

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 11 OF 2013

CAROLINE WANJIKU NGUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Judgement, sentence and conviction in Criminal case number 800 of 2011, R. vs Wilbroda Juma, C.M. at Nyeri, delivered delivered on 25.1.2013).

JUDGEMENT

On 24.8.2011, **Caroline Wanjiku Ngugi** (hereinafter referred to as the appellant) was arraigned before the Senior Resident Magistrates court at Nyeri charged with the offence of forgery contrary to Section 345 as read with section 349 of the Penal Code.^[1]

The particulars of the offence were that on the 12th day of May 2011, at Kenya Police College in Nyeri District within Central Province forged a certain document, namely Kenya Certificate of Secondary Education purporting it to be a genuine certificate issued by the Kenya National Examination Council.

The appellant faced a second count of uttering a false document contrary to section 354 of the Penal Code.^[2] It was alleged that on the 25th day of May 2011 at Kenya Police College Kiganjo in Nyeri District within Central Province, knowingly uttered a certain forged certificate of Secondary Education to CPL **Jonason Lemuna** purporting it to be a genuine certificate issued by Kenya National Examination Council.

In determining this appeal, this court fully understands its duty as stated in the case of **Okeno v. R**^[3] which is to subject “*the evidence as a whole to a fresh and exhaustive examination*”^[4] and this court to arrive at its own decision on the evidence and that as a first appellate court, this court must itself weigh conflicting evidence and draw its own conclusions^[5] must make its own findings and draw its own conclusions making allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.^[6]”

In other words, the first appellate court must itself weigh conflicting evidence and draw its own conclusions^[7] and also scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.^[8]

PW1 No. 79004 CPL Martin Fwamba, a documentation officer at Kenya Police College, Kiganjo recalled that on 25/5/11, he received original certificates from the Director, Junior Training wing of the Kenya Police College for urgent verification. He forwarded the documents to the Kenya National Examinations Council for verification. The verification results showed that the appellant altered her results in some subjects and her mean grade attained. He confirmed the altered certificate is the one the appellant submitted to the college as genuine. The appellant obtained grade C- but the certificate she submitted showed that she had obtained B- and that her results for maths in the certificate she submitted were B- while at the Kenya National Examinations Council showed she got a D-. Also, in Chemistry the results submitted showed she got a B while the council results showed she obtained a D grade. Similarly, in biology, her correct grade was D but the results submitted showed a B. In commerce, she got a C- but in the results she submitted it showed a B-. The appellant was one of the recruits for Police training and

recruitment was promptly terminated.

PW2 NO. 64551 Cpl Johnso Lenuwa testified that on 12/5/11 he was assigned duties to welcome and register new recruits, the work involved verifying recruits identity cards and numbers to confirm that they were the ones recruited. On 25.5.11 he was instructed by the registration officer to collect the academic certificates for all the graduate recruits for onward transmission to the Kenya National Examination Council for verification. He was called by staffing officer on 23.8.11 and instructed that the appellant herein had to be terminated due to forgery and he was instructed to withdraw the kit that had been issued to the appellant. The appellant was arrested by CID officers from Nyeri.

PW3 Linus Lijina Shikhan an assistant examination secretary with the examinations Council testified that on 12.10.11 KNEC received a letter from DCIO Nyeri asking that results of the appellant be verified. The verified that the appellant was a *bona fide* registered candidate at Gachire Sec School, that she sat for KCSE in 2004 and obtained the following results, Eng.-C+, Kis. -C, Maths D-, Bio- D, Chem.- D, Hist & Govt.- C-, C.R.E- C, and Commerce- D+. The mean grade was C-.

That the certificates they were given to verify had the following grades, Maths- B-, Bio.- B, Chem.- B, Commerce B+, Mean Grade B+. He produced the computer printout verifying the results.

PW4 Naomi Njeri Njehia, Principal of Gachoire Sec Sch at the time of giving evidence confirmed that the appellant appeared in their records and that she studied at the school from 2001 to 2004 when she sat for the exams. She gave the results attained exactly as the ones tabulated by PW3.

PW5 No. 76241 PC Daniel Makoko was the investigating officer. He produced all the exhibits in the case and charged the appellant with the offences.

At the close of the prosecution case the trial magistrate was satisfied that a *prima facie* case had been established and put the accused person on her defence. The provisions of section 211 of the Criminal Procedure Code were complied with and the appellant herein opted to give sworn evidence.

In her defence, the appellant stated *inter alia* as follows, that she was un employed, that in April 2011, she successfully applied to the Kenya Police College recruitment and she reported as required. That on 25.11.2011 she was asked to provide her original certificates and copies which she did, that on 23.8.2011 she was informed that her course would be terminated since there was a problem of alterations on her certificates, that she had never heard of the alteration before, that the certificate she had was issued by the examinations council and had no idea as to how the examinations council came up with the discrepancy. She denied that she forged the certificates.

After evaluating the prosecution and the defence case, the trial magistrate found the appellant guilty and sentenced her to serve 18 months imprisonment for count one and one year imprisonment for count 2, both sentences to run concurrently.

Aggrieved by the said finding, the appellant appealed to this court against the conviction and sentence imposed and raised six grounds of appeal, which in my view can be conveniently reduced into two grounds, namely; **(i)** that the learned magistrate erred in law in concluding that the prosecution had proved its case beyond reasonable doubt, **(ii)** that the learned magistrate erred in failing to up hold the appellants defence.

I have carefully considered the submissions by the appellants' advocates and submissions by the learned state counsel and the relevant law and authorities. I will address both grounds together.

To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty.

The key question that this court seeks to answer is whether or not the prosecution proved the ingredients of the offences and whether the appellant offered any other explanation that could exonerate her from the offence or whether there exists any other co-existing circumstances which could weaken or destroy the inference of guilt which is a necessary test before arriving at a conviction on the evidence tendered. This calls for close examination of the law, the evidence tendered and the defence offered by the accused.

In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. Perhaps the most eloquent statement of reason for this is to be found in the opinion of **Brennan J** in the United States Supreme Court decision in **Re Winship**^[9] where the court stated:-

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction.....Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned”

The existence of the principle of proof beyond reasonable doubt is unchallenged in the common law world. In the English common law, it was elegantly affirmed by the House of Lords in the celebrated judgement of **Viscount Sankay** in **D.P.P vs Woolmington**. The United States Supreme Court in the above cited case of **Re Winship** held that the reasonable doubt rule has constitutional force under the due process provisions of the United States Constitution.

On whether the appellants defence raised reasonable doubt on the prosecution case, I find useful guidance in the case of *Victor Mwendwa Mulingevs Republic*^[10] the court of appeal rendered itself on the issue of alibi thus:-

“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution; see Karanjavs Republic^[11]*this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought”*

The onus on the prosecution to prove the charge against the accused beyond reasonable doubt never shifts. A trial court has a duty to weigh the evidence adduced in court by all the parties in totality and make a finding on the culpability or otherwise of the accused. Choosing to analyse the prosecution evidence and leave out that of the accused is a fatal mistake. It’s a duty bestowed in every court to weigh one set of evidence (prosecution) against another (defence) before arriving at a conclusion. This is the basic calling of every court without exception.^[12] The South African case of *Ricky Gandavs The State*^[13] provides useful guidance. In the said case it was held:-

“.....The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accuser's guilt”

Section 345 of the Penal Code^[14] defines forgery as 'the making of a false document with intent to defraud or deceive.'

In the High Court of India in the case of *Sukanti Choudhury vs State of Orisa*^[15] held that the following ingredients are necessary for an offence of this nature to be proved.:-

- i. *The document must be forced.*
- ii. *Accused used the document as genuine.*
- iii. *Accused knew or had reason to believe that it was a forged document, and*
- iv. *Accused used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document.*

Forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud. Thus, the elements of forgery are:-

- i. **False making of-** *The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. "Writing" includes anything handwritten, type written, computer generated, printed or engraved.*
- ii. **Material alteration-** *The person must have taken a genuine document and changed it in some significant way. It is intended to cover situations involving false signatures or improperly filling in blanks on a form or altering the genuine content of a document.*
- iii. **Ability to defraud-** *The document or writing has to look genuine enough to qualify as having ability to mislead others to think its genuine.*
- iv. **Legal efficacy-** *The document or writing has to have some legal significance.*
- v. **Intent to defraud-** *The specific state of mind for forgery does not require intent to steal, but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting, through the use of type writer or a computer.*

In the Nigerian case of *Alake vs The State*^[16] the court listed the following as the ingredients of the offence of forgery:-

- i. *That there is a document or writing;*
- ii. *That the document or writing is forged;*
- iii. *That the forgery is by the accused person;*
- iv. *That the accused person knows that the document or writing is false;*
- v. *That he intends the forged document to be acted upon to the prejudice of the victim in the belief that it is genuine.*

It is not disputed that the appellant successfully applied for police recruitment and that she submitted her academic certificates. It's not disputed that as a formality, all academic documents submitted by the recruits were forwarded to the examinations council for verification and the examinations council confirmed from their records that the appellants certificate had been altered and forwarded the correct results which matched the records held by the school as per the testimony of the principle of the school. The evidence in this regard is manifestly clear and convincing that he appellants' results were altered which in my view confirmed an act of forgery. The appellants defence that those are the results given to her by the examination council is totally unconvincing and raises more questions than answers. I find that count one was proved beyond doubt and to the required standard.

On count two, I find useful guidance in the Nigerian case of *Nelson Moore vs Federal Republic of Nigeria*^[17] where it was held that in an offence of this nature, the prosecution must prove the following

ingredients, namely; *that the accused person knowingly and fraudulently uttered a false document, or writing or counterfeit seal.* Thus, the elements of uttering a forged document are:-

- i. Uttering and publishing as true a false, forged, or altered instrument;*
- ii. knowing the instrument to be false, altered, forged, or counterfeited; and*
- iii. intending to injure or defraud.*

Turning to the facts of this case and the evidence adduced, I Find no difficulty in believing that the appellant presented to the Police Training College her academic certificates and secured an admission on the basis of the said results. The school principal gave the results as per their records which must have been the results collected by the appellant from the school while the witness from the examinations council gave details of the results released by the council and held by the council as the results obtained by the appellant. Thus what she presented to the college was evidently altered, and the mere fact that the certificate was presented to the college to secure admission proves an act of intention to cause the college to believe that the results were genuine, hence a motive to deceive or to commit fraud using the altered results.

I find count two was proved to the required standard and that the elements of the offence were proved.

I have carefully considered the defence and prosecution evidence, I find that the prosecution proved the two counts and that the learned magistrate properly analysed the evidence and the law and arrived at the correct conclusion. Accordingly, I find no reason to interfere with the conviction and I hereby uphold it and dismiss the appeal against conviction.

On sentence I stand guided by the general principles the court adopts in appeal relating to sentence as stated by Nicholas J in the South African case of *R vs Rabie*^[18] where the learned judge stated that “*In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal-*

(a) Should be guided by the principle that punishment is “pre-eminently a matter for the discretion of the trial court;” and

(b) Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been “judiciously and properly exercised”

The test for (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

On count one, section 349 of the Penal Code^[19] provides for a penalty of three years while section 354 of the Penal Code^[20] provides that a person found guilty of the offence of uttering a false document is liable to punishment, as if he had forged the document.

The appellant was sentenced to 18 months imprisonment for count one and one year imprisonment for count two. The learned Magistrate ordered both sentences to run concurrently.

I find that the said sentence is as provided by the law. However, considering the age of the appellant and that she is a young mother, I find that a custodial sentence may be harsh in the circumstances. I therefore give her the option of a fine and order that the appellant may be released upon payment of a fine of **Ksh. 10,000/=** for count one and **Ksh. 10,000/=** for count two.

Right of appeal 14 days

Dated at **Nyeri** this **10th** day of **December** 2015

John M. Mativo

Judge

[1] Cap 63, Laws of Kenya

[2] Ibid

[3] {1972} E.A, 32at page 36

[4] See Pandya vs Republic {1957} EA 336

[5] See Shantilal M. Ruwalav vs Republic {1957} EA 570

[6] See Peter vs Sunday Post {1958} EA 424

[7] Shantilal M. Ruwala V. R (1957) E.A. 570

[8] see Peters V. Sunday Post (1958) E.A. 424

[9] 397 US 358 {1970}, at pages 361-64, see also the more recent elaboration of the rationale of the principle in R VS Oaks 25 D.LR (4TH) 200 {1987} at pp 212-214

[10] {2014} eKLR

[11] {1983} KLR 501

[12] John Matiko & Another vs Republic, Criminal Appeal No. 218 of 2012

[13] {2012} ZAFSHC 59, Free State High Court, Bloemfontein

[14] Supra

[15] CRLREV No. 1407 of 2008

[16] {1997} 7 NWLR 568

[17] {2012} LPELR-19663(CA)

[18] {1975} {4} SA 855 {A} at 857 D-F

[19] Supra

[20] Ibid