REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Revision Case 371 of 2012

STARFURD OMWOYO NYAUMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The applicant, **STARFURD OMWOYO NYAUMA**, is on trial before the Chief Magistrate's Court. He was charged with the offences of;

i. Making a Document without authority contrary to section 357 (a) of the Penal Code; and

ii. Uttering a false document contrary to section 353 of the Penal Code.

A total of 10 (ten) witnesses testified for the prosecution. The applicant was thereafter put to his defence, whilst his co-accused was acquitted by the learned trial magistrate.

The decision to put the applicant to his defence was made on 26th March 2012.

On 17th July 2012, the applicant moved to the High Court seeking a review of the decision made by the trial court.

The applicant contends that the charge sheet that formed the basis of the charges against him was illegal and it violated his constitutional rights.

It is his position that the errors in the charge sheet were substantial, and would therefore prejudice his defence, if the issue was not properly addressed.

Three issues were raised by the applicant, and the same can be summarised as follows;

(a) **Section 134 and 135 (2) of the Criminal Procedure**

Code:

The particulars in the evidence introduce an offence or

charge which is not in the charge sheet.

The trial court was obliged to inform the applicant of the charge in respect to which he had a case to answer, because otherwise, the applicant would not know exactly what he was required to defend

himself against.

(b) **Section 137 (f) of the Criminal Procedure Code:**

It is in doubt when and where the offence was committed.

Unless the applicant knew exactly when and where the offence was committed, he believes that he will be unable to put forward his alibi defence, which he is entitled to.

(c) Chapter 4, Section 50 of the Constitution.

(i) The applicant was not informed in advance, about the evidence which the prosecution intended to rely on.

He submitted that the reason for that, was that the prosecution intended to ambush him. When he was ambushed, he was denied an opportunity to prepare his defence, so the applicant said.

The applicant told this court that he did not understand why his

co-accused was accorded the benefit of doubt, yet he was found

to have a case to answer.

In his view, the charge sheet should have stated how the documents he is alleged to have made and also to have uttered, were made.

This court was invited to give directions as to the regularity of the ruling made by the learned trial magistrate.

In answer to the application for revision, Mr. Mulati, learned state counsel, pointed out that the applicant was given witness statements before he told the court that he was ready to proceed.

Secondly, the respondent submitted that the only dates which the prosecution could state with certainty, were those of the days when the false documents were uttered.

But the applicant strongly asserts that the offence of Making a Document without Authority is a complete offence, in itself. Therefore, the charge sheet should have specified when and where the said offence was committed.

The charge sheet in question is couched in the following manner;

"CHARGE – MAKING A DOCUMENT WITHOUT AUTHORITY CONTRARY TO SECTION 357 (a) OF THE PENAL CODE.

PARTICULARS
OF OFFENCE - 1. JERUSHA KARARIO MWENDA

2. STARFURD OMWOYO NYAUMA

On or about the 29th day of January 2009 at unknown place within the Republic of Kenya, jointly with others not before court, without lawful authority or excuse made a certain false document namely a certificate of Business Registration number BN/2009/1350 in the names KANARIO PRINTERS, purporting it to be a genuine certificate issued by the Registrar of Companies"

Counts 3,4 and 5 are also worded in words which are generally similar to the foregoing, save that they relate to Certificate of Registration in the names of INGAIZA ENTERPRISES LTD; MUHONJA

INVESTMENT; and MAGODO SUPPLIES, respectively.

In Count 2, the applicant and his co-accused were said to have uttered the false certificate of registration, in the name of KANARIO PRINTERS, to a person named ESTHER MUTHONI GITHAIGA who was a cashier at Equity Bank, Moi Avenue Branch Nairobi.

The false document was uttered on or about 29th January, 2009.

To my mind, the particulars of the offences on all the five (5) counts are sufficiently detailed to disclose the offences as well as the dates when they are alleged to have been committed.

The false document is said to have been uttered on or about 29th January 2009. Until the document was uttered, the prosecution is unlikely to have had any knowledge about its existence. And even after it had been uttered, the prosecution could only be certain about the fact that it had been made earlier on that date or on a date that was earlier than that.

It cannot be correct to assert, as did the applicant, that the charge sheet was not more specific about the exact date when he made the false documents only because the person drawing up the charges wanted to deprive the applicant of his defence of an alibi.

Secondly, the charge sheet did not cite **section 346 of the Penal Code.** Therefore, I do not understand the applicant's contention that the prosecution combined the offences charged under **sections 347** and **357 (a) of the Penal Code, into one count.**

In any event, **section 347 of the Penal Code** is simply the definition of what constituted the offence of Making a False Document.

Thereafter, **section 348 of the Penal Code** spells out the meaning of the phrase “Intent to Defraud.”

Neither **section 347** nor **section 348** creates any offence.

Section 357 (a) creates the offence of Making Documents Without Authority”. It is under that statutory provision that the applicant was charged. The charge sheet does not make any reference to **section 347 of the Penal Code**. Therefore, there is no basis for the applicant's contention that the prosecution has combined into one (1) count, offences that are prescribed by two (2) distinct provisions of the law.

Secondly, the fact that one accused person is found to have no case to answer, whilst his co-accused is placed on his defence, is not sufficient, in itself to show that the trial court was biased against the accused person who was put to his defence.

The learned trial magistrate has given reasons for acquitting the applicant's co-accused. The court noted that the applicant was an advocate who had confirmed that he could understand the process of registering a Business Name.

PW 1 introduced the 1st accused to the applicant. **PW 1** and the 1st accused paid Kshs.8,000/- to the applicant for his professional services.

Although the Applicant made available Certificates for 3 Business Names, the said certificates were found to be names of Business Names which had not been registered.

The trial court found no evidence that the 1st accused made or sourced the certificates. She is said to have received the certificates from the applicant. She then presented the said certificate to Equity bank's Esther Muthoni. In doing so, the 1st accused is said to have had no criminal intention.

It is for those reasons that the applicant's co-accused was acquitted.

By necessary implication, the learned trial magistrate must be deemed to have made findings against the applicant, which were not consistent with his innocence.

The failure to make express findings against the applicant on the various ingredients of the criminal offence is not an error or omission, at this stage.

Indeed, when a trial court puts an accused person to his defence, it is not necessary for the court to give a detailed analysis of the reasons for doing so. If anything, it is not advisable that the court should specify the exact reasons in the ruling in which an accused person is found to have a case to answer. When the court gives a detailed evaluation of evidence after the prosecution closes its case, there would be a real danger that the accused may, (if he is found to have a case to answer), concentrate his answer to the case, to the reasons given by the court, instead of responding to the entire case that the prosecution had put forward against him.

The charge sheet makes it clear that the prosecution did not know the exact place where the fake documents were made. Therefore, there is no way that the prosecution could be expected to specify information which they did not have.

I have given due consideration to the charge sheet and find that it is in compliance with **Section 137 of the Criminal Procedure Code.**

Meanwhile, as regards the provisions of the Constitution of Kenya 2010, I note that the same was promulgated on 27th August, 2010.

Therefore, the provisions thereof cannot have had a retrospective application to proceedings that took place before the Constitution came into being.

In this case, the plea was taken on 25th September 2009, when the current Constitution was not yet in place.

Both the accused told the trial court that they were ready to proceed with the trial, on 28th September, 2009.

Similarly, on 14th January 2010, the applicant and his co-accused told the trial court that they were ready to proceed with the trial.

Witnesses testified and were cross-examined by both accused persons. The nature and length of the cross-examination undertaken by the applicant suggest that he was truly ready to proceed with the trial, as he had told the court.

On 25th February 2010, the 1st accused informed the court that he was not ready to proceed. Her reason was that she had not procured some documents from Sheria House, which she intended to rely upon.

In contrast, the applicant told the trial court that he was ready to proceed.

The learned trial magistrate adjourned the trial, so as to provide the 1st accused with an opportunity to prepare.

On 17th August 2010, the two accused persons were both ready to proceed. Therefore, the trial went ahead.

After **PW 6** testified, the prosecution sought an adjournment. The accused persons did not object to the adjournment. However, the applicant asked the court to order the prosecution to make available all its witnesses in court, at the next date when the trial would resume. The applicant also asked for witness statements.

The learned trial magistrate did not even ask the prosecution to respond to that request. The court simply directed the prosecution to provide the accused persons with witness statements.

And when the trial resumed on 22nd September 2010, both accused persons informed the court that they were ready to proceed.

It is only after **PW 7** testified and the prosecution sought an adjournment that the applicant informed the court that the prosecution was yet to provide him with witness statements.

In response, the trial court directed the prosecution to provide the accused persons with ALL witness statements.

On 11th May 2011, the 2 accused persons were both ready to proceed with the trial.

Thereafter, the accused persons were always ready to proceed. Therefore, I deem it reasonable to presume that they had been provided with witness statements, after the court's order dated 22nd September 2010.

That would imply that after the current Constitution took effect, the trial court gave effect to it.

I find no merit in the applicant's contention that he had been ambushed, or that the failure to provide him with witness statements earlier, denied him a chance to prepare his defence.

If anything, on 19th June 2012, the applicant is on record as saying;

"I am ready to proceed with the case once I get a clarification of the charges made to me before I defend myself. I am, however, not ready to proceed today. I need time to understand the charges. I have a copy of the charge sheet."

After that date, the applicant filed his application before the High Court, for Revision. That is the application before me.

In the application, it is clear that the applicant's main concern is that the co-accused.

"was accorded benefit of doubt and I was not accorded, as it is clear that the charge sheet raises very many doubts which cannot sustain a charge in a fair court of law. The charge is defective as it does not state how the said documents were made."

With all due respect to the applicant, that is his considered legal view. It cannot be a substitute to the court's view. It can only be construed as his submissions before the court, regardless of how correct or otherwise the said views are.

If the court makes a decision which is erroneous on the merits thereof, that would normally form the basis of an appeal if there is a conviction. But I also appreciate that pursuant to the provisions of **Section 362 of the Criminal Procedure Code,** the High Court may call for and examine the record of any subordinate court, for the purpose of satisfying itself as to the correctness, legality or propriety of any findings, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

Having given due consideration to the issues canvassed, I find no merit in the applicant's contention of alleged substantial errors which may prejudice his defence. I therefore reject the invitation to review the Ruling made by the learned trial magistrate when the trial court found that the applicant has a case to answer. The applicant should now proceed to put forward his defence.

Dated, Signed and Delivered at Nairobi, this 19th day of December, 2012.

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FRED A. OCHIENG
JUDGE