



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 486 of 2004**

(From original conviction and sentence in Criminal Case No.6320 of 2002 of the Chief

Magistrate's Court at Kibera - Ms. Mwangi – PM)

ISAAC OWIYE MUSAMBAIAPPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant, ***ISAAC OWIYE MUSAMBAI*** was sentenced to a term of 2 years each in respect of two counts of Forgery contrary to Section 349 of the Penal Code. The two sentences were ordered to run concurrently. Being aggrieved by the conviction and sentence, the Appellant lodged the instant Appeal setting out 12 grounds of Appeal.

When the Appeal came up for hearing however, Mrs. Gakobo, conceded to the Appeal on the grounds that the evidence of PW3, the document examiner was not conclusive as to whether the Appellant forged the cheques. That from the recorded evidence it was not clear whether the specimen signature of the Appellant was taken and forwarded to the document examiner. If that had been done then it would have been possible to tell whether the Appellant was involved in the crime. Counsel further submitted that from the evidence of PW2, it is clear that the Appellant was a signatory to the account. For all intents and purposes therefore the Appellant had a right to sign the cheques. Finally Counsel submitted that the evidence on record showed that the Appellant had opportunity to commit the crime but it was not proved beyond reasonable doubt that he forged the Cheques in question.

Mr. Ikapel, Learned Counsel for the Appellant, welcomed the state's gesture. He however added that an essential element in an offence of forgery is "***intend to defraud.***" This ingredient of the charge was not included in the charge sheet. According to Counsel's failure to include the words "***with intend to defraud***" rendered the charge defective. For this submission Counsel referred me to Section 345 of the Penal Code the case of ***MARY MANGA MESHACK VS REPUBLIC CRIMINAL APPEAL NO 96 OF 1996 (UNREPORTED)***. With regard to the importance to be attached to the evidence of a document examiner, Counsel referred the Court to the celebrated case of ***HASSAN SALUM VS REPUBLIC (1964) EA 126.***

The Prosecution case was that PW1 was a sales representative for Bugnet Kenya Limited. The Company distributes AT&T items in the region. The Appellant was the accountant and custodian of the Company's Financial documents. He was also a signatory to the Company's Bank accounts. On 16th May, 2002 the Company had equipment for Citibank to clear from South Africa. The Company had no money for the exercise and opted to borrow. The Appellant requested PW1 to sign two blank cheques that would be used as security to borrow Kshs.115,000/= required to clear the goods. The Appellant

managed to raise the funds and had the goods cleared and delivered to the Customer. Once the goods were cleared and the Appellant paid he never went back to the offices of the Company. Rather he moved to the offices of the Company's Managing Director's wife. PW1 became suspicious regarding the Appellant's behaviour and opted to visit their bankers where to his surprise he learned that the account only held Kshs.18,000/=. That the accused had forged his signature with which he withdrew Kshs.108,000/=. He reported the matter to the Police and the Appellant was arrested and charged accordingly.

Put on his defence the Appellant testified that he was employed as a Finance Manager of the Company. He said that he borrowed money on the strength of the two blank but signed cheques of the Company. The money was borrowed from a Shylock. The cheque for Kshs.455,000/= was used to pay off the debtors. He denied having been involved in the crime. His defence was backed by DW1, the Managing Director of the Company. He stated that they borrowed the money to pay debts. He testified further that he was the one who opened the cheques in question and asked the Appellant, who was also a signatory to the account to look for the other signatories to open the cheques. As far as DW1 was concerned the Appellant committed no offence.

I have carefully analysed and evaluated afresh the evidence tendered before the Court by both sides, bearing in mind that I neither saw nor heard any of the witnesses and giving due allowance. See **OKENO VS REPUBLIC (1972) EA 32.**

From the evidence on record it is quite clear that there were boardroom wars between PW1 with other Directors on one side and the Appellant with the Company's Managing Director on the other side. As a result of those wars the Appellant became an unwilling victim. The Appellant was an authorised signatory to the account. How then could he have forged his own signature. Secondly, PW1 claims that this signature was forged. However, he is unable to tell how, where and when his alleged signature was forged. He only concludes that his signature must have been forged by the Appellant because he is the one who was paid the cash from the cheque. However this is pure speculation. There was no cogent and concrete evidence tendered to show that it was the Appellant who forged PW1's signature if at all. The document examiner's evidence in this regard would have been vital. However the document's examiners evidence tends to clear the Appellant from the commission of the offence. PW3 the document examiner candidly stated:-

".....After the examination I could not find any agreement. The questioned signatures were written by a different hand...."

Under cross-examination by the Appellant he remarked:-

"...I found the known signature were not written by the same hand...."

This is an expert's opinion. He categorically states that the signatures sent to him for examination and comparison were not made by one person. That evidence clearly exonerates the Appellant. However it should always be kept in mind that the evidence of a document examiner, is expert evidence contrary to the submissions by the Learned State Counsel, he need not in his evidence conclusively state who could have forged the document(s) forwarded to him for examination. As stated in the case of **HASSAN SALUM VS REPUBLIC (1964) EA 126:-**

"..... The most that an expert on handwriting can properly say in an appropriate case, is that he does not believe a particular writing was by a particular person or, positively, that two writings are so similar as to be indistinguishable, the handwriting expert should have pointed out the particular feature or similarity or dissimilarity between the forged signature on the receipt and the specimen of handwriting....."

In the case of **SAMSON TELA AKUTE VS REPUBLIC CRIMINAL APPEAL NO 844 OF 2004 (UNREPORTED)**, this Court dealing with issue stated:-

“.....If as in the instant case, the expert boldly state, that the signatures were by the same hand, he would, as correctly submitted by Counsel of the Appellant have acted beyond the legitimate scope of his calling.... The evidence of an expert is a mere opinion which is not binding 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 with 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....”

The Learned Magistrate went ahead to convict the Appellant although the document examiner stated that the signatures on the impugned cheques were not from the same hand. There is nowhere on the record and in her Judgment that she undertook personal examination of the signatures on the cheques and came to the conclusion that the Appellant forged the signatures. It was not denied in evidence that PW1 did not sign the cheques. Indeed he admitted that he signed the two blank cheques. His only problem with the cheques was that he never signed any of the two cheques to be opened. It is not apparent on record, how many signatories were to be mandatory before the account of the Company could be transacted; or how many signatories were required before the Company cheque could be opened. It is not also clear from the record that the Complainant signature on the company cheque was mandatory. In my view the handwriting expert's evidence was not properly appreciated and evaluated by the Leaned Magistrate in terms of the directions above. Had she done so she could definitely have come to the conclusion that the Appellant did not commit the offence charged. Yes and as correctly submitted by the Learned State Counsel, the evidence showed that the Appellant had the opportunity to commit the offence and that perhaps the forged signature might have been written by him, but this fell short of proving beyond reasonable doubt that the Appellant was infact the forgerer.

Forgery is defined under Section 354 of the Penal Code as:-

“.....Forgery is the making of a false document with intent to defraud or to deceive.....”

It would appear from the definition of forgery that:-

“.....intent to defraud or to deceive.....” is a major component of the offence.

The Prosecution must prove that in forging the document, the forgerer's intention was to defraud the Complainant. No such evidence was led. What we have is that the Company was experiencing financial doldrums and could not raise some amount to clear a consignment from South Africa meant for its client. That being the case it was agreed that they look elsewhere for financial accommodation. The Appellant managed to raise the amount from a Shylock on the strength of the signed blank cheques. The Appellant proceeded to use the money so obtained to clear the shipment. If these are uncontroverted facts, where is the intention to defraud or deceive on the part of the Appellant. I discern none whatsoever.

I also note on perusing the charge sheet that the said essential element **“intend to defraud”** was not included in the partiulars of the charge sheet. To that extent I would hold that the charge sheet was fatally defective. In terms of Section 345 of the Penal Code, intend to defraud must form the particulars of the charge sheet.

All in all I hold the view that Mrs. Gakobo, Learned State Counsel, properly did not support the Appellant's conviction on the two counts of forgery contrary to Section 349 of the Penal Code. It is the normal practice in offences of this nature to include an alternative count of uttering a false of document. This was not done in the circumstances of this case. In the case of **MARY MANGA MESHACK VS REPUBLIC CA NO 96 OF 1996, UNREPORTED** in a similar situation as obtaining herein the Court of Appeal observed:-

“..... We wish to observe here that the manner the charge was preferred was a departure from the unusual practice of including an alternative count of altering a false document.....”

This omission should be condemned and deprecated. It should not be condoned at all. I hope the

Prosecuting authorities will take heed and act appropriately. Anyhow, the Appellant having not been charged with any related offence to forgery, I will make no finding in that regard.

In the circumstances, I allow the Appellant's Appeal, quash the conviction and set aside the sentences of two years imprisonment on each count which had been imposed on him. He must be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 29th day of November, 2006.

.....

MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:=

Appellant

Mrs Gakobo for State

Mr. Ikapel for Appellant

Erick – Court clerk

.....

MAKHANDIA

JUDGE