



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.92 OF 2012

(An Appeal arising out of the conviction and sentence of B.A. Ojoo P.M. delivered on 16th October 2012 in Busia criminal case no.92 of 2011)

JAPHETH WESA OMUSISIAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. The Appellant was convicted and punished to a prison term of 2 years for the offence of Forgery contrary to Section 349 of the Penal Code. He was acquitted of two other counts. These were in respect to Stealing contrary to Section 275 of The Penal Code and uttering a False Document contrary to Section 353 of The Penal Code. This Appeal is against both conviction and sentence on the offence of Forgery.
2. It had been alleged that on the 19th day of January, 2011 at Family Bank in Busia County, with others not before Court, forged cheque No.00077 the property of Busia County Council. To sustain the conviction the Prosecution called 10 witnesses. Electine Wefula (PW 6) was in September 2009 a payment cashier with Busia County Council (**The Council**). Her duties included paying out cheques and cash. She was also the person who kept the cheque books for the Council. In the course of an audit exercise, she noticed that 2 cheque leaves Nos.000066 and 000077 were missing from one of the cheque books. She reported this to John Adongo (PW8) who was the County Treasurer. PW8 issued a stop payment instruction in respect to the cheques and the same was lodged with their bankers, National Bank of Kenya Ltd.
3. The cheque book which had the missing leaves was handed over alongside other documents by PW6 to Hellen Beatrice Wasike (PW4). The handing over report was signed by both PW4 and PW6. It was also witnessed by Beatrice Olesia Obayo (PW5). PW5 also signed the report.
4. On 19th of January 2011, a certain lady deposited a cheque in the account of Jeff Electricals at Family Bank, Busia. The cashier who received that cheque was Stanley Kipkoech Sigoei (PW2). The cheque was for kshs.880,000/=. Because it was for an amount of more than kshs.100,000/=:, the payment need authorization from his senior. So, PW2 sought authorization from his Manager John Muchai Ngure (PW1). PW1 thought that the signature on the cheque was not genuine. For that reason, he telephoned William Otuo Picha (PW3) who was at that time the Treasurer for the County Council and alerted him of the suspicious cheque.
5. In the company of George Mami (**the County clerk**), PW3 visited the bank. He saw the cheque. On it was a signature that resembled his own. But to him it was forgery as he was not a signatory to the account at the date the cheque was drawn. A second signature on the cheque resembled that of the County clerk. But the same did not appear genuine. The handwriting that drew the cheque resembled that of PW4 but again, it appeared not to be hers. PW3 and The County clerk reported

- the incident to the District Criminal Investigation Officer.
6. The officer who was designated to investigate the matter was John Onyango who has since passed on. The conduct of the matter then fell to PC Philip Rotich (PW 10) who took over the file after investigation had been complete and the Appellant duly charged. And so, although PW 10 produced 4 exhibits at trial, he did not carry out the investigation.
 7. At the heart of the Prosecution case was a Forensic Document Examination Report prepared by Antipas Nyanjwa. He is a Forensic Document Examiner, Voice and Acoustics Analyst. Due to his absence from the jurisdiction of the Trial Court, his report was produced by Jacob Oduor (PW 9). The witness explained the contents of the report. The long and short is that the person who drew or authored cheque No.00077 was the Appellant.
 8. The Appellant confirmed that he is the proprietor of Jeff Electricals but he denied that he drew the controversial cheque. It was his further evidence that the Police took samples of his handwriting and signature. It was his evidence that he never presented the cheque for payment. It was his view that Councilors of County Council had framed him for no apparent reason.
 9. In the Memorandum of Appeal filed on 29th of October 2012, the Appellant raises some 6 grounds. Not surprisingly, being a home-grown Appeal, it lacks coherence and clarity. But, I understand the Appellant to be questioning the conclusion reached by the Learned Magistrate on the Document Examiners Report. The Appeal also criticizes the Trial Magistrate's evaluation of the evidence of PW1, PW2 and PW7.
 10. At the hearing the Appellant relied on written submissions he had prepared and filed in Court on the 12th of April 2013. The Appellant argued that the documents relied on by the Prosecution were not provided to him in advance. This, he said, affected his preparation of the Defence and was an affront to his rights as an accused person guaranteed under Article 50 (2) (c) of The Constitution 2010. It was further argued that he had no connection with the offence as a majority of the witnesses being PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8 had not met him prior or at the time the offence was committed. The other arguments criticized the quality of the Prosecution evidence.
 11. The Appeal was opposed by the State. Mr. Obiri State Counsel gave a brief rehash of the essential portions of the Prosecution case to demonstrate that the evidence against the Appellant was overwhelming.
 12. This is a first Appeal and I am required to re-evaluate the evidence, assess it and draw my own conclusion, minded that unlike the Trial Court I never saw or heard the witnesses testify. And that some allowance must be made for this. (see **Okeno –vs- Republic [1972] E.A. 32**).
 13. There was evidence that an unknown person but of female gender presented cheque No.000077 (**Exhibit 1**) for payment at the Busia branch of Family Bank. The payer was the County Council of Busia. The payee was Jeff Electronics. The date of the cheque was 17th January 2011. The paying bank was National Bank. There was also evidence that, that a cheque leaf bearing the same number had gone missing from the cheque book held by the Council. Evidence to that effect was given by PW6 and corroborated by PW4, PW5 and PW8. That cheque that was missing was noticed at least 2 years prior to the presentation of **Exhibit 1** at the Bank. The evidence of this was contained in the handover report from PW6 to PW4 (**Exhibit 5**). So as to stop the payment of the missing cheque in the event that it was presented, PW8 issued a stop payment instruction to the bank (**Exhibit 2**).
 14. When PW1 suspected that the signatures on **Exhibit 1** were not genuine, he invited the officials of the County Council to the Bank to verify the same. When PW3 visited the bank, he noticed that they were 2 signatures on the cheque. One of them resembled his signature but he straight away thought it to be a forgery because at that time he was not a signatory to the account. When the matter was reported to the Police, the Police submitted the document to Forensic Examination.
 15. The documents examined were,
 - i. The questioned cheque.
 - ii. The specimen handwriting and signatures of PW3, PW4, PW5, PW6, PW7 and PW8.
 - iii. The specimen handwriting and signatures of the Clerk to Council.
 - iv. The specimen handwriting and signatures of one Charles Wafula.
 - v. The specimen handwriting and signature of the Appellant.

Also examined were the known handwritings of PW5, PW6, PW7, PW8 and Charles Wafula.

16. After due examination and comparison, the Document Examiner returned the following finding;

“I have today examined and compared the questioned handwritings and signatures indicated with the arrows in black ink on the exhibits marked A2 – A5, with the standard handwritings and signatures on the exhibits marked B1 – B11. They are in my opinion similar and indistinguishable.”

Exhibits A2 – A5 were the questioned document while Exhibits B1 – B11 were the specimen handwritings and signatures of the Appellant. The return by the Document Examiner was that the handwritings and signatures on cheque No.000077 for ksh.880,000/= and dated 17th January 2011 presented to Family Bank on 19th January 2011 were made by the Appellant. Important, as well, was that the Document Examiner was unable to find any agreement between the writings and signature on the questioned document with the other handwritings and signatures that he examined. Thus ruling out that the questioned document was authored by any of the other persons other than the Appellant.

17. On the evidence of the Document Examiner, there would be reason to believe that it is the Appellant who forged the controversial cheque. And, that evidence would be further strengthened because the person to benefit from the forgery was Jeff Electricals. It was conceded by the Appellant that Jeff Electricals is his trade name. For this reason, I fully endorse the following finding by the Learned Magistrate;

“The fact that accused was the one who had filled out the cheque in his favour raises an overwhelming presumption that he intended to use the cheque to illegally enrich himself.”

18. On my own analysis, this Court finds as the Trial Court that the Prosecution discharged its onus as required by the law. It did not matter that the Appellant himself did not present the cheque for payment. That is why he was acquitted on the charge of uttering the cheque. What mattered is that there was evidence that he drew and authored the forged cheque. That evidence was corroborated by the fact that he was to benefit from the forgery. The charge was proved beyond reasonable doubt.

19. But before I make my disposition, I have to consider the merit of the Appellant’s submission that the trial contravened the provisions of Article 50 (2) (c) (**Perhaps Article 50 (2) (j)?**) of the Constitution 2010. Under that Article, an accused person has a right to be informed in advance of the evidence the Prosecution intends to rely on, and to have reasonable access to that evidence. The complaint by the Appellant is that the documents relied on by the Prosecution were not provided to him in advance. I have looked at the entire proceedings, and I am unable to find any reason for holding that those documents were not provided to the Appellant in advance of the evidence. At no time during the trial did the Appellant complain about the non-availability of the documents. And, this Court is not told that the complaint could not have been raised during the hearing. I think that this is an afterthought. No wonder it was not raised in the Memorandum of Appeal which was filed 13 days after the conviction but only came up many months later in the Appellant’s written submissions. I find no merit in the complaint.

20. For reasons that I had earlier stated, I uphold the Trial Magistrate’s finding on conviction. On the sentence, the Trial Magistrate imposed a prison term of 2 years. Section 349 of the Penal Code provides that the general punishment for forgery is a liability to imprisonment for 3 years. The 2 years imposed by the Trial Magistrate was therefore lawful. However, being a first offender, it would be expected that the prison term be shorter. But, the Trial Court explained the harshness of the sentence imposed. After the close of the Defence case, the Appellant absconded and it took the effort of his surety to secure his attendance on the 16th of October 2012 when judgment was read. That behavior negated against the imposition of a more compassionate sentence. I see no reason to interfere with the sentence imposed by the Trial Court.

21. The Result. The entire Appeal lacks merit and is hereby dismissed.

F. TUIYOTT

J U D G E

DATED, SIGNED AND DELIVERED AT BUSIA THIS 23RD DAY OF JANUARY 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

.....FOR APPELLANT

.....FOR RESPONDENT