/6/2015 the 1st appellant presented a Release Order in **Criminal case No. 49 OF 2012 Republic Versus Erick Simiyu Wanyonyi** at Kitale Farm Prison. Upon counter checking with the court, it was found that the Release order as a forgery. The 1st appellant revealed that 2nd appellant was the one who had given him the release order. Both the 1st and 2nd appellants were arrested. The 2nd appellant admitted having obtained the released order from a person who introduced himself to her as a judicial officer and that she paid Kshs 5,000/- for the Release order.

3. The 1st and 2nd appellant were convicted and sentenced to 3 ½ years each. Both the 1st and 2nd appellants were dissatisfied with both the conviction and sentence and appealed to this court. Their separate appeals were consolidated and heard as one. The grounds of appeal can be summarized as follows:-

- (a) That the appellants were not cautioned on the consequences of pleading guilty on a charge which was serious.
- (b) That there was no evidence that the appellants made or abetted the making of the document.
- (c) That the appellants had no knowledge that the impugned document was forged.
- (d) That the facts given by the prosecution did not support the charge.
- (e) That the plea of guilty was equivocal.
- (f) That the sentence of 3 ½ years was harsh and excessive.

4. The state conceded to the appeal. Both the learned counsel for the appellant and the Learned counsel for the state made oral submissions which I have duly considered.

5. Section 207 of Criminal Procedure Code provides for the procedure for plea taking. The said section of the Law does not provide for the trial court to caution the accused persons on the seriousness of the offence. The plea was taken in compliance with all the procedures for plea taking (**See for example ADAW -V- REPUBLIC [1973] EA**).

6. A close scrutiny of the facts fails to disclose the role played by both the 1st and 2nd appellants in the making of the document in question. It is not clear from the facts if the appellants knew whether the document was a forgery or not. Indeed the mitigation by both 1st and 2nd appellant retracts the plea of guilty as each one of them appears to dispute any guilty knowledge. The 1st appellant stated that he was only sent to take the release order to prison while the 2nd appellant stated that she was misled by a person who posed as a judicial officer. The plea was equivocal.

7. The appellants have been in prison for about nine (9) months now. Although the Learned counsel for the state urged the court to order for a retrial, my view is that the appellants have substantially served the sentence.

Consequently, I decline to order for a retrial. I allow the appeal. The appellants are at liberty unless otherwise Lawfully held.

B. THURANIRA JADEN

JUDGE

COURT: Judgment dated and delivered this 17th March 2016.

B. THURANIRA JADEN

JUDGE