



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.167 OF 2011

ARTHUR GAKUO KIRUTHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.4010 of 2009 by Hon Hon. W. Juma, Chief Magistrate, dated 9th November, 2010]

JUDGMENT

1. The appellant was charged with the offence of **Forgery** contrary to **Section 349** of the **Penal Code**.
2. There was also an alternative count of **making a document without authority** contrary to **Section 357(a)** of the **Penal Code**.
3. The particulars of the offence are that the appellant was arrested whilst posing as a Police Officer. Upon being searched, he was found in possession of a Police Certificate of Appointment
4. The Force Number on the Certificate – No.52478, belonged to Reuben Kemu Kiptingos (**P.W.2**) who was a Police Officer attached to Olereko Police Patrol Base in Trans Mara.
5. The names found on the Certificate were that of Michael Warui Karanja.
6. The appellant was convicted and sentence to eighteen (18) months imprisonment.
7. Being aggrieved by the decision of Hon. W. Juma, Chief Magistrate delivered on the 9th November, 2010, the appellant preferred this appeal and in his Petition of Appeal listed six (6) Grounds of Appeal inter alia:
 - i. That the learned trial magistrate erred in finding that the charge against the appellant had been proved beyond reasonable doubts
 - ii. That the learned trial magistrate erred in law and in fact in failing to give the appellant the benefit of doubt which arose from the evidence adduced.
 - iii. That the prosecution or respondent's case was replete or full of contradictions which ought to have been resolved in favour of the Appellant by the learned trial magistrate
 - iv. That the respondent did not adduce sufficient evidence to prove the case against the Appellant beyond all reasonable doubts and the magistrates finding is not supported by the weight of evidence adduced.
 - v. That the trial court proceeded on an erroneous proposition that the appellant had a duty to establish his innocence instead of the correct legal proposition that the respondent had the onus of proving the case beyond all reasonable doubt.
 - vi. That the trial court was obviously biased.
1. At the hearing of the Appeal, both counsel for the appellant, Mr. Maragia and Prosecuting Counsel for the State, made oral submissions.

2. The Appellant's counsel submitted that it was the evidence of P.C. Pasieny Stephen (**P.W.1**) that he had received information that there was a person posing as a Police Officer.
3. **P.W.1** and **P.W.3** searched the appellant and found a Police Certificate of Appointment hidden under a cap he was wearing.
4. The Appellant was arrested yet both witnesses, that is P.W.1 and P.W.3 stated in their evidence that the appellant was not acting suspiciously.
5. Counsel further contended that no independent witness was called to give details as to how the Certificate of Appointment was being used by the Appellant before he was arrested.
6. Counsel referred the court to the entries in the Occurrence Book (OB) which entries indicate that the appellant was initially booked for the offence of robbery.
7. That even the evidence of P.W.1 confirmed that he had arrested the appellant on suspicion of robbery.
8. It was counsel's submission that the entries in the OB made no mention of the offence of forgery nor was there any entry of the forged document that is the Certificate of Appointment.
9. Counsel's contention is that the OB ought to contain a first report of forgery and the Certificate ought to have been exhibited therein and that such an omission was indicative of the fact that no such offence occurred on the 28th July, 2009 or at all.
10. Counsel urged the court to quash the appellant's conviction and set aside the sentence as the evidence of the police officers was that "***the appellant was not acting suspiciously***" and therefore exonerated the appellant on the charge of forgery and impersonating a Police Officer.
11. Prosecuting Counsel for the State opposed the appeal and submitted that the appellant was properly convicted under the provisions of **Section 349** of the **Penal Code** being that of forgery.
12. Counsel submitted that the appellant was arrested and found in possession of the forged certificate with a Force Number belonging to P.W.2.7
13. That evidence was adduced and it was established that the Certificate of Appointment was a forged certificate.
14. It was counsel for the State's contention that the appellant was arrested on suspicion of being involved in a robbery.
15. That after being cleared of involvement in a robbery, the offence was substituted with that of forgery. Counsel's contention was that there was no need of mentioning the forgery issues in the OB entry.
16. Counsel submitted that the trial court made direct observations on the "fitting" of the hat and after deep analysis and upon the strength of the evidence adduced, the trial court rightly convicted the appellant.
17. Counsel urged the court to uphold the conviction as it was safe and also uphold the eighteen (18) month sentence imposed and to dismiss the appeal.

ISSUES FOR DETERMINATION:

18. Upon hearing the submissions of the parties, this court finds the following issues for determination
 - a. whether the prosecution proved intent and motive;
 - b. whether the prosecution proved the offence of forgery beyond reasonable doubt.

ANALYSIS:

19. This being the first appellate court, it is incumbent upon the court to re-assess and re-evaluate the evidence on record and come up with its own independent conclusion. Refer to the case of **Okeno V. Republic** [1972] E.A. 32.
20. This court has had occasion to peruse the charge that the appellant was convicted on and the words used in the particulars are:

"...forged a Kenyan Police Certificate of Appointment..."

21. The words forged connote or imply that the appellant made the forged document, yet no evidence is on record to show or prove that the appellant was arrested with any equipment used in the

- making of the forged document.
- 22.The other aspect of the offence of forgery is that if there is no proof of making, there must be proof of intent or motive.
 - 23.It is incumbent upon the prosecution to prove that there was intent to deceive or defraud.
 - 24.The evidence of **P.W.1** and **P.W.2** was that when they arrested the appellant, he was not acting “*suspiciously.*”
 - 25.It was also their evidence that they received information that there was a person posing as a Police Officer. 7
 - 26.That this court notes that no person was brought by the prosecution as witness to testify that he/she was the supplier of the information.
 - 27.This court concurs with the appellant's Counsel's submissions that the prosecution failed to call an independent witness and/or the informant to testify as to how the appellant used the forged document and that he/she was deceived or defrauded by the use of this document.
 - 28.The evidence of **P.W.1** and **P.W.3** was that they searched the appellant and found the forged document hidden under the hat he was wearing.
 - 29.The question posed by the court is that if the appellant was not acting suspiciously and the document was found hidden under a hat, what improper motive or intent can then be inferred?
 - 30.It is also interesting to note that the evidence of **P.W.1** and **P.W.3**, both Police Officers, was that the information they received related to a person posing as a policeman and that the arrest of the appellant was on the strength of the forged documents.
 - 31.Yet when the appellant was booked, the OB entry related to the offence of robbery and no mention was made therein of forgery or the forged documents.
 - 32.There can be no logic in arresting the appellant with forged documents and then proceeding to book him for robbery.
 - 33.This court further opines that the failure to call an independent witness, by the prosecution to verify whether the information received related to robbery or forgery casts great aspersions as to the intentions of the police, whether noble or otherwise.

FINDINGS

- 34.For the reasons stated above, this court finds that failure to prove intent or improper motive means that the prosecution failed to prove its case beyond reasonable doubt.
- 35.The appeal is found to have merit in its entirety.

CONCLUSION

- 36.The appeal is hereby allowed.
37. The conviction is hereby quashed and the sentence set aside.
- 38.The appellant to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 22nd day of January, 2014.

A. MSHILA

JUDGE