



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION CRIMINAL**  
**APPLICATION NO. 514 OF 2007**

SAMUEL O. OCHIENG .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**J U D G M E N T**

**Introduction**

1. At the trial which gave rise to this appeal the appellant and another faced seven counts of making a document without authority contrary to **Section 357(a)** of the **Penal Code**. In addition they faced four counts of forgery contrary to **Section 349** of the **Penal Code** and one count of stealing contrary to **Section 275** of the **Penal Code**.

**Brief Particulars**

2. The particulars in the three counts in which the appellant was convicted were that on the 18<sup>th</sup> day of March 2004 at Murang'a Properties Building Accra Road within Nairobi area, jointly with others not before the court, with intent to defraud, without lawful authority or excuse they made certain documents namely;

40 copies of delivery notes in the name of Triton Petroleum Company Limited in count I;

500 copies of loading instructions to National Oil Corporation of Kenya purporting them to be documents issued by Triton Petroleum Company Limited in count 2; and six cash receipts for Triton Petroleum Company Limited in count 3.

3. **Count 4** stated that on or about 27<sup>th</sup> February 2004 at unknown place, within the Republic of Kenya, jointly with others not before court, with intent to defraud, without lawful authority or excuse, made a certain document, namely loading instructions to National Oil Corporation of Kenya serial number 24561, and 24562 respectively, purporting it to be genuine documents issued by Triton Petroleum Company Limited.
4. **Count 10** stated that on or about 8<sup>th</sup> march 2004, at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud and without lawful excuse, made a certain document, namely loading instructions to National Oil Corporation of Kenya no. 34559 purporting it to be a genuine document and issued by Triton Petroleum Company Limited.

5. The appellant and his co-accused denied the charges and the prosecution called twelve witnesses to prove their case. At the close of the trial they were convicted in six out of the seven charges brought under **Section 357(a)** of the **Penal Code** and acquitted in the rest of the charges. They were sentenced to pay fines of Kshs.300,000/- in default to serve one (1) year imprisonment in counts no. **1** and **2**, and to fines of Kshs.100,000/= in default to serve one (1) year imprisonment in counts no.**3,4** and **10** respectively.
6. The appellant's co-accused John Bosco Saria, successfully appealed against the trial court's decision and all convictions entered against him were quashed and the sentences imposed upon him set aside on 6<sup>th</sup> may 2009. This appeal is therefore in respect of the appellant Samuel Odhiambo Ochieng alone and will only refer to the counts in which he was convicted.

## **Background**

7. The background to this case is that on 17<sup>th</sup> March 2004, representatives of Triton Petroleum Company reported to their Advocate Mr. Ombeta, **PW1** that some documents purported to be from their company were being printed in some premises along Accra Road. Mr. Ombeta after preliminary investigation, reported the matter to the police and accompanied them to Murang'a Properties Building in Nairobi on 18<sup>th</sup> March 2004. They found the appellant. A search in the premises led to the recovery of six cash sale receipts, and loading instructions to National Oil Corporation of Kenya, SN 24561, 24562, 34517, 34556, purported to be genuine and issued by Triton Petroleum Company Limited.
8. According to **PW1** who was present during the search, the appellant said the Triton documents were brought to him by one Bosco who worked at Westlands and that he (the appellant) did the printing on second floor. He led the police to Westlands where he identified the appellant.
9. "**Section 357** of the **Penal Code** under which the appellant was convicted provided that any person who, with intent to defraud or to deceive

**“without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing.”**

is guilty of a felony and is liable to imprisonment for seven years”

10. Learned counsel Mr. Odera submitting on behalf of the appellant, relied on the grounds of appeal set out in the appellant's petition dated 7<sup>th</sup> September 2007 in their entirety. Mr. Odera, however laid emphasis on three grounds therein that he termed fundamental.
11. Mr. Odera first, argued that under **Section 311** of the **Criminal Procedure Code**, the trial court had a duty to call upon the accused person or his advocate to address the court at the close of the case since the accused person elected to remain silent in his defence. Second, that the circumstantial evidence on which the court relied, did not meet the threshold upon which the appellant should have been convicted. Third, that the appellant was not found doing the actual printing and that for the court to have suggested that he should have explained his presence or said something in his defence was a kin to shifting the burden of proof onto him.
12. In rebuttal Miss Ndombi for the respondent addressed herself to the provisions of **Section 310** of the **Criminal Procedure Code**, on the first ground. On the second and third grounds Miss Ndombi stated that **PW2** visited the location where the offending documents were said to be printed and found the appellant and the documents and that the appellant offered no explanation as to his presence or why he had the documents. Hence the finding of the court that he was guilty.
13. In my analysis on the first ground, **Section 311** of the **Criminal Procedure Code** stipulates a

procedural requirement and in my view no prejudice has been demonstrated to have been occasioned to the appellant by the non-compliance with the said section. This is more so since the appellant was represented and his counsel made submissions at the close of the prosecution case, on no case to answer.

14. On the second ground, in the celebrated case of **R v Kipkering Koske (1949) EACA pg 135**, to which Mr. Odera referred me, proof of a case on the basis of circumstantial evidence was enunciated thus at pg 136:

**“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused.”**

In the case before me the appellant is said to have been arrested because he was found at the premises where some documents bearing the name of the complainant company were also found. He was not found printing the documents nor was there any evidence linking him with Zamolek Enterprises who were said to have printed the documents.

15. On the third ground the court is in agreement. As stated above the appellant was not found printing the documents nor was there any evidence linking him with Zamolek Enterprises who were said to have printed the documents. The evidence of **PW11**, CPL Wambua who conducted part of the investigation was that they did not find the equipment used to print the documents nor the plates and negatives at the said premises.

16. This being a criminal case the burden of proof rests without shifting upon the prosecution. The appellant's election to remain silent when placed upon his defence was his right as provided by law and should not have been held against him.

17. On the fourth ground Mr. Odera submitted that **Section 200 Criminal Procedure Code** was not complied with when a succeeding magistrate took over the case from the one who commenced the trial. Miss Ndombi replied that page 26 of the proceedings shows that the appellants were notified of their rights under **Section 200(3) Criminal Procedure Code** and that one of the two advocates on record informed the court that they wished to proceed from where the case had reached.

18. I have perused the record and find that the trial court did explain to the appellants in depth, what their rights under **Section 200(3) Criminal Procedure Code** entailed. Indeed one of the advocates on record responded that they wished to proceed from where the case had reached. I therefore find that **Section 200(3) of the Criminal Procedure Code** was complied with.

19. In sum, I find that the evidence against the appellant was tenuous and did not meet the threshold of proof beyond reasonable doubt. For the foregoing reasons this appeal succeeds. The convictions in each of the six counts are quashed and the appellant's sentences set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED and DELIVERED** in open court this **26<sup>th</sup>** day of **March 2014**.

**L. A. ACHODE**

**JUDGE**