



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 256 of 2006

OSCAR WALTER AGANYAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original decision in Criminal Case No. 290 of 2004 of the Chief Magistrate

Court at Kibera - Ms. Kasera SRM)

J U D G M E N T

OSCAR WALTER AGANYA, the appellant, was charged before the Subordinate Court with two counts. Count 1 was for making a document without authority contrary to section 357 of the Penal Code. The particulars were that on or about 7th August 2003 in Nairobi within the Nairobi Area Province jointly with others not before court with intent to defraud and without lawful authority made a certain receipt No. 450-0023 purporting it to be a genuine receipt from All Fix Services Ltd. for the payment of Kshs.317,000/= being for custom duty for motor vehicle registration KAR 619A makes Nissan Caravan matatu. Count 2 was for forgery contrary to section 349 of the Penal Code. The particulars of offence were that on 7th August 2003 in Nairobi Area with intent to defraud forged a certain document namely All Fix Services Ltd. receipt No.450-0023 purporting it to be a genuine receipt written and signed JOHN MUYA KARIUKI. After a full trial, he was acquitted of count 1, but convicted of count 2. He was sentenced to serve 3 years probation. Being aggrieved by the decision of the learned magistrate, he has appealed to this court against both conviction and sentence.

At the hearing of the appeal, the appellant appeared in person and made submissions in support of the appeal.

The learned State counsel, Mr. Makura, conceded to the appeal. Counsel submitted that the evidence did not prove the offence for which the appellant was convicted. Counsel contended that, since the appellant was acquitted of count 1, he should also have been acquitted of count 2, as the specimen signature of the appellant was not taken to the document or handwriting examiner for comparison.

I have considered the appeal and submissions by the appellant and the State Counsel. The conviction of the appellant was with regard to a receipt No.0450-0023, which was apparently used by the appellant in a civil case. The receipt was purportedly made by PW2 JOHN MUIYA KARIUKI, who works with All Fix Services, which sold a Nissan Sunny matatu on credit to the appellant. The document examiner stated that the receipt was not prepared by PW2, after he compared it to the specimen handwriting of PW2.

The specimen handwriting of the appellant was not sent to the document examiner. The investigating officer in the case PW5 CORPORAL ZABLON WAMBANI stated in evidence ?

“Accused recorded a statement before an inspector. I told him to go away to wait for a report from the examiner. I did not get handwriting from the suspect. I took specimen handwriting from PW2-----“

The charge for which the appellant was convicted was for forgery. Therefore the prosecution had to prove that he actually forged the document. They did not prove that he forged the document, as they did not prove that he wrote anything on that document. Therefore, he should not have been convicted of the offence. Infact, the sworn defence of the appellant appears to be more credible, than the prosecution allegation that he forged the document. It is not indispute that the said receipt relates to payment of custom duty on which the appellant did not stand to gain anything, as it would not reduce his indebtedness to M/s All Fix Services Ltd. It is therefore believable that he was given the copy of receipt by an employee All Fix Services Ltd.

The learned State counsel has conceded to the appeal on the ground that the evidence tendered by the prosecution did not prove the charge. I think he was right in doing so. I also find that the prosecution did not prove its case on count 2. Therefore, I will allow the appeal.

For the above reasons, I allow the appeal, quash the conviction and set aside the sentence imposed by the learned magistrate. If the appellant is in custody for this case, I order that he be released, unless otherwise lawfully held.

Dated and delivered at Nairobi this 16th day of April, 2008.

George Dulu

Judge

In the presence of :?

Appellant

Mr. Makura for State - absent

Mwangi – court clerk