



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 521 of 2010

MOSES MUNYOKI MWENDWA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of Mrs. S. Muketi, Principal Magistrate (as she then was), in the **Chief Magistrate's Cr. Case no. 445 of 2004** at Nairobi on 18<sup>th</sup> November, 2008. In the said judgment the learned magistrate convicted the appellant as charged for the offence of forgery contrary to **section 349** of the **Penal Code** in **counts No. 1, 3, 4 and 6**, and for the offence of making a document without authority contrary to **Section 357(a)** of the **Penal Code** in **counts No 2 and 5**
2. Upon conviction the learned trial magistrate sentenced the appellant to pay a fine of Kshs.50,000/= in each of the six counts and in default to serve 12 months imprisonment on each count.
3. On 30<sup>th</sup> September 2010 the appellant filed a petition of appeal in which he raised 11 grounds of appeal. In the grounds of appeal he faulted the learned magistrate's reliance on circumstantial and uncorroborated evidence in reaching her findings. It was urged by Mr. Njugi the learned counsel for the appellant that there was no circumstance in the prosecution case to link the appellant to any of the offences for which he was convicted.
4. Mr. Njugi further urged that the theories put forth by the prosecution were not corroborated, and that the learned trial magistrate based her conviction on hearsay evidence. He also contended that the charges were fatally defective, for the reason that the appellant should have been tried under **Section 350** of the **Penal Code** instead of **Section 349** of the **Penal Code** since the charges were particularized as forgery of land documents and judicial documents. Mr. Njugi submitted finally that the testimonies of the prosecution witnesses had a lot of inconsistencies, which should have been resolved in the appellant's favour.
5. In response Mr. Mulati the learned state counsel argued that the appellant failed to discount the prosecution case in his defence and that the appeal was untenable and should be dismissed. He contended that the 1<sup>st</sup> accused John Njoroge Ngugi, was a joint holder of the parcel of land which was the subject matter of the case, together with the complainant. That John Njoroge Ngugi contrived to register a lot more land than the relevant parcel of land in the said transaction and the appellant herein did the conveyancing on his behalf.
6. I have anxiously re-evaluated the evidence on record bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record to see if there was some evidence to

support the lower court's findings and conclusion. This is in line with **Kiilu and Anor v Republic [2005] 1 KLR pg 174**, in which the learned Judges of Appeal, Tunoi, Waki and Onyango Otieno JJA, held *inter alia* that:

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts’ own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.”***

7. I have perused the proceedings and note that none of the prosecution witnesses testified to having witnessed the appellant either forge any of the documents or make them as set out in the respective charges.

8. Secondly, the provisions of **Section 350 (1) of the Penal Code**, adverted to by Mr. Njugi are specific to charges where forgery of documents of title to land and judicial records are involved. The charges in this case were brought under **Section 349 of the Penal Code**, which is a general provision for forgery of any document.

9. In **Yongo -vs- Republic [1986] KLR 323**, on which the learned counsel relied the Court of Appeal had this to state:

**“In our opinion, a charge is defective under Section 214(1) of the Criminal Procedure Code where:-**

**a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offence in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or**

**b. It does not, for such reasons, accord with the evidence given at the trial; or**

**c. It gives a misdescription of the alleged offence in its particulars.”**

10. The documents said to have been forged in the case before me included letters of consent from Oloolaiser Land Control Board in Ngong, letters of transfer of land and two court orders in **HCCC No. 2796 of 1998** and **3138 of 2002** respectively. There was no document of title to land said to have been forged.

11. **Section 349** of the **Penal Code** is generalized in application and covers:

**...”any person who forges any document”...**

In any case, the particulars were set out in the charge sheet so that the appellant understood both the charges facing him and the particulars therein. The charges were therefore neither defective nor was the appellant prejudiced in this regard.

12. My disquiet however, arose from the evidence itself which revealed that **PW2** Mr. Issack Advocate, exonerated the appellant and failed to connect him to the charges, while **PW4**, Mr. Onamu the Executive Officer, testified that the files alleged to have been forged did not exist at the High Court registry, and he could not tell who made the documents in question. **PW5**, Mr. Simon Rotich testified that he never encountered the appellant, while **PW6**, Mr. Saitoti testified that he did not see the appellant at the plenary and disowned the testimony of **PW1**.

13. **PW7** Mr. Kenga, the document examiner, testified that the appellant's handwriting samples were not part of his investigations and he could not therefore, conclude that the questioned entries were made by the appellant. **PW8** could not recall the utterer of the documents, while **PW9**, **PW10** and **PW11** did not give any relevant testimony in relation to the case.

14. With regard to making of documents, no evidence was adduced to demonstrate that it was the

appellant who made the documents in question. With regard to forging of court documents, it would have been prudent for Justice (Rtd) Kuloba to be called as a witness to either confirm or deny that he issued the orders in question. This failure would not, on its own however, deal a fatal blow to the prosecution case in view of the non existence of the cases in which the orders were said to have been made, in the court registry. In view of all the foregoing discrepancies it is difficult to determine on what basis the trial magistrate reached a conclusive finding that the appellant forged the documents.

**15.** It is not in dispute that there existed a dispute between Kawangware Camena Ltd, in which the complainant and his two wives are the directors, and Funguo Enterprises Ltd in which his daughter and son-in-law are directors. The appellant herein became a nominee of Funguo Enterprises Ltd, to act as a director in place of the complainant's son-in-law who was on a tour of duty outside the country.

**16.** I have with great care, scrutinized and reviewed the lower court record in order to determine whether the conclusion reached upon that evidence should stand. I have also considered the grounds of appeal, the submissions of both counsels, and the cases to which I was referred as:

**(1) Republic vs Joshua Kirimi Nyaga and 3 others (2009) eKLR,**

**(2) Jane Wangechi vs R (2000) eKLR,**

**(3) Samson Tela Akute vs R (2006) eKLR;**

**(4) Wako Gindarobas & 2 others vs R (2005) eKLR**

**17.** In my humble view, the failure of the learned trial magistrate in her judgment to consider the discrepancies that I have set out above, and the resultant doubts raised in the evidence, occasioned a miscarriage of justice. Had she done so, the doubts may have been resolved in favour of the appellant and consequently earned him an acquittal.

**18.** For the foregoing reasons I allow the appeal, quash the convictions entered in all the counts and set aside the sentences passed upon the appellant. I order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**SIGNED DATED and DELIVERED** in open court this *25<sup>th</sup>* day of *April* 2013.

**L. A. ACHODE**  
**JUDGE**