**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAIROBI (NAIROBI LAW COURTS) Criminal Appeal 1226 of 1994**

**OTIENO KOPIYO GERALD..... APPELLANT**
**VERSUS**

**REPUBLIC ……. RESPONDENT**

***(From the original conviction and sentence in Criminal Case No. 764 of 1992 of the Chief Magistrate's Court at Nairobi by U.P. Kidula - Chief Magistrate)***

**JUDGMENT**

The appellant, **GERALD OTIENO KOPIYO**, was convicted on two counts, **of forgery contrary to section 349 of the Penal Code**, and of **making a document without authority contrary to section 357 (a) of the Penal Code,** respectively.

For the offence of forgery, he was sentenced to 12 months imprisonment, whilst for the offence of making a document without authority, he was sentenced to 8 months imprisonment. The two sentences were to run concurrently.

Being dissatisfied with the conviction and sentence, the appellant lodged an appeal to the High court. He also filed an application for bail pending appeal. The application was granted on 14th October, 1994.

The appeal was first heard by Oguk and Mitey JJs, on 21st February 2000. Their Lordships scheduled the judgment for 30th March 2000. However, both Judges retired before they delivered the judgment.

Consequently, the appeal was canvassed anew on 5th February 2010 and on 1st March 2010.

Dr. Khaminwa, the learned advocate for the appellant first submitted that the conviction cannot be sustained because the prosecution failed to produce the original documents as exhibits.

Secondly, the court was told that the appellant was overwhelmed and embarrassed by the fact that he was charged with six counts. In his view, the maximum number of counts ought not to have exceeded three.

Thirdly, the appellant submitted that the whole trial was fatally flawed by virtue of the fact that the trial court accepted written submissions.

The other issue that was raised by the appellant was that essential witnesses were not called to testify. Of the persons deemed to have been essential witnesses, the appellant cited Dr. Mbabu, who was named in Count 1, as the person who had been alleged to have issued the

forged veterinary certificate. Another person was Dr. Machaga, who signed the said certificate on behalf of Dr. Mbabu. Because Dr. Machaga did not testify, the appellant submitted that that was prejudicial to him, as he did not have the opportunity to cross-examine him.

The appellant also submitted that the trial court was wrong to have concluded that the alteration was intended to deceive, whereas the prosecution did not lead evidence to prove any such criminal intent. As far as the appellant was concerned, the alteration could have been attributable to a mistake.

He pointed out that the Sales Manager of the Kenya Meat Commission had actually approved one alteration, from 32 to 25 cases.

The appellant told this court that **PW 7** had testified that there was nothing wrong with the documents.

But, in any event, there were no eye-witnesses to the forgery or to the making of a document without authority. That meant that the prosecution relied solely on circumstantial evidence. And the appellant was of the view that the said circumstantial evidence was not water-tight.

The appellant also pointed out that the Kenya Meat Commission was not dealing with him as an individual; but was dealing with a company. Therefore, he believes that the trial court was wrong to have concluded that it is only he who stood to benefit from the alteration.

Another issue arose from the fact that **PW 11** was originally a suspect. And, when he testified, he is said to have contradicted the evidence of **PW 7**.

On the question of the sentence, the appellant submitted that in the unlikely event that the conviction was not quashed, he should nonetheless not be given custodial sentence. As far as he is concerned, the fact that he has had the conviction hanging over his head for very many years, was sufficient punishment in itself. During that period, he was out, on bail, pending the hearing and determination of this appeal, but he says that he was still suffering.

In response to the appellant, the learned state counsel, Ms Nyamosi, submitted that the conviction was sound.

It was her contention that the appellant never objected to the use of photocopy documents, even though he was represented by an advocate throughout the trial.

The respondent also submitted that six counts cannot have overwhelmed the appellant. Indeed, it was pointed out that the very legal authority which the appellant had cited, did hold that upto 12 counts could not be construed as too many in any one case.

Meanwhile, as regards written submissions, the respondent pointed out that it was the advocate for the accused who sought and was granted an opportunity to provide the trial court with written submissions.

Therefore, the respondent was of the view that the accused could not have been prejudiced in any manner, when he was allowed to do the very thing that he had asked for from the court.

As regards witnesses, the respondent submitted that pursuant to the provisions of the Evidence Act, the prosecution was allowed to call such witnesses as they deem adequate to prove the case. In this case, the respondent believes that the 12 witnesses called by the prosecution, were sufficient to prove, and did prove the case against the accused, beyond any reasonable doubt.

In any event, as far as the respondent was concerned, if the accused felt that there was any witness whom the prosecution had failed to call, and who would have helped the defence case, then the accused would have been at liberty to call such a witness.

The respondent submitted that the reason why the maker of the documents was not called is that the prosecution wanted to proved alteration, not forgery. Ms Nyamosi submitted that an alteration cannot be a forgery. And it was for that reason, we are told, that the prosecution did not call a hand-writing expert.

Although the evidence adduced was circumstantial, the respondent submitted that it gave rise to a water-tight case against the appellant. Therefore, we were invited to hold that the conviction was safe.

However, on the issue of sentence, the respondent shared the views of the appellant.

In determining this appeal, we have first perused the entire record of the proceedings before the trial court. We have re-evaluated all the evidence on record, and drawn therefrom our own conclusions. We have also taken into account the submissions made by both parties, as well as to the authorities cited and the applicable law.

On the issue of the documentary evidence, we have noted that on 16th February 1993, Mrs Mwaura advocate sought to know, from the prosecution, where the originals were.

The prosecution said that the original documents were to be produced by a witness who was to come from the Netherlands. In the light of that revelation, by the prosecution, the learned trial magistrate directed as follows:

> ***"In that case, the documents in court will only be marked for identification."***

Thereafter, the trial went ahead, with the prosecution witnesses making reference to copies of documents.

On 20th July 1993, the prosecution addressed the trial court in the following words;

> **"We had problems at the last hearing of document (sic!) We referred to duplicates. Originals were said to be in Germany and the officer who came with the two is not in the picture. I ask for adjournment with a view to apply the case after 24th, to find out the position about the original documents."**

Clearly, therefore, the appellant did raise the issue about original documents, very early during the trial. And the prosecution was fully alive to that fact.

Then, on 30th July 1993, the prosecution informed the court that the original documents had been received from Germany. It is those original documents which were produced in evidence by the Investigating Officer. The other witnesses, who produced documentary exhibits, did produce originals. Therefore, we find no merit on that aspect of appeal.

As regards the number of counts in the charge sheet, we do agree with the respondent, that six counts were not too many.

In the authority cited by the appellant, **PETER OCHIENG Vs REPUBLIC (1982-88) 1 KAR 832,** the accused had been charged with a total of 44 counts, which covered 12 transactions. He was convicted on 11 counts of forging invoices; 8 counts of forging payment vouchers; and 4 counts of stealing by public servant.

In the light of the very many counts, the Court of Appeal expressed itself thus;

> **"It is undesirable to charge an accused person with so many counts on one charge sheet. That alone may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of the**

**trial to the counts upon which it wishes to proceed. Usually, though not invariably, no more than 12 counts should be laid in one charge sheet. The others can be withdrawn under S.87(a) of the Criminal Procedure Code, which will entitle the prosecution to bring them again if necessary."**

As the Court of Appeal has made it clear that upto 12 counts are acceptable on one charge sheet, we find that the six counts herein could not and did not, in themselves, prejudice the appellant. We therefore find no merit in that ground of appeal.

On the issue of written submissions, it is evident from the record, that it was the accused who, through his advocate, sought leave of the court, to file written submissions. That request was sought and was granted, at the stage when the prosecution had closed its case.

After the trial court had given due consideration to the submissions, it held that the accused had a case to answer.

Thereafter, the accused gave a sworn testimony, in his defence. When he had concluded his case, his advocate addressed the court, orally. In other words, at the end of the trial, the final submissions were not in writing.

In **AKHUYA Vs REPUBLIC [2002] 2 E.A 323, at Page 324, the Court of Appeal said;**

**"But the question is whether the written submissions by the prosecutor and defence counsel form part of the trial under the provisions of section 77 (2).**
**As we stated earlier, final submissions are supposed to be made orally in court, at the close of the hearing of the case for the prosecution and the defence, respectively."**

Their Lordships made it clear that it mattered not that the advocate for the accused had asked the court to allow him to make written submissions. The rationale was that the accused was entitled to hear what was said, so that, if necessary, he could exercise his right to clarify or to object to any point raised.

Although that case dealt with final submissions, unlike in this case in which the written submissions were made at the stage after the prosecution closed its case, we believe that the gist of their Lordships finding was to the effect that written submissions do not have any sanction of the law.

However, we have become aware of a more recent decision, of the Court of Appeal, which qualifies that position. In **HENRY ODHIAMBO OTIENO Vs REPUBLIC, (KISUMU) CRIMINAL APPEAL NO. 83 of 2005**, the Court of Appeal said;

**"It cannot be said that merely because the appellant's counsel acceded to putting in written submissions, the accused thereby consented to that course of events. The question as to whether or not written submissions could be put in, was not put to him. The Constitution envisages express consent.**
**So when section 213 and 310 of the Criminal Procedure Code are read with section 77 (2) of the Constitution, it is clear that where written submissions are tendered without the accused's express consent, the proceedings of the court concerned are thereafter rendered null and void. That is the conclusion we have come to herein."**

In the light of that judgment, it is not necessarily a fatal mistake for the court to accept written submissions. The mistake is only fatal

if the express consent of the accused is not obtained by his advocate, who then files written submissions.

To our minds, that would therefore imply that when an accused is not represented by an advocate, he should, if he so requests, be allowed by the court, to file written submissions. Our said reasoning is informed by the reality that plays itself before us on a regular basis.

Many appellants act for themselves. And they tell us that they have neither legal training nor the eloquence that would enable them to put forward their submissions, orally.

Some of them have told us that if we were to reject their written submissions, which they had gone to great lengths to put together, with the assistance of their colleagues in prison, the courts would have denied them the opportunity to put forward their cases.

In the light of those experiences, we believe that the window of opportunity which the decision in **HENRY ODHIAMBO OTIENO Vs REPUBLIC** (above-cited) has opened, captures both the will of many accused persons, and the real sense of justice. That is because we cannot visualize how a person could purport to be prejudiced when he is permitted to do the very thing which he asked for.

Notwithstanding the foregoing legal pronouncement, we find that in this case, the appellant's express consent was not sought before the trial court accepted the written submissions.

That finding is sufficient to determine this appeal.

However, we feel obliged to make some brief comments on a few more issues.

First, it is noteworthy that in count 1, the appellant is alleged to have forged the veterinary certificate, purporting it to have been issued by Dr. Mbaabu of the Ministry of Agriculture and Livestock Development.

Even though the certificate was supposedly issued by Dr. Mbaabu, that gentleman did not testify. Secondly, when **PW 10** testified, she said that the veterinary certificate in question was actually signed by Dr. Machaga.

In effect, although the signing of a document may not necessarily be synonymous with the preparation thereof, it does appear to us that the prosecution never produced any veterinary certificate which had been purportedly prepared by Dr. Mbaabu. Therefore, the evidence on record was at variance with the particulars of the charge. That is therefore another ground upon which the appeal ought to be allowed.

Meanwhile, although the Kenya Meat Commission was dealing with a company called Fresh Water Limited, it is clear that the appellant was the Managing Director of that company.

In civil cases, the limited liability company is completely distinct from its directors and shareholders, who would, ordinarily, not be personally liable for the company's actions or omissions. However, in criminal cases, one or more officers of the company would be the persons who would be hauled before the court. Those officers could not hide behind the legal reasoning that they were distinct from the company.

The rationale is that a company cannot be sentenced to imprisonment, even if it were convicted for a criminal offence. It is only the officers of the company who could be sent to prison, if the company was held to be criminally liable.

Therefore, we find no fault at all, in law, for the charges having been directed against the Managing Director of Fresh Water Limited, in respect of something that had allegedly been done by the said company.

In any event, a forgery cannot be done by a legal person such as a company. Such an act can only be done by a natural person,

through whom the company has a mind, hands etc.

One issue which has attracted our attention, but to which none of the parties before us alluded, is the evidence of **PW 2, FRANCIS WAFULA NABISWA;** and the evidence of **PW 3, PETER KARANJA NGANGA.**

**PW 3** made plates after receiving artwork from **PW 2**. The artwork were letter-heads for Kenya Meat Commission and for the Ministry of Agriculture and Livestock Development.

After **PW 3** had made the plates, **PW 2** took the same to Golden Stone, who printed letter-heads for KMC and the Ministry.

According to **PW 2,** it is the appellant who had placed an order for letter-heads.

Surely, persons who make letter-heads or other documents, which are supposed to be for parastatals, Government Ministries or other such institutions or establishments, should only do so upon receipt of orders from the officers duly authorized from within the establishment concerned. Those who receive orders from individuals, and proceed to make letter-heads, are, in our view, party to the culture which spurs illegalities in this country. To our minds, they ought not to escape from the arms of the law.

Finally, for the reasons already stated herein, the appeal is allowed. The conviction on counts 1 and 6 are quashed; and the sentences set aside. The appellant has thus earned his unconditional liberty. But, as he is not in custody, there is no need for this court to order that he be set at liberty.

The security which he had deposited in court may now be released to him, unless there is any other lawful reason to withhold it.

Dated, Signed and Delivered at Nairobi this 21st day of April, 2010.

**FRED A. OCHIENG**
**.....**
**JUDGE.**

**M. A. WARSAME**
**.....**
**JUDGE.**