



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 61 of 2007

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 656 of 2000 – G.A.Ndeda [C.M], J. Nduna [S.R.M.] & H. M. Nyagah [S.R.M])

JOSEPH MACHARIA MBUTHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Joseph Macharia Mbugha was charged with four counts under the Penal Code. He was charged with the offence of **Conspiracy to defraud contrary to section 317 of the Penal Code**. The particulars of the offence were that between the 12th August and the 3rd November 1999 at Kenya Pipeline Company Nakuru Depot, the appellant jointly with others not before court, conspired with intent to defraud the Kenya Revenue Authority the sum of Ksh.12,000,000/= by falsely pretending that a certain forged armed forces canteen organization (AFCO) local purchasing order (LPO) No.2147 dated the 15th October 1999 was a genuine and valid AFCO LPO issued by AFCO to Agip Oil (K) Limited, Nakuru Depot to deliver to AFCO, Nanyuki and Isiolo 200,000 litres of Super Petrol, 100,000 litres of Regular Petrol, 100,000 litres of Diesel and 100,000 litres of Kerosene duty free fuel. The appellant was further charged with making a document without authority contrary to **Section 357 of the Penal Code**. The particulars of the offence were that between the 12th August and 3rd November 1999 at Nakuru Township, with the intent to defraud and without authority or excuse made a certain document namely AFCO LPO No.2147 purporting it to be a genuine LPO issued by AFCO.

The appellant was further charged with another count of conspiracy to defraud contrary to **Section 317 of the Penal Code**. The particulars of the offence were that between the 30th July and November 1999 at Kenya Pipeline Company Nakuru depot, jointly with others not before court conspired with the intent to defraud Kenya Revenue Authority the sum of Ksh.12 Million by falsely pretending that a certain forged AFCO LPO No.2038 dated the 30th July 1999 was a genuine and valid AFCO LPO issued by AFCO to Agip Oil (K) Limited Nakuru depot to deliver to AFCO Lanet 20,000 litres of Super petrol, 10,000 litres of Diesel and 10,000 litres of Kerosene duty free fuel. The appellant was charged with another count of making a document without authority contrary to **Section 357 of the Penal Code**. The particulars of the offence were that between the 30th July and November 1999 at Nakuru Township with intent to defraud and without authority or excuse made a certain document namely AFCO LPO No.2038 purporting it to be a genuine LPO issued by AFCO. The appellant pleaded not guilty to the charges. After a full trial, the appellant was convicted as charged on all the four counts. He was sentenced to serve two years imprisonment each on counts 1 and 3 respectively. He was sentenced to serve three years imprisonment

on counts 2 and 4 respectively. Count 1 and 2 were ordered to run concurrently whilst the sentences in counts 3 and 4 were ordered to run consecutively. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant has raised nine grounds of appeal challenging the trial magistrate's decision in convicting him. The said grounds of appeal may be summarised as thus; He was aggrieved that he had been convicted based on insufficient and uncorroborated evidence of the prosecution's witnesses. He faulted the trial magistrate for unduly relying on the evidence of the document examiner to convict him yet the said evidence was not by itself sufficient to prove the charge against him to the required standard of proof. He was aggrieved that the trial magistrate had shifted the burden of proof and thereby placed the onus of proof on the appellant which was contrary to the law. He faulted the trial magistrate for not considering his defence before he arrived at the decision to convict him. He was finally aggrieved that the convicting magistrate had taken over the proceedings in the criminal trial without complying with mandatory provisions of **Section 200 of the Criminal Procedure Code**. He was finally aggrieved that the trial magistrate had failed to discharge the burden placed upon him to assess the totality of the evidence adduced before him before arriving at the said decision to convict him.

At the hearing of the appeal, Miss Chelagat, learned counsel for the appellant reiterated the contents of the grounds of the appeal and urged this court to allow the appeal. She summarised the grounds of appeal by arguing three broad themes of the appeal. She submitted that the trial magistrate had erred when he held that the testimony of the documents examiner sufficiently connected the appellant to the offences committed. She submitted that the trial magistrate erred when he failed to subject the testimony of the said document examiner to scrutiny in order to determine if it established that indeed the appellant had forged the local purchasing orders that were allegedly used to purchase the duty free fuel from the Agip fuel depot. She further submitted that the documents that were purportedly identified as having been made by the appellant were in fact made by persons who were variously referred to as Karanja Mbutia and Joseph Mbutia. She submitted that the appellant is known by the names Joseph Macharia Mbutia and not the two names referred to by the document examiner.

Miss Chelagat further submitted that the evidence that the trial magistrate found to have incriminated the appellant was contradictory and did not in fact refer to the appellant. She submitted that the exhibits which were produced by the prosecution and which were allegedly made by the appellant were in fact made by other persons who were not charged together with the appellant. She submitted that the trial magistrate had abdicated his duty to evaluate the evidence of the document examiner and reach an appropriate determination whether the said evidence could sustain a conviction on the charges brought against the appellant. She referred this court to the case of **Gitau vs Republic [1989] KLR 187** in support of her submissions.

Miss Chelagat further submitted that the proceedings before the magistrate's court were conducted by three magistrates. She submitted that the magistrate who took over the proceedings from the initial magistrate who commenced the proceedings did not comply with the mandatory provisions of **Section 200 (3) of the Criminal Procedure Code**. She submitted that the magistrate who heard the testimony of PW15 CPL Dickson Omumia did not inform the appellant of his right to recall witnesses who had testified if he so wished. She submitted that it was this evidence which was irregularly admitted that was the basis upon which the appellant was convicted. She referred this court to the case of **Mudoola vs Republic [1990] KLR 616** in support of her submissions on this point.

She finally submitted that the trial magistrate had not properly evaluated the evidence adduced by the prosecution witnesses and that which was adduced by the appellant in his defence. She submitted that had the convicting magistrate properly evaluated the evidence adduced, he could not have arrived at the finding that the prosecution had proved its case against the appellant to the required standard of proof beyond reasonable doubt. She submitted that insufficient evidence was adduced and could not sustain the conviction of the appellant. In the circumstances therefore, she urged the court to allow the appeal and acquit the appellant.

Miss Opati for the State conceded to the appeal. She submitted that the provision of **Section 200 of the**

Criminal Procedure Code was complied with when the convicting magistrate took over the proceedings from the magistrates who had previously heard the case. She conceded that the convicting magistrate had relied on the testimony of PW14 Antipas Nyanjui, the document examiner to convict the appellant yet the said convicting magistrate did not have an opportunity of assessing the evidence of the said document examiner when he testified before court. She however submitted that this court should order that the appellant be retried in view of the failure by the convicting magistrate to comply with the provision of **Section 200 of the Criminal procedure Code.**

This being a first appeal, this court is mandated to re-evaluate and to re-consider the evidence adduced in the trial before the magistrate's court so as to reach its own independent determination whether or not to uphold the conviction. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore could not make any finding as regard the demeanour of witnesses (See **Okeno –vs- Republic [1972] E.A. 32**). The issue for determination by this court is whether the prosecution proved its case on the charge of attempted defilement against the appellant to the required standard of proof beyond reasonable doubt. I have carefully considered the submissions made by Miss Chelagat on behalf of the appellant and by Miss Opati on behalf of the State. I have also re-evaluated the evidence which was adduced before the trial magistrate's court as I am required to by the law.

Section 200 (3) of Criminal Procedure Code provides as follows;

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused may demand that any witness be re-summoned and be heard and the succeeding magistrate shall inform the accused person of that right.”

In **Mudoola vs Republic [1990] KLR 616**, Omolo J, (as he was then) quoted with approval the following dictum of the Court of Appeal in the case of **Peter Karobia Ndegwa vs Republic CA Criminal Appeal No.125 of 1984** at page 3 which stated as follows;

“Section 200 is not to be invoked where, as seemingly in the instant case, such a half-heard trial is a short one, it could be conveniently started de novo because the prosecution witnesses are still available locally and passage of time when the trial first commenced and another magistrate taking over almost midway, is so short so as not to cause or produce any accountable loss of memory on their part, whether actual, presumed or pretended, to the prejudice of either the prosecution or the accused. No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration. It could be also argued that the salutary and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in the other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully ‘observed’ the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case, in our opinion.”

In the present appeal, the criminal trial of the accused was presided over by three magistrates. The first magistrate Mrs. G. A. Ndeda, Chief Magistrate heard fourteen (14) witnesses before she ceased having jurisdiction. The proceedings were taken over by Mr. J. Nduna, Senior Resident Magistrate who partly heard the testimony of PW15. The convicting magistrate, Mr. H. M. Nyagah, Senior Resident Magistrate concluded hearing the evidence of PW15 when he was cross-examined by the accused. The convicting magistrate then heard the testimony of the appellant in his defence. It is clear that when Mr. J. Nduna Senior Resident Magistrate took over the proceedings from Mrs. G. A. Ndeda, Chief Magistrate, he did not explain to the appellant his rights to recall witnesses if he so wished as provided by **Section 200 (3) of the Criminal Procedure Code**. Although Mr. H. M. Nyagah Senior Resident Magistrate informed the appellant of his right under the said section of the law, the damage had already been done by his predecessor. Where a succeeding magistrate does not inform an accused person of his right to recall

witnesses, the said proceedings will be vitiated by an illegality. In the present circumstances therefore, and on that ground alone this court will allow the appeal and set aside the conviction of the appellant.

However for the completeness of the record, it is imperative that this court addresses the other issue raised by the appellant in his appeal. The appellant complained that the trial magistrate did not properly evaluate the evidence adduced by PW14, the document examiner and therefore reached the erroneous decision that the said document examiner had indeed found that the appellant had forged the local purchasing orders (LPO) of the complainant with the intention of defrauding the Kenya Revenue Authority. What did the convicting magistrate state in his judgment on his aspect of the evidence? At page 3 of his judgment the convicting magistrate stated as follows;

“The evidence of the document examiner is that the documents were made by the accused person. He examined the known handwriting of the accused and compared it to the two documents in question. Though the accused denies this, I think the case against him is water tight. All the other employees at the affected AFCO stations had their handwritings examined. They were absolved. Same for the accused person (sic). I have no reason to doubt that it is the accused person who wrote the said documents.”

I have re-evaluated the evidence adduced by the said document examiner. I am satisfied that the complaint made by the appellant as regard the manner in which the convicting magistrate evaluated the said evidence is valid. The convicting magistrate did not assess the said evidence and give reasons why he believed the testimony of the document examiner to be credible. The document examiner did not tell the trial court how he arrived at the conclusion that it is the appellant who wrote the said document.

As was held in the case of **Gitau & Anor. Vs Republic [1989] KLR 197**, it is the duty of the trial magistrate to assess the evidence adduced by an expert witness so as to satisfy himself of the accuracy of the expert upon whose opinion he relies. The record must show that the trial magistrate duly applied his mind to the said evidence that was adduced by the document examiner and arrived at the conclusion that the said opinion was accurate. In **Samson Tela Akute vs Republic Nairobi HC CRA No.844 of 2004 (unreported)** Lesiit and Makhandia JJ, had this to say as regard the evidence of handwriting experts (at page 12);

“...We would have expected that the expert would have explained to the court in detail the particular features of similarity or dissimilarity regarding characteristics of the signatures and the pen lift so that the court could be in a position to appreciate the weight of his technical evidence and on examining the said characteristics would have assisted him arrive at his own opinion. Further by the expert using the word ‘etc’ he alludes to some other features he did not disclose to the court. This rather casual approach to an otherwise serious matter is deprecated. Be that as it may we find that the expert witness failed in his noble task of pointing out similarities and dissimilarities regarding the characteristics of the signature as well as the pen lift that would have enabled the trial court to weigh their relative significance. It would have assisted the trial magistrate as we stated earlier to examine the specimens and draw his own conclusion. In the case of Wakeford vs Linclon (Bishop), [1921], 90 L.J.P.C (174) Lord Birkenhead observed;-

‘...the expert called for the prosecution gave his evidence with great candour. It is not possible to say definitely that anybody wrote a particular thing. All you do is to point out the similarities and draw conclusions for them. This is the manner in which expert evidence on matters of this kind ought to be presented to the court, who have to make up their minds, with such assistance as can be furnished to them by those who have made a study of such matters, whether a particular writing is to be assigned to a particular person...’

It is therefore apparent in this case that PW14 did not discharge the duty placed on him to illuminate to the court the reasons why he had formed the opinion that the handwriting in the forged documents was that of the appellant. By merely saying that the handwriting in the forged documents was made by the same hand with the specimen handwriting of the appellant, the document examiner abdicated his responsibility of persuading the court as to the accuracy or credibility of his opinion. The convicting

magistrate fell into error when he adopted the opinion of the document examiner without verifying the accuracy of the said opinion. The conclusion of the convicting magistrate was further made untenable by the fact that he never had an opportunity of seeing the said document examiner as he testified before court and appropriately assess his demeanour due to the fact that he took over the proceedings after the said document examiner had already testified.

The upshot of the above reasons is that the appeal filed by the appellant will be allowed. His conviction is quashed. The sentences imposed are hereby set aside. No useful purpose will be served if the appellant is retried taking into consideration that he has already served a quarter of the period that he had been sentenced to serve by the convicting magistrate in the impeached trial. The appellant is acquitted of all the charges brought against him. He is ordered released from prison and set at liberty unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU THIS 23rd day of AUGUST 2007

L. KIMARU

JUDGE