REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 269 of 2004

(From original conviction and sentence in Criminal Case No. 3988 of 2003 of the Chief Magistrate's Court at Kibera)

BENSON MACHARIA NJUGUNA…….....…….APPELLANT

VERSUS

REPUBLIC …….....…….RESPONDENT

JUDGMENT

The Appellant, **BENSON MACHARIA NJUGUNA,** was charged in the Chief Magistrate's Court at Kibera with four counts of forgery contrary to **Section 349** of the **Penal Code**; making a document without authority contrary to **Section 357(a)** of the **Penal Code**; uttering a false document contrary to **Section 353** of the **Penal Code**; and personating a public officer contrary to **Section 105(a)** of the **Penal Code**. He was found guilty on all the four counts and sentenced to imprisonment for one (1) year for court 1; One (1) year for court 2, and one (1) year for count 3, the sentences to run concurrently. He moved to this court on appeal against conviction and sentence.

The Appellant's eight grounds of appeal were that-

1. That the learned trial magistrate erred in both law and fact by misdirecting herself on the propriety of the evidence tendered by the prosecution.

2. That the learned magistrate misdirected herself in ignoring the contradictions of the prosecutions evidence.

3. That the learned magistrate erred in law and fact by finding that the offence of forgery and making a document were proved against the accused by circumstantial evidence

4. That the learned magistrate erred in law and fact in finding that the offence of altering (*sic*) a document was proved without evidence of the actual recipient of the said document.

5. That the learned magistrate erred in law and fact in finding that the offence of impersonation was proved against the accused without evidence that a presidential Aide is a person employed by the public service.

6. That the learned magistrate erred in law by ignoring the circumstances under which the accused person was arrested and charged.

7. That the learned magistrate erred in law and fact by relying on circumstantial evidence only.

8. That the conviction and sentence were against the weight of the evidence.

Regarding the offence of forgery, it is instructive that under **Section 345** of the **Penal Code,** forgery is defined thus-

"345. Forgery is the making of a false document with intent to defraud or deceive."

The particulars of the charge were that on the 5th day of May, 2003 in Nairobi within Nairobi Area, the Appellant forged a certain letter purporting it to be a genuine letter written and signed by the State House Comptroller, Matere Keriri.

In the context of this case, the alleged forged document was a letter ostensibly written and signed for Mr. Keriri (PW4), the then Comptroller of State House. In his evidence, Mr. Keriri stated that he did not write the said letter as it was ostensibly written for him. However, he did not know who had written or signed it. There was no evidence at all as to who wrote that letter and/or who signed it. In the absence of such evidence, it cannot be assumed that it was the Appellant who wrote and or signed the letter. Before drawing any such conclusion, there ought to be some concrete evidence that it was the Appellant who wrote it. Since there is no such evidence, then there is no basis upon which the Appellant can be found guilty of forgery.

The second offence for which the Appellant was found guilty of and convicted was making a document without authority contrary to **Section 357(a)** of the **Penal Code**. The particulars of that charge were that on the 5th day of May, 2003 in Nairobi within Nairobi Area, with intent to deceive without lawful authority or excuse the Appellant made a certain document namely a letter purporting to be a genuine letter issued by State House comptroller Matere Keriri.

This charge carries similar overtones to those on the count of forgery. By the necessary implication, therefore it attracts similar observations and reaction. In the first instance, Mr. Lumumba, the then Secretary to the Constitutional Review (Commission) who testified as PW1, explained the genesis of that letter which was that sometime in the month of May, 2003, the Appellant went to PW1's office and identified himself as an aide to the President of Kenya. He also informed the witness that the President had detailed him to seat through the proceedings of the Constitutional Conference at the Bomas of Kenya and brief the President on a daily basis. After the Appellant had been taken through the accreditation process, a badge was issued to him describing him appropriately as the Presidential Aide. This was how the Appellant had described himself. After the Appellant was issued with the badge, Mr. Lumumba assumed, rightly so, that all was smooth sailing.

However, later in May, Mr. Mukawa (PW2), the accreditation officer told Mr. Lumumba that the Appellant ***"had asked for his allowance."*** Mr Lumumba then said that he would not authorize the same unless he got a letter from the President or a Senior Officer authorizing payment from State House. In his own words in evidence, Mr. Lumumba said ***"I did not receive a letter for payment but a letter was received in the office and brought to me with the Coat of Arms of the State and signed from the State House Comptroller."*** Although Mr. Lumumba told the court that after receipt of the letter from State House he acknowledged receipt thereof under private and confidential cover, he also said that the letter he wrote ***"was an acknowledgement of the letter brought by Mr. Macharia Njuguna."*** If the matter were to rest there, there may be a window for speculation that the said letter was made by the Appellant. However, Mr. Lumumba subsequently said in cross examination that ***"I don't know who delivered the letter to my secretary."*** That negates the earlier statement that the letter had been brought by the Appellant.

Two points arise for observation. The first one is that there is no direct evidence that the letter from State House was authored by the Appellant. Secondly and, even more importantly, the witness said candidly that he did not know who delivered the letter to his secretary. This flies right in the face of count three which is uttering a false document contrary to **Section 353** of the **Penal Code.** For the avoidance of

any doubt, the particulars of that count read thus-

"Benson Macharia Njuguna: on the 5th day of May, 2003 at Bomas of Kenya Nairobi within Nairobi Area, knowingly and fraudulently uttered a certain letter purporting to have been written and signed by State House Controller (sic) Matere Keriri to P.L.O. Lumumba the Secretary to the Constitution of Kenya Review Commission." According to Mr. Lumumba himself, the letter was not delivered to him, but to his secretary. Secondly, he did not know who delivered it. In the face of these apparent contradictions the count for uttering a false document cannot be sustained inasmuch as it is not certain that it was the Appellant who uttered the document to Mr. Lumumba's secretary.

Finally, the last count against the Appellant is personating a Public Officer contrary to **Section 105(a)** of the **Penal Code.** The particulars thereof were that ***"the Appellant on the 5th May, 2003 at Bomas of Kenya, Nairobi within Nairobi Area, personated to PLO Lumumba, the Secretary Constitution of Kenya Review Commission, a person employed in the Public Service on an occasion of Constitution Review of Delegates Meeting when such a person was required to do an act of registering himself as a Presidential Aide by virtue of his employment."*** As observed earlier on, the evidence on record is that on the material date, the Appellant went to the office of Mr. Lumumba and identified himself as an aide to the President of Kenya, Hon. Mwai Kibaki. He informed Mr. Lumumba that the President had detailed him to sit through out the proceedings of the conference and brief him on a daily basis. Mr. Lumumba accordingly directed the Appellant to Mr. Mukawa (PW2) with instructions that the Appellant be taken through the accreditation process and that he be issued with the badge describing him appropriately as the Presidential Aide. That was how the Appellant had described himself. As a result, he was issued a card in which the names were Macharia Njuguna, Identity Card No. 7128499, and description ***"Presidential Aide."***

This information was relayed to PW2, Collins Mukawa, who testified that the Appellant went to him in early May, 2003 and told the witness that Mr. Lumumba (PW1) had referred the Appellant to PW2 to be accredited as an aid for His Excellency President Mwai Kibaki. This evidence was given more credence by Solomon Mworia Anampiu (PW5) who confirmed that the Appellant's card bore the wording ***"Presidential Aide."*** However, the Appellant explained to the witness that he wanted the words ***"Presidential Aide"*** to be deleted because the words attracted too much attention. The above evidence leaves no doubt that for some time, the Appellant had carried himself around as a Presidential Aide. Against that background, the Appellant has raised the point that the learned magistrate erred in law and fact in finding that the offence of impersonation was proved against the Appellant without evidence that a Presidential Aide is a person employed by the Public Service.

With respect, that argument cannot hold sway. To call for proof that a Presidential Aide is employed in by the Public Service is to ask for the obvious. The court is entitled to take judicial notice that a Presidential Aide is not a personal employee of the President, but of the Government of Kenya. He is therefore in the service of the Government. **Section 3(1)** of the **Interpretation** and **General Provisions Act** defines ***"public officer"*** as a person in the service of or holding office under the Government of Kenya whether that service or office is permanent or temporary or paid or unpaid.

By reason of the foregoing, I find that the conviction of the Appellant on the 1st three counts cannot be sustained. His appeal on those three counts is accordingly allowed, the conviction quashed, and the sentence set aside. However, I uphold the conviction on count 4.

I note from the judgment of the learned magistrate that although she convicted the Appellant on all four counts, she did not impose any sentence on count four. After the time that has elapsed between the date of conviction in 2004 and today, the Appellant must have had to contend with a lot of mental anguish, not knowing whether he would be set free on appeal or imprisoned. Bearing in mind the passionate mitigation of his advocate, I find that a custodial sentence would be oppressive at this stage. I accordingly sentence him to a fine of Kshs. 40,000/= on count 4, the said sum to be deducted from his cash bail of Kshs. 100,000/=.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 31st day of July, 2012.

L. NJAGI
JUDGE