



IN THE HIGH COURT AT HOMA-BAY

CRIMINAL APPEAL NO. 3 OF 2013

BETWEEN

BOAZ OWITI OKOTH 1ST APPELLANT

TOM MBOYA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 902 of 2010 at Principal Magistrate's Court at Rongo, Hon. Z. Nyakundi dated on 28th March 2012)

JUDGMENT

1. In the subordinate court, the appellants **BOAZ OWITI OKOTH** and **TOM MBOYA** were charged with three counts as follows:

Count 1

Forgery contrary to section 349 of the Penal Code CAP 63 Laws of Kenya

Particulars: On the 23rd day of July 2010 at Migori Township in Migori District within Nyanza province, jointly with others not before the court (they) jointly with others not before court with intent to defraud forged a certain document namely plaint purporting to be a valid and genuine plaint filed before the High Court Kisii in Civil suit No. 214 of 2010.

Count 2

Attempt to extort by threats, contrary to section 300(1) (c) of the Penal Code CAP 63 Laws of Kenya

Particulars: On the 1st day of August 2010 at Migori Township in Migori County within the Republic of Kenya, (they) jointly with others not before court, with intent to extort money from **PETER EDICK OMONDI ANYANGA** threatened to sue **PETER EDICK OMONDI ANYANGA**.

Count 3

Forgery contrary to section 345 as read with Section 349 of the Penal Code CAP 63 laws of

Kenya

Particulars: *On the 23rd day of July 2010 at Migori Township in Migori County within the republic of Kenya (they) jointly with others not before court, with the intent to deceive forged a certain rubber stamp impression purporting it to be a valid and genuine rubber stamp impression stamped at the Civil Registry at Kisii High Court.*

2. They pleaded not guilty and after a full trial, they were acquitted on count 2 and each of them convicted on count 1 and 3 and sentenced to three years for each offence. The sentences were ordered to run concurrently. In the meantime they were released on bail pending appeal.
3. To prove its case, the prosecution assembled six witnesses to testify. PW1, a court clerk at Kisii Law Courts, testified that on 13.08.2010 he met the second appellant carrying a notice of withdrawal of suit in respect of **HCCC No. 214 of 2010** which had already been assessed and paid for. He confirmed that the suit had been filed on 27.07.2010 on behalf of the 1st appellant by the 2nd appellant against PW4 seeking Kshs. 115,500.00.
4. PW2 testified that on 13.08.2010 he was at work when the first appellant in the company of a clerk from a law firm came to complain about **HCCC No. 214 of 2010**. The first appellant said that he was the plaintiff in the said suit and that he wanted to know what was contained in the Plaintiff. He testified that 1st appellant complained that the claim in the plaintiff was not what he wanted and that the suit had been withdrawn without his instructions. PW2 advised him to go to his advocate.
5. PW3, an advocate of the High Court practicing in Kisii, stated that he was instructed by PW4 to defend him in **HCCC No. 214 of 2010** where he had been sued by the 1st appellant. He applied for a copy of the pleadings from the court and found that the claim was for Kshs. 115,550.00. When he called PW4 to advise him to settle the claim out of court, PW4 informed him that the plaintiff he had been served with was for a sum of Kshs. 11,550,000.00. PW4 sent PW3 the plaintiff in his possession and he confirmed that the amounts claimed in both plaintiffs were different. PW4 then instructed PW3 to lodge a complaint with the police. PW3 confirmed the existence of another case **HCCC No. 260 of 2010** in which the 1st appellant claimed Kshs 11,550,000.00 from PW4.
6. PW4 recalled that on 29.07.2010 he was at Awendo when someone, who identified himself as a process server from Kisii Law Court, served him with an envelope containing a plaintiff drawn and filed by the second appellant. It was the claim filed in **HCCC No. 214 of 2010** against him for Kshs. 11,500,000.00 made by the 1st appellant. He instructed counsel, PW3, to take up the matter and defend him and that PW3 realized that the plaintiff in the court file was not the same as the Plaintiff he had been served with. He instructed PW3 to lodge a complaint with CID.
7. PW5, a police officer, testified that he investigated the matter. He was instructed to ascertain whether the receiving stamps on the two plaintiffs as well as the signatures were from the same stamp and person respectively. He stated that from his investigations he established that the signatures on both documents were appended by the same person while the court stamps were different. PW6, a police officer, testified on behalf of the document examiner and produced his report which established that the signatures on the plaintiffs were the same and that the court stamp impression on both documents was not the same.
8. PW7, the investigating officer, testified that he caused the appellant to be arrested following the complaint lodged by PW3. He went to Kisii High Court where he established the existence of **HCCC No. 214 of 2010**. He obtained certified copies of the pleadings, recorded statements from two court clerks, obtained specimen signatures from the verifying affidavit and stamp impressions from the two documents and forwarded them to a document examiner who later discovered that the signatures were the same but the stamp impressions were not.
9. When put on their defence, the 1st appellant (DW1) gave a sworn statement while the second

appellant (DW2) gave an unsworn statement. DW1 stated that he was a contractor and that he had won a tender in Nyatike Constituency. He stated that he knew the complainant, PW4, as he had assisted him during election campaigns in 2007. After winning the tender, PW4, called him and told him that he could supply him with building materials for the tender he had won. He also requested him to lend him some money so that he could be able to supply the materials. He stated that lent PW4 a total of Kshs. 11,550,000.00 on various dates but despite lending PW4 the money, he failed to deliver the materials. When DW1 demanded the money, PW4 became hostile and engineered his arrest at Migori on 07.07.2010 on grounds that he had been given a public project and failed complete it.

10. Upon release the DW1 instructed DW2 to file suit at the High Court at Kisii against PW4. DW2 filed the suit but later withdrew it. He learnt that the withdrawn suit was not what he had instructed DW2. He was served with a demand for costs of the withdrawn suit **HCCC No. 214 of 2010** which he paid. He instructed another advocate to file suit **HCCC No. 260 of 2010** in which he claimed Kshs. 11,550,000.00 from PW4.

11. DW2 told court that he was a victim of circumstances due to the deep rooted grudge between DW1 and PW4 and that he was being punished for taking up instructions from DW1 to file suit against PW4. He testified that on 17.09.2010, a matter was reported in Migori and that he was charged with robbery but was never arrested despite presenting himself to the police. He said that the difference in the figures was a result of a typographical error from his secretary and that the same could be amended.

12. Being dissatisfied with the conviction and sentence, the appellant filed individual petitions of appeal dated 29th March 2013. The first appellant relied on the following grounds:

1. *The learned trial magistrate erred in law and in fact in finding that the prosecution had proved its case beyond any reasonable doubt on the two counts as required by law.*
2. *That the learned trial magistrate erred in law and in fact in concluding that there was common intent between the appellant and his-co accused.*
3. *The learned trial magistrate erred in law and in fact in concluding that there was criminal involvement of the appellant in the forgery of the alleged plaint and the stamp when in fact there was no evidence at all as the plaint discloses the drawer and the filer thereof.*
4. *The learned trial magistrate erred in law and in fact in including that execution of a verifying affidavit was equivalent to forgery of the accompanying plaint when the two documents are separate and distinct in criminal justice.*
5. *The learned trial magistrate erred in law and in fact in linking the appellant to the forgery of the stamp without any evidence connecting him to the same.*
6. *The learned trail magistrate erred in law and in fact in failing to appreciate the principals relating to advocate client relations which wholly exonerated the first appellant in respect of the charges*
7. *The learned trail magistrate erred in law and in fact in failing to appreciate that the prosecution case was not safe for conviction on either of the charges.*
8. *The learned trail magistrate erred in law and in fact in failing to appreciate the deep seated bad blood between the 1st appellant and PW1 relating to unsettled debts.*
9. *The learned trial magistrate erred in law and in fact in failing to appreciate that the charges as drawn were defective and could not support a conviction.*
10. *The learned trial magistrate erred in law and in fact in punishing the 1st appellant for issues that were fully in the hands of his counsel.*
11. *The learned trial magistrate erred in law and in fact in meting sentences which were excessive and harsh in the circumstances.*
12. *The learned trail magistrate erred in law and in fact in relying on the document examiner's evidence which was defective in law.*

13. On his part, the second appellant relied on the following nine grounds:

1. *The learned trial magistrate erred in law and in fact in failing to appreciate that the charges as drawn were defective hence could not sustain any lawful conviction.*
2. *That the learned trial magistrate erred in law and in Fact in failing to appreciate that the prosecution case was not safe for conviction as the same had glaring gaps and contradictions.*
3. *That the learned trial magistrate erred in law and in fact in failing to appreciate that the matter before the court was more of a civil nature thus attracting no criminal liability.*
4. *The learned trial magistrate erred in law and in fact in failing to appreciate that there existed a deep grudge and bad blood between the first appellant and PW1 which could easily point to framing and settling scores.*
5. *The learned trail magistrate erred in law and in fact in failing to appreciate that there was no tangible evidence linking the second appellant to the alleged forged documents as the process server thereof was not availed in court.*
6. *The learned trail magistrate erred in law and in fact in meting out sentences which were excessive and harsh in the circumstances.*
7. *The learned trail magistrate erred in law and in fact in erroneously concluding that there was common intent between the appellants without any tangible evidence.*
8. *The learned trial magistrate erred in law and in fact in failing to appreciate the defence adduced by the appellant properly as required in law.*
9. *The learned trail magistrate erroneously relied on the document Examiner's evidence which was defective in law.*

14. The grounds outlined by the appellants call upon this court, as the first appellate court to review the facts of the case independently and come to its own conclusion making allowance for the fact that it neither heard nor saw the witnesses testify (see ***Okeno v Republic (1972) EA 32***). The appellants, through their counsel made submissions in support of the appeal. The State through its counsel, Mr Oluoch, conceded that the conviction could not be supported.

15. I have considered the submissions I take the following view of the matter. The relationship between the appellants was that of an advocate and client. The 1st appellant was the client of the 2nd appellant, an advocate. The 1st appellant instructed the 2nd appellant to file suit on his behalf against PW4 to claim Kshs 11,500,000.00. The plaint and verifying affidavit in **HCCC No. 214 of 2010** were drawn and filed by the 2nd appellant. The case was later withdrawn by a notice of withdrawal and in fact costs assessed and paid to the PW4. The learned trial magistrate found as a fact that the plaint filed was genuine as per the evidence of PW1 and PW2. Moreover, PW3 used the same plaint to assess the costs. From these facts it is clear that the 1st appellant gave his advocate instructions to file suit against PW4. There is no evidence that he did anything else in the matter other than instruct the 2nd appellant, his advocate, to file suit. The learned magistrate was therefore wrong to ascribe common intention to commit forgery by holding that the 1st appellant was liable by signing the verifying affidavit when the verifying affidavit was not the subject of the charge before the court and when it was clear that the pleadings were drawn and filed by the 2nd appellant. Furthermore, considering the defence of the 1st appellant, where he explained his dealings with PW4 and his relationship with the 2nd appellant, I find that the charges against the 1st appellant could not stand. In the circumstances, the State properly conceded the appeal. I find and hold that the prosecution evidence cannot support the conviction of the 1st appellant.

16. In order to prove the offence of forgery charged in the 1st and 3rd count, the prosecution called PW6, a police officer, who produced a report prepared by a document examiner. The appellants raised an objection to the production of the report by the police officer who was not the maker thereof as this was contrary to **section 33 of the Evidence Act (Chapter 80 of the Laws of Kenya)**. The learned magistrate disallowed the objection on the basis that the prosecution had laid a basis for its production and that the appellants could deal with the concerns about admission in cross-examination.

17. **Section 33** of the *Evidence Act* provides for admission of statements made by persons who cannot be called as witnesses. The opening part of the section states as follows:

33. Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

18. In order to admit a document without calling the maker under **section 33** of the *Evidence Act*, the prosecution must establish the conditions precedent outlined in the section, that is, the maker of the document is dead, cannot be found, is incapable of giving evidence or whose attendance cannot be procured without great delay or expense. I would hasten to add that admissibility is a threshold issue that must be determined before the document is admitted. It was therefore wrong for the learned magistrate to hold that issues of admission could be addressed or cured by cross-examination.

19. From the record, PW6 did not state why the document examiner could not come and testify and why testified he on his behalf. All he stated was that he knew the document examiner and was able to identify his signature. He did establish the any evidential basis for admission of the document as required by **section 33** of the *Evidence Act*. The failure to deal with the documentary evidence in accordance with the law led to a fatal error to the prosecution case. Mr Ocharo, counsel for the 1st appellant, further pointed out that the exhibit memo form was dated 12th May 2011 yet the document examiner's report states that he received the exhibit memo form dated 12th May 2010 which implied that the document examiner examined another document not related to the case. In dealing with error the learned magistrate stated that this error in the document examiner's report was a mere mistake and was not fatal to the prosecution case.

20. The learned magistrate could not come to such a conclusion in the absence of the evidence of the maker of the document that the date in the report was a mere error in the absence of an explanation by the maker or any other evidence enabling the court to come to such a conclusion. I find and hold that learned magistrate erred in admitting the document examiners report without calling the maker thereof. The report could not be relied upon to form the basis of the conviction for the offence of forgery on count 1 and 3.

21. Counsel for the appellants and the State all agree that the matter in this case was in the nature of a civil case and it was unnecessary to resort to criminal charges. The intent to defraud or deceive, which was *mens rea* to be proved by the prosecution to establish the appellants' guilt on both counts, was clearly negated by the admission by PW3 that there was a genuine claim, to wit **HCCC No. 260 of 2010**, in which PW1 sued PW4 for Kshs. 11,550,000.00 and was being defended by him.

22. In light of the findings I have made, I do not find it necessary to consider all the grounds and arguments that have been raised by the appellants and the State.

23. The appeal is allowed. The conviction and sentence are set aside.

DATED and DELIVERED at HOMA BAY this 14th August 2014

D.S. MAJANJA

JUDGE

Mr Ocharo instructed by Ocharo and Company Advocates for the 1st appellant.

Mr Ongoso, Advocate, instructed by the 2nd appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.