



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 5 OF 2011

SAMUEL ULUNGA OWINO.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the sentence of Hon. S.M. Mungai (S.P.M) delivered on 14/01/2011 in Machakos Chief Magistrate's Court Criminal Case No. 133 of 2009)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Samuel Ulunga Owino**, was jointly charged with two others as follows:-

Count I: Making a document without authority contrary to **section 357 (a)** of the **Penal Code**.

The particulars of the charge were that “on diverse dates between 1st January 2009 and 14th January 2009 at **Athi-River Township** in **Machakos District** within **Eastern Province** jointly with intent to deceive or defraud without lawful authority or excuse made a certain document namely letter to investigate suspects of **Economic and Commercial Crimes** from **Criminal Investigations Department CID Headquarters Nairobi** addressed to Chief Inspector **P. Musyoka**, purporting the said letter to be genuine and authorized letter by the officer in charge **Economic and Commercial Crime Unit CID Headquarters Nairobi Mr James Muinde (ACP)** a fact you knew to be false”.

Count II: Personating a public officer contrary to **section 105 (b)** of the **Penal Code**.

The particulars of the charge were that “on the 14th day of January 2009 at **Athi-River town** in **Machakos District** within **Eastern Province**, jointly presented themselves to be persons employed in the public service, namely police officers from **CID Headquarters Nairobi** and assumed to arrest **Joyce Nyangeri** and **Thomas Nyangeri**”.

2. The Appellant pleaded not guilty. After a full trial the Appellant was convicted in both Count I and II. The Appellant was sentenced to serve 2 years imprisonment in Count I and one year in Count II. The Appellant was aggrieved by both the conviction and sentence and appealed to this court. Although the Appellant in his memo of appeal had listed 12 grounds of appeal, the Appellant’s counsel during submission collapsed them into two grounds as follows:-

- **The conviction was against the weight of the evidence.**
- **The charges were defective.**

3. During the hearing of the appeal, the Appellant’s counsel relied on written submissions which I have duly considered.

4. The learned counsel for the State conceded to the appeal.

5. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – *See Okeno –vs- Republic (1972) EA 32.*

6. PW1 **Joyce Bosieri Nyangeri** testified that the Appellant was one of the three men who went to her house and introduced themselves as police officers from Headquarters who were interrogating suspected criminals. That PW1 and his husband PW2 **Thomas Nyangeri Onyancha** were on the list of the said suspected criminals. PW1 telephoned her husband (PW2). The husband who smelt a rat returned home with police officers from **Athi River Police Station**, among them **CPL. Mboya** (PW3). Upon interrogations by PW3 and PW5 **CIP Festus Kyambi**, it turned out that the Appellant and his two accomplices were not police officers. Arrests were made and the Appellant and the two others ended up in court.

7. The Appellant in his defence case gave sworn evidence. He denied the offences. His case is that he had accompanied his colleagues to the house of PW1 and PW2 where one of them had a contract to carry out some private investigations. That his colleagues and they had informed him that he could secure a contract for security services for his company. The Appellant denied the charges and stated that he introduced himself as a former police officer. He described himself to the court as a victim of circumstances.

8. The totality of the evidence of the prosecution witnesses (PW1, PW2, PW3 and PW5) is that the Appellant falsely presented himself to them as a police officer. However, as rightly argued by the Appellant’s counsel and the counsel for the State, the charge sheet in the count of personating a public officer is defective. Under **section 105 (b)** of the Penal Code, the words “falsely” represented himself is an essential ingredient of the offence. Without the said word, the particulars of the offence do not disclose any offence known in the law.

9. In the first count of making a document without authority, there is no iota of evidence to establish who made the document. The document in question was not found with the Appellant and there is no evidence that links him to the making of the same.

10. With the foregoing, I find the appeal has merits and I allow the same. I quash the conviction and set aside the sentence. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of October 2014.

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JUDGE