REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 243 of 2008

ERICK MUTETHIA KIRUKI……………………………………...……..APPELLANT

V E R S U S

REPUBLIC ………………………………………………………..RESPONDENT

J U D G M E N T

The Appellant Eric Mutethia Kiruki was charged before the Meru Chief Magistrate's Court with two counts. In one count of making a document without authority contrary to section 357(a) of the Penal Code. The particulars of the offence were that on the 15th day of May, 2006 at Ntima Farmers Co-operative Society Limited Savings and Credit (FOSA) in Makutano shopping center in Meru Central District within Eastern Province, with intent to defraud without lawful authority or excuse made a certain document namely Ntima Farmers Co-operative Society Limited Savings and Credit receipt No. 005 purporting it to be a receipt issued by Ntima Farmers Co-operative Society Savings and Credit (FOSA).

The Appellant was convicted in both counts and sentenced to three years imprisonment in each count with sentences ordered to run concurrently. Being aggrieved by the conviction and sentence the appellant filed this appeal. The Petition is dated 25th November, 2008 and has three counts as follows:

1. That the trial magistrate erred in law in convicting the Appellant in a charge that was not proved beyond reasonable doubt by the prosecution.

2. That the trial magistrate erred in law and fact in convicting the Appellant wherein the essential ingredients of the offence were not proved beyond reasonable doubt by the prosecution.

3. That the learned trial magistrate erred in law and fact by disregarding the defence case thus occasioning a miscarriage of justice.

The Appellant filed a supplementally ground of appeal dated 8th October 2012 in which he raises grounds as follows:

1. **That the trial court erred in law and fact by entertaining and determining a constitutional issue over section 72(3) of the constitution of Kenya while he did not possess the requisite jurisdiction**.

The Appellant was represented by Mr. Mwanzia Advocate who made submissions. I have considered submissions by him.

The state was represented by Mr. Mungai, learned State Counsel. He opposed the appeal. I have considered his submissions.

This is a first appeal. I have analyzed and evaluated afresh the entire evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I have given due allowance for same. I am guided by the celebrated court of Appeal case of **Okeno Vrs. Republic** 1972 EA 32 is relevant. It was stated in that case as follows:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not th function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vs Sunday Post [1958] E.A 424."

The brief facts of this case are that the father of the Appellant owned Ksh.114,540/- to the Complainant. Ntimba Farmers Co-operative Society Ltd being a loan charges and interest he took in May 2005. The complainant sent a demand letter to the Appellants father hereinafter the debtor demanding payment of the outstanding sum. On the 23rd January 2007, the mother of the Appellant and wife of the debtor who was DW2 in this case proceeded to the complainant's offices armed with a receipt dated 15th May, 2006 showing that the sum of Ksh. 100,000/- had been paid to the complainant as repayment of the loan on the date of the receipt. PW 1 who received the receipt from her told her that the receipt was not genuine. DW 2 told PW1 she would send her son to them as he was the one who gave her the receipt.

The following day, 24th January 2007, the Appellant proceeded to the complainant's offices and was arrested by PW3, PC Tom Oranga. PW3 also searched the Appellant and recovered a receipt serial No. 009 dated 15th May, 2006 showing that the debtor had paid 100,000/- being loan repayment. PW3 took known writings of the Appellant from his home and sent them together with the specimen writings for the Appellant Exhibit 10 and 11 and the two receipts Exh. 2 and 9 to a Document Examiner.

The Document Examination PW4, Antipas, states that after examining the writings on the two documents and the known writings of the Appellant he came to the opinion that they were all by the same hand. His report was Exhibit 13.

The Appellant's defence in this case was that he was issued with the receipt Exh.2 by a clerk working for the complainant whom he could identify. He said he took the second receipt Exhibit 9 from the same clerk after he wrote it and wanted to throw it away. He said that he picked the receipt and kept it. The Appellant denied writing the two receipts.

Mr. Mwanzia for the Appellant submitted that the prosecution failed to call the person who applied for the loan as a witness. Counsel submitted that the receipt in question was issued by the complainant's officer to the Appellant. Counsel urged that the receipt register and the records of 15th May, 2006 were not availed in court by PW1, the Attendant clerk, and that he admitted so in cross examination. Mr. Mwanzia submitted that the prosecution witnesses admitted that they did not know who wrote the receipt Exhibit 2 yet it was from the complainant's offices. He submitted that the offence of uttering was not demonstrated. Counsel urged that the Appellant in his ….had said that he knew the physical appearance of the person who issued him with the receipt yet the prosecution made no effort to get the person. In regard to the Appellants defence counsel urges that the court ignored it yet appellant established he paid money in different denominations to employees of the complainant and receipts issued which were exhibited in court. He stated that Appellant called his mother DW23 who confirmed they sent him with 100,000/- to pay to the complainant.

Mr. Mungai, the learned State Counsel stated that the issue before the court was whether the Appellant made the receipts in court. Counsel urged that PW1 and 2, employees of the complainant society confirmed that the receipt was fake, and produced genuine ones. He urged that the two witnesses also proved that the debtor had not paid the loan by the time the Appellant was arrested. Counsel submitted that the Appellant was found with another fake receipt for which he made no explanation how he came by the receipt.

Mr. Mungai submitted that PW4, the Forensic Document Examiner found the handwritings on the fake receipts similar to the writings on the Appellants exercise books.

Mr. Mungai urged that DW2, Appellants mother said that she got the fake receipts from the Appellant and that in the circumstances it is the Appellant who was the source of the receipts.

The learned counsel for the Appellant submitted that a constitutional issue was raised under section 72(3) of the Constitution over the delay. In bringing the Appellant to court. Mr. Mwanzia submitted that the trial court noted the issue, agreed with it but found it had no jurisdiction to deal with it. Counsel urged that the trial court had power, even sua moto, to refer the matter to the High Court for determination under s.67. Counsel urged the court to set aside the conviction and sentence on this ground.

Mr. Mungai learned counsel for the State submitted that the trial court deliberated on the Constitutional issue raised by the defence. Counsel urged that the issue was raised at the defence stage after prosecution had crossed its case. He urged that the defence did not even cross examine PW2 about the length of his detention. Mr. Mungai submitted that the prosecution was not given an opportunity to explain why the appellant was held for over 24 hours.

On this issue it is clear that the defence did not raise it until the time of the Appellants defence. I have noted from counsel for the Appellant during the trial before the lower court that he submitted that the Appellant had been detained for 9 days before he was arraigned in court. The record shows that the Appellant was arrested on 24th January, 2007 and arraigned in court on 26th January, 2007. That means the Appellant was held in custody for two nights i.e. 24th and 25th night and one day i.e. 25th. The earliest he could have been charged was 26th there was no inordinate delay in arraigning the Appellant in court, and there was therefore no evidence of breach of his Constitutional rights. There was no substance in this issue and accordingly I disregard it altogether. Mr. Mwanzia submitted that the prosecution witnesses admitted that the they did not know who wrote the receipt exhibit 2 yet it was from the complainants offices. He submitted that the offence of altering was not demonstrated. Counsel urged that the Appellant in his had said that he knew the physical appearance of the person who issued him with the receipt yet the prosecution made no effort to get the person in regard to the Appellant defence counsel urged that the court ignored it yet the Appellant established he paid money in 6 different documentations to employees of the complainants and receipts issued were well exhibited in court. He stated that Appellant called his mother DW2 who confirmed they sent him with Ksh.100,000/- to pay to the complainant. Mr. Mungai the learned State Counsel stated that the issue before the court was whether the Appellant made the receipts in court. Counsel urged that PW1 and 2, employees of the Complainant Society confirmed that the receipts was fake; and produced genuine ones. He urged that the two witnesses also proved that the debtor had not paid loan by the time the Appellant was arrested. Counsel submitted that the Appellant was found with another fake receipt for which he made no explanation how he came by the receipt.

Mr. Mungai submitted that PW4 the Forensic Document Exam found the handwriting on the fake receipts similar to writings on the Appellants exercise books.

Mr. Mungai urged that DW2, Appellants mother said that she got the fake receipts from the Appellants and that in the circumstances it is the Appellant who was the source of the receipts.

The evidence adduced in support of court. I was that of an expert PW4 the document examiner. His evidence was that the writings on the questioned documents, that is, the receipts PExh 2 and Pexh were in the same hand as the known writings of the Appellant and the specimen writings of the Appellant. The findings of PW4 were

"On 27/8/2007 I did examine and compared the handwriting and I arrived at the opinion that they were similar and indistinguishable. I wrote report on my findings on the same day 27.8.2007 detailing the methodology used and the characteristics and similarities that formed the basis of my findings. I signed the Report which I now produce as Pexh 13"

The learned trial magistrate after hearing the case posed the issue for determination as follows:

" **The only questions to answer are whether the accused person made the receipt that was handed over to PW1 by his mother and whether he uttered the said receipt to PW1"**

The learned trial magistrate then came to the following conclusions.

"**PW1 and 2 clearly demonstrated to the court that the two receipts in question did not belong to their society. They produced genuine receipts in court. DW2 told the court that the receipt she gave to pw1 was given to her by her son. That points to the accused person as the sole source of that particular receipt. The accused person was at the time of his arrest also found with another receipt. He gave an explanation as to how he came by this second receipt. The court however notes that whenever a cashier makes a mistake on a receipt he/she cancels that receipt and retains it for accounting purposes. They did not throw it away as the accused person wants this court to believe. PW4 told the court that the receipt was made in the handwriting of the accused person. His expert opinion supports the evidence of other witnesses section 4 of Penal Code utter Act there DW2 given by Appellant to act. D.W. 2 did was to give to PW1. Act is giving Exh.2 to PW1 is that "Act" envisaged under section 4 of Penal Code**."

The manner in which the evidence of a hand writing expert should be treated and the weight to be given to it was discussed by Spry J in HASSAN **SALUM V. REPUBLIC 1964 EA 126** the learned judge held:

"(i) the most that an expert on handwriting can properly say, in an appropriate case, is that he does not believe a particular writing was by a particular person or, positively, that two writings are so similar as to be indistinguishable; the handwriting expert should have pointed out the particular features of similarity or dissimilarity between the forged signature on the receipt and the specimens of handwriting.

(ii) the evidence showed that the appellant had the opportunity to commit the offences and the forged signature might have been written by him, but this fell far short of proving beyond reasonable doubt that the appellant was in fact the forger."

This is persuasive authority. However, the principle enunciated the cited case has been adopted by courts as the correct and applicable test in adopting the evidence of handwriting experts. The legal position is that the evidence of handwriting expert witness is opinion evidence and the court has a duty to consider the evidence, compare the writings and make its own finding. In evidence that he had given a report of his findings detailing the characteristics and similarities that formed the basics of his findings. I have looked at his report, Pexh 13 and find no details of characteristics that he found in the writings he examined that were the reason for his finding. I expected specific details of which characteristics in the manner in which specific letters were written as to lead to the conclusion that they were indistinguishable and therefore written by the same hand.

The hand writing expert referred generally to his methodology in examining the documents but did not explain to the court the particular features of similarity or dissimilarity in which specific letter or letters so as to enable the court weigh his findings and draw her own conclusions.

I noted that the handwriting expert had concluded that the known handwritings of the Appellant Exhibit 10 & 11 and the questioned writing Pexh 2&9 were by the same hand with respect to him, the expert went beyond the proper limits. The most he could have said was that the writings were so similar as to be indistinguishable giving reasons for his conclusion by demonstrating the unusual features which made the similarity remarkable. I do find that the expert witness evidence was not treated as an opinion, and further

more the court did not draw its own conclusion and findings regarding the writing.   I find that the learned trial magistrate misdirected herself on the proof required for the charging of making a false document and therefore, came to the wrong conclusion. The conviction was clearly unsafe and cannot be allowed to stand. Count two relating to ultering a false document with intent to defraud contrary to section 357(b) of the Penal Code.

That charge is based on the document Receipt No. 005 which is the basis of count 1.   There are two difficulties with this particular count.   One is the fact that the clear evidence adduced by the prosecution was tht the document was given to PW1 by the mother of the Appellant DW2.   Who uttered it?

S.4 of the Penal Code defines utter as. **"utter' means and includes using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with, or act upon the thing in question;"**

The prosecution did not establish that the Appellant uttered the document because one he did ot take the document to PW1 two the document was being given to PW1 for the benefit of the Appellant's father not the Appellant himself. The nexus between the Appellant and the offence is so remote that it did not fit the offence.

More importantly the court has come to the conclusions tha the prosecution failed to prove that the document ws made without authority by the Appellant.   That being the case, the charge of uttering it as a false document does not lie. That charge therefore fails.

Having carefully considered the Appellants appeal I have come to the conclusion that for the reasons I have given herein above the convictions entered against the Appellant were unsafe. I allow the appeal quash the conviction and set aside the sentence. I noted that the Appellant was on a cash bail and surety bond any cash bail paid by him and security deposited to secure his release on bond should be refunded to the depositors.

SIGNED AND DELIVERED AT MERU THIS 16th DAY OF MAY 2013.

J. LESIIT
JUDGE