



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 844 of 2004

(From original conviction and sentence in Criminal Case number

2766 of 1999 of the Chief Magistrate's Court Nairobi- Boaz Olao – CM)

SAMSON TELA AKUTE APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The Appellant **SAMSON TELA AKUTE** was together with two others namely **JACOB JUMA** and **DAVID MACHARIA NDEGWA** were jointly and separately charged with various counts ranging from **abuse of office, forgery**, to **giving false certificate by a Public officer**. The Appellant separately faced six counts of **abuse of office contrary to Section 101 (1) of the Penal Code**. He also faced one count jointly with Jacob Juma of forgery contrary to Section 349 of the Penal Code. Jacob Juma alone also faced another charge of forgery contrary to section 349 of the penal code. Finally David Macharia was charged alone with one count of **giving false Certificate by a Public officer contrary to Section 102 of the Penal Code**. The particulars of the charge were set out in the charge sheet and we need not repeat them here. Suffice it to state that the charges arose from a government contract given to Juma Construction Company Ltd to construct Lugulu-Makuselwa (E308) and Misikhu-Naitiri (D283) Junction Roads. The Prosecution case was that the contract was not properly given. That in the process there was abuse of office as well as acts of forgery by the parties involved, hence the charges preferred against the three accused persons.

The Prosecution called nineteen (19) witnesses and at the close of the Prosecution case, Jacob Juma was acquitted of all the charges facing him. The case then proceeded to defence hearing.

In a well reasoned Judgment delivered on 4. 5. 2001, the learned trial Magistrate acquitted the third accused – David Macharia of all the charges facing him as well. As regards the Appellant, the trial Magistrate also acquitted him of the charges except count vii in which he found him guilty of forgery and sentenced him to a fine of Kshs.40,000/= in default 12 months imprisonment. The Appellant was aggrieved by the conviction and sentence and through Messrs Mohammed Muigai Mboya Advocates lodged this Appeal.

In his petition of Appeal, the Appellant faults his conviction and sentence on the following grounds:-

- (i). THAT the Learned trial magistrate erred in law in holding as he did that the offence of forgery had been proved.
- (ii). THAT the Learned Magistrate erred in law when he relied solely on the evidence of the handwriting expert as the basis of the conviction of the Appellant.

(iii). THAT the Learned Magistrate erred in law in finding that evidence of the handwriting expert on which he based the conviction was sufficient to sustain a conviction.

(iv). THAT the Learned trial Magistrate erred in failing to give the Appellant the benefit of doubt.

(v). THAT the Learned Magistrate erred in fact and in law in failing to appreciate or to appreciate fully submissions by Counsel for the Appellant that the Prosecution had failed to discharge the burden to prove forgery.

(vi). THAT the Learned Magistrate erred in law in convicting the Appellant against the weight of evidence.

(vii). THAT the Learned Magistrate erred in law in convicting the Appellant in the circumstances of the case.

In his submissions in support of the Appeal, Mr. Nyaoga learned Counsel for the Appellant compressed his arguments into two broad grounds; to wit: reliance by the learned magistrate on the evidence of the handwriting expert and the failure by the trial Magistrate to resolve in favour of the Appellant the benefit of doubt created in the Prosecution case.

On the first ground, Learned Counsel submitted that the handwriting examiner went beyond his province when he made a categorical finding that the writing in question was by the same hand. That under the law, the evidence of hand writing examiner should be restricted to pointing out similarities and dissimilarities in a handwriting and that even when the examiner considers the similarities and dissimilarities, he must elaborate on the features that form the similarities and dissimilarities. He cannot deal with those similarities and dissimilarities en-masse. For this submission Counsel relied on the case of **HASSAN SALUM VS REPUBLIC (1964) EA 126**. Counsel submitted that it was not the business of the handwriting expert to make a categorical finding that the writing in question was by the same hand. Counsel faulted the trial Magistrate for treating the expert's evidence as a finding and went ahead to substitute his own finding with that of the hand writing expert. The Court did not venture into making its own finding. Counsel also pointed out that although the handwriting expert said he examined the characteristics of the signatures and pen lift, he did not elaborate which these characteristics were or where the similarities and dissimilarities were, nor did he elaborate with specifics which pen lift characteristics were similar or dissimilar.

On the second ground, Counsel submitted that there were sufficient grounds on record to form the basis for availing the benefit of doubt to the Appellant. The documents the handwriting expert had examined were photocopies. The doubts Counsel submitted were created in the evidence of the handwriting expert when he testified that he knew that photocopies could be manipulated but he had concluded that it had not been done in the instant case. On this Counsel pointed out that there was no evidence to show that there was no manipulation. The expert also admitted that it was possible to superimpose a document. However he stated that there was nothing to show that it was done in the instant case. The expert also admitted that a photocopy's accuracy depended on the machine used and the skill of the user. To this Counsel responded that there was no evidence to show that the machine used was not defective or to show the skill of the person who made the photocopy. Finally Counsel pointed out that the expert witness also admitted that the signature on the photocopy could differ from the original. However he discounted that possibility without any proof. For all the foregoing, Counsel maintained, the trial Magistrate should have given the benefit of doubt to the Appellant and acquitted him of the charge.

The Appeal was opposed. Mr. Mungai Learned State Counsel submitted in opposition that the trial Magistrate wrote a well considered Judgment and never misdirected himself on the evidence tendered before him and was right in convicting the Appellant by relying on the evidence of PW16, the handwriting expert. On who qualifies as an expert witness, Counsel referred us to the case of **ONYANGO VS REPUBLIC (1969) EA 362 and MUTONYI V R (1982) KLR 203**. In his Judgement the trial Magistrate stated that he accepted the opinion of the expert after examining his demeanour which according to Counsel was the right thing to do. Referring to the case of **WAINAINA VS REPUBLIC**

(1978) KLR 11 Counsel submitted that expert evidence did not require corroboration.

Regarding the second ground of Appeal argued by the Counsel for the Appellant, Learned State Counsel submitted that there were no doubts created in cross-examination of PW16 by the Learned defence Counsel. That although the witness conceded that the document was a photocopy he clearly stated that he had dealt with photocopies before. That therefore the examination he conducted on the document was sufficient to draw a conclusion. Counsel concluded by submitting that the evidence on record was sufficient to find a conviction.

In reply, Counsel for the Appellant sought to distinguish the authorities cited by the Learned State Counsel. He pointed out that whereas Mutonyi's case talked about experts generally, Salum Case was specific and dealt with the evidence of a handwriting expert. As for Wainaina's case, Counsel pointed out that Salum's case was relied on and adopted in the said case. On failure by the defence to cross-examine PW16 on the characteristics and pen lift on the specimen, counsel submitted that the burden of proof always lies with the Prosecution which cannot be discharged by cross-examination of witnesses by the defence.

As the evidence of PW16 which is impugned by the Appellant is fairly short, we shall reproduce the same herein in extenso.

"PW16 No. 217401 EMMANUEL KENGA MALE SWORN STATES-

"... I am a document examiner at C. I. D. headquarters, Nairobi. I was trained locally and in Israel. I have ten years experience in my field and my daily work is the examination of disputed documents....."

On 19. 4. 2000 while in my office, I received exhibits from Inspector Hassan of CID. These were:-

- (i). Letter of commencement dated 17. 12. 97 – MFI 2 (questioned document)**
- (ii). Specimen signatures marked Q1 to Q8 – MFI – 31**
- (iii). Known signatures marked SI to S3 – MFI 32 in the name of Samson Akute.**

I was requested to examine and compare the questioned signatures on the questioned document together with the known signatures. I did the examination as requested on the documents as marked and I came to the conclusion that the signatures were by the same hand. I did this by considering the characteristics of the signatures, the pen lift etc. I prepared my report dated 13. 4. 2000 and now wish to produce the same as exhibit in this Court.

Exhibit 33 report of PW16.....

PW16 XX by Nyaoga.

I have ten years experience in my job. I am in charge of the document examination Section. I trained locally and overseas. I am now a superintendent of Police and an expert in document examination. It is true that the document I examined was a photocopy. What was on the exhibit memo was written by the investigating officer. My examination was to examine the questioned signatures as against the specimen signatures provided. The document was a photocopy but was legible. I use the same expertise whether the document is original or photocopy. I know a photocopy can be manipulated but in this case, that was to done. It is possible to superimpose a document on another but that was not done in this case. Photocopying is one of the areas that I was trained on. Photocopy accuracy depends on the machine being used. That would also depend on the skill of the maker. If the machine is defective, then the copy will also be defective. I do not know the skill of the person who made the copy neither did I know the condition of the machine on which the photocopying was done. I do not know if the photocopying was made from another copy or original. I never saw the original copy so I cannot

comment on it.

The Learned State Counsel spent considerable time persuading us to find that PW16 was an expert. In our view this fact was not in dispute at all and the Learned Counsel for the Appellant did admit that much in his submissions. The grave men of the Appellants objection to the evidence of this witness was that in his conclusions, he went outside the scope of his duty as an expert witness and secondly that the Court adopted the opinion of the expert as its finding contrary to law. In which event then most of the authorities cited by Leaned State Counsel in reinforcing his argument that PW16 was an expert witness were unnecessary.

We would agree with the Learned Counsel for the Appellant that the proper role of a handwriting expert was correctly and succinctly set out in the following passage in the case of **HASSAN SALUM VS REPUBLIC (1964) EA AT PAGE 128.**

“..... In saying that he (the expert) had no doubt that the forged signature had been written by the Appellant, he was going far beyond the proper limits. I think the true answer was given by the expert in Bishop of Lincoln Case (1921) 90 LJPC 174 that it is not possible to say definitely that any body wrote a particular thing. I think an expert can properly say, in an appropriate case, that he does not believe a particular writing was by a particular person. On the positive side. However the most he could ever say is that two writings are so similar as to be indistinguishable and he could, ofcourse, comment on unusual features which make similarity the more remarkable. But that falls far short of saying that they were writhen by the same hand.....”

The aforesaid paragraph was cited with approval in the case of **WAINAINA VS REPUBLIC (SUPRA).** The above case is on all fours with the instant case. We think that PW16 went beyond the scope of his duty when he categorically stated that:-

“...I came to the conclusion that the signatures were by the same hand....”

In effect what this conclusion really meant was that the signatures had been executed by the same person meaning the Appellant.

To fortify and reinforce our above holding we revert to the summing up by Lord Heward in **REPUBLIC VS PODMORE (1930), 46 T. L. R. 365** in which he stated:-

“...Let me say a word about handwriting experts. Let everyone be treated with proper respect, but the evidence of handwriting experts is sometimes misunderstood. A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is the person who, habituated to the examination of hand writing, practiced in the task of making minute examination of handwriting, directs the attention of others to things which he suggests are similarities. That and no more than that, is his legitimate province....”

If as in the instant case, the expert boldly states that the signatures were by the same hand, he would, as correctly submitted by Counsel for the Appellant, have acted beyond the legitimate scope of his calling.

How did the expert arrive at the conclusion that the signatures were by the same hand? He stated that by:

“.....Considering the characteristics of the signatures, the pen lift etc....”

In our view this was so general approach as to be of little assistance if any to the trial Court. 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 conclusions.

In the case of WAKEFORD VS LINCOLN (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.....”

The evidence of an expert is a mere opinion which is not bidding on the trial Court. The Court has to make its own independent evaluation and finding, the opinion of the expert notwithstanding. The Court has to examine the documents itself and come up to the conclusion with such assistance as can be furnished by the experts in the field, whether a particular writing is to be assigned to a particular person. In the instant case there is no evidence that such an exercise was undertaken by the trial Magistrates. There is no indication whatsoever that the Learned trial Magistrate did on his own examine the signatures and arrived at the conclusion that they were similar. Instead what we have on record is that:-

“.....I observed him in cross-examination by Mr. Nyaoga and I am satisfied that he is knowledgeable in his work and that his findings deserve to be accepted and I have no reason to doubt the same.... I am accordingly satisfied that (PW6) had before him sufficient material on which to carry out proper examination which he did, and I accept his findings.....”

This was a gross-misdirection on the part of the trial Magistrate. He cannot abdicate his duty of making his finding for the opinion of the expert. He was required to and indeed ought to have made his own independent finding on the issue by undertaking his own examination of the documents.

In our view therefore the Appellant's complaint regarding the learned trial magistrate's treatment of the expert witness is not without merit.

In his defence the Appellant stated with regard to this count thus:-

“.....With regard to count No. 7 I would like to say that I did not sign the original of the commencement letter whose photocopy was produced in Court. As a former Senior civil Servant, my signature was and is till available in public documents. Anybody can still have access to my signature and can make a copy of such as the one that was presented in this Court. I am convinced that that is what happened in this case....”

Basically what the Appellant was saying that some other person may have lifted his signature and put it on the questioned document. With the advanced technology in modern times this possibility cannot be discounted particularly taking into account the questioned documents was a photocopy. In cross-examination this witness was asked by Counsel the following questions.

- Whether a photocopy can be manipulated
- Whether it was possible to superimpose a document on another.

His standard answer was that it was possible but that it did not happen in the instant case. The witness was not present when the document was photocopied and cannot in our view candidly say that it was not manipulated or superimposed. That possibility cannot be ignored. Further the witness conceded that a photocopy's accuracy depends on the machine used and the skill of the person making the photocopy.

When questioned whether he knew the machine from which the photocopy was made and the skill of whoever made the photocopy, he answered in the negative. Further the witness stated that he did not know if the photo-copying was made from another copy or from the original. He stated that the original signature and the signature on a photocopy can differ depending on the machine used and how the photocopying was done. Taking into account these concessions and the defence advanced by the Appellant, we think that the trial Court should have been cautious in accepting the experts evidence. Obviously many doubts were raised regarding the authenticity of the questioned documents. Like in every criminal case such doubts must of necessity be resolved in favour of the accused person. Had the Learned trial Magistrate considered the doubts raised as aforesaid and resolved them in favour of the Appellant as he should have, there would have been no evidence at all upon which the Court would have proceeded to convict the Appellant.

In the result, we allow the Appeal set aside the conviction and sentence imposed on the Appellant. The fine of Kshs.40,000/= if it was paid by the Appellant should forthwith be refunded to him. That will be our judgment in this Appeal.

Dated at Nairobi this 13th day of June, 2006

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LESIT

JUDGE

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MAKHANDIA

JUDGE-