



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL No. 330 OF 2006

(From Original Conviction and Sentence in Criminal Case No. 2099 of 2004 of the Chief Magistrate's Court

at Mombasa – H. Adika, RM)

AHMED OMAR MOHAMED.....APPELLANT

- Versus -

REPUBLIC.....RESPONDENT

J U D G M E N T

Abdalla Omar Mohamed (the 1st accused) and ***Ahmed Omar Mohamed*** (the appellant) are brothers. They were charged and convicted of the offence of forgery contrary to Section 349 of the Penal Code. The particulars of the offence being that-

“On or about the 20th day of February 2001 at Mombasa Township, Mombasa District within the Coast Province, jointly with others not before court, with intent to deceive or defraud, forged a certain consent to the making of a grant of administration intestate purporting to be a genuine and valid consent signed by SAID OMAR MOHAMED.”

Each was sentenced to a fine of Kshs. 5,000/- and in default 2 months imprisonment. The conviction and sentence is the subject of this appeal.

Although the 1st accused had also filed an appeal, he died on 23rd June, 2008 during the pendency of his appeal and this court on 5th December 2011, on the strength of the provisions of **Section 360** of The Criminal Procedure Code, marked the appeal as abated.

The appellants appeal raises the following grounds:-

(i) That the learned trial Magistrate erred in law and fact in convicting the Appellant against the weight of evidence.

(ii) That the learned trial Magistrate erred in law by failing to comply with the provisions of Section

169(1) of the Criminal Procedure Code.

(iii) That the learned trial Magistrate erred in fact in finding that the Documents Examiner examined the 3rd and not the 4th signature of one Twahir.

(iv) That the learned trial Magistrate erred in law and fact by failing to adequately consider the defence of the Appellant.

(v) That the learned trial Magistrate erred in failing to find that the complainant did indeed execute the questioned document and further that the signature appearing besides his name must be his as was confirmed by 'PW1'.

The State opposed the appeal. At the hearing of the appeal Mr. Gakuhi represented the appellant while Ms Macharia appeared for the State.

PW2 (Omar Mohamed) is the elder brother of both the 1st accused and the appellant. That sometime in 2001 he came to learn that someone had forged his signature on consent to the making of a grant to the Estate of his late mother. He thought that the forgery had been committed by his two brothers. The document had been attested by PW1 (Benjamin Kimani Njoroge) who is a lawyer practicing in Mombasa. Although he is not familiar with PW2's signature, PW1 does not remember PW2 signing the document. He also could not recall who appeared before him at the time the document was signed. The appellant, it is said, had given the same consent to PW3 (Muhidin Omar Mohamed) who appended his signature. At that time, PW3 remembers seeing that the complainant had signed.

The controversial signature was examined by PW4 (E. Kenga) a Document Examiner with the Kenya Police. He found that the signature did not agree with the known signatures of PW2 (the complainant).

In his short unsworn testimony, the appellant states how when his mother passed away, his brothers and himself visited Njoroge Advocate for purposes of taking out Letters of Administration. The brothers appeared before the advocate when each signed some papers. He however denies forging the complainant's signature.

None of the witnesses called saw the appellant forge PW2's signature. PW1's evidence was not helpful at all. He could not remember who appeared before him. As to PW3 he remembers signing some papers given to him by the appellant but said this in cross examination-

"I did not read the paper to know what it was about."

He did not say that these papers were the consent now in question. The documents were not found with the appellant and there was no evidence as to who filed it in court. Again, although the document examiner took the appellants specimen handwriting he did not examine it to ascertain that it was the same hand that had made the questioned signature. The result of all these is that no connection was established between the forged signature and the appellant.

This court, as is duty bound, has re-evaluated the evidence adduced at trial and comes to the conclusion that it is not sufficient to found a safe conviction. There may be suspicion that the appellant forged the signature but mere suspicion is never good enough. The upshot is that the conviction is quashed and sentence set aside. The appellant had paid the fine, this shall be refunded to him.

Orders accordingly.

Dated and delivered at Mombasa this 16th day of February, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Jamii for state

Omwenga for Gakuhi for Appellant

Court clerk - Moriasi

F. TUIYOTT

JUDGE

16.02.2002