REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 648 OF 2003
(From original conviction and sentence in Criminal Case No. 6674 of 2002 of the Principal Magistrate's Court at Kibera: Ms. Mwai, R.M.)

DANIEL SHIHEMI SHISIAH……..…APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

The appellant **– DANIEL SHIHEMI SHISIALI - Cr. A. no. 648 of 2003** – was charged with forgery contrary to Section 349 of the Penal Code, the particulars of which were that on diverse dates **between December, 1999 and 6th March, 20001, at Sarit Centre Westlands, Nairobi with intent to deceive or defraud, without lawful authority or excuse made a recommendation letter purporting to be a certificate issued by MR. ROBERT FOULSER** the Managing Director of Consultants for Effective Training Limited.

He was also charged with an alternative charge of making a document without authority contrary to **Section 357(a**) of the Penal Code the particulars of which were that: **On divers dates between December 1999 and 6th March 2001 at Sarit Centre Westlands in Nairobi, with intent to deceive or defraud, without lawful authority o excuse made a recommendation letter purporting to be a certificate issued by MR. ROBERT FOULSER the** Managing Director of Effective Training Limited.

The appellant was charged, convicted and sentenced at Kibera R.M.'s Court in Criminal Case No. 6674 of 2002, and being dissatisfied with both the conviction and sentence, he has appealed to this court on the following grounds:

1. The Learned Trial Magistrate erred in law and fact in holding that the prosecution proved the case beyond any reasonable doubt because there was no evidence to establish that the appellant forged the recommendation letter purporting it to be from Mr. Robert Foulser – the Managing Director – of Consultant For Effective Training Limited; and because there was no evidence to show that the appellant made the document.

2. The lower court erred in law and fact by failing to appreciate that there was no expert opinion to show that the appellant actually did and personally forged the said signature.

3. The Learned Magistrate erred in law and fact in holding that since the document related to the appellant, then it is the appellant who must have forged it.

4. The Learned Magistrate erred in law and fact when she sentenced the appellant to 12

months jail or a fine of Kshs.20,000/- by disregarding the Defence of the appellant, which expression was clear and raised serious and reasonable doubts as to whether or not the appellant made the document alleged.

Briefly, the prosecution's case was that the appellant was employed by the complainant – Consultants for Effective Training Limited on casual basis, between 1998 – 1999. The circumstances of his leaving the employment are that he was dismissed by P.W. 2 – Faula Omar – one of the directors for misconduct. P.W. 2 said that in February 2000 they were summoned to court after appellant sued them for wrongful dismissal. It is then that they found a letter that the appellant had produced in his pleadings purporting that the said letter was given or issued to the appellant by P.W. 1 – Robert Foulser, one of the directors of the complainant company.

The letter was scrutinized and found to be a forged letter. P.W. 1 denied ever signing the said letter. He dismissed the signature of the said letter, and also noted other abnormalities in the said letter. He said the letter was not on the original paper as required, it was not dated, had no reference, and had a seal whereas such letter did not require a seal. He then concluded that the document was without authority and his signature forged. P.W. 2, who is also familiar with P.W.1's signature, also said that the letter did not look like that of the complainant.

P.W. 3 and P.W. 4 Charles Okuche and Elijah Shitagwa, both employees of the complainant company, narrated the circumstances that led to appellant's dismissal. He had failed or refused to do his duty and was sacked. P.W. 4 said he is familiar with P.W. 1's signature, as he works as an administrator. He said the signature on the disputed document was not that of P.W. 1.

The said disputed document and specimen signature of P.W. 1 were taken to the Expert for examination and confirmation. P.W. 5, Emmanuel Kenga, the document Examiner, said that from examination of the documents he formed the opinion that the signatures were not from the same hand, in effect, therefore that the signature on the document was not written by P.W. 1.

P.W. 6 – P.C. Alfred Mutisya, the investigating officer then charged the appellant with this offence. He said that he retrieved the document from the Milimani Commercial Court, where his case against the company, and where he was seeking damages for illegal dismissal. He also said that he found out that the appellant had filed similar cases previously against the companies that had employed him.

The said letter was produced in the court as evidence.

In defence, the appellant said he was dismissed after he complained about the NSSF, NHIF, that he was told to go for his salary towards end of April, that he was later told that a letter would be written and given to P.W. 4 to take to him. Appellant also said that it was P.W. 4 who took a letter to him, and the letter was not dated. Appellant then filed a case against the company, and he won the case. He denied that the document in question is the one he was given by Elijah. Appellant said the letter he was given by Elijah was produced in court. He claimed that he later went to Milimani Commercial Courts and he did not take the letter in his court file.

Appellant called one witness – Francis Makonu – a relative – who said that he stayed with the appellant and that it was P.W. 4 who gave him the letter, to give to the appellant as the appellant was not present at the time. Makonu said that he saw the letter when appellant opened it, and noted that the letter had no date. He also claimed that the letter he saw in court was different from the one he saw, although they looked similar

I have carefully perused the proceedings and the judgment from the lower court, and re-evaluated the same in light of the grounds of appeal.

The lower court found no evidence to support conviction under Count 1 which dealt with forgery contrary to Section 349 of the Penal Code and accordingly acquitted the appellant on that count. While I find no cause to disagree with the Learned Magistrate, I need to point out the relationship between the Count 1 on

which appellant was acquitted and Count 2 on which he was convicted. This is in an effort to show the difficulties in acquitting on Count 1, under Section 349, and going on to convict under Count 2, on the same facts, but under Section 357(a) of the Penal Code.

To begin with, Section 349 provides for forging a document and the punishment for forging any document. But forgery is defined in Section 345 of the Penal Code as follows:

"Forgery is the making of a false document with intent to defraud or to deceive"

Under this definitional section of forgery, the elements are: making a document; which document must be false, in the sense that it was forged, or of telling a lie about itself; and the false document must have been made with the intention to defraud or deceive. Those elements were exhaustively dealt with in **KIMANI V. REPUBLIC, C.A. No. 76 of 1983 [1984] K.L.R. 670.**

In acquitting the appellant on Count 1, the Learned Magistrate, at J2 found that there was no expert [evidence] opinion to show that the appellant personally forged the signatures on the documents. Although his specimen writing were taken, they were not taken to the exert for analysis and the prosecution's case was that since the document relates to the appellant then he must be the one who forged. If that be the case, and my reevaluation of the evidence shows that the learned magistrate was absolutely right in acquitting on Count 1, then difficulties arise in convicting on Count 2 too.

On Count 2, the appellant was charged, as per the Charge Sheet, with making a document without authority, in that at the material time, the appellant, with intent to deceive or defraud, without lawful authority or excuse **made a recommendation** letter purporting it to be a certificate issued by P.W. 1.

The question which arises here is the evidence that the appellant made the recommendation letter complained about by the company? Without proof that a document was made by the appellant, intention to defraud or deceive or the motivation to do so are irrelevant. As was held in **HASSAN SALUM V. REPUBLIC [1964] E.A.** 126 the appellant might had the opportunity to commit the offence and that the forged signature might have been written by him but that falls far short of proving beyond reasonable doubt that the appellant was in fact the forger.

From J2 through J 3, the learned magistrate found that the signature on the document was indeed forged. But by whom, the lower court failed to evaluate the prosecution evidence before pining down the appellant. At J 2 the lower court found that there was no expert opinion to show that the appellant personally forged the said signatures. This is because appellant's specimen writing were not taken to the expert for analysis.

Without the above expert evidence, the learned magistrate acquitted the appellant on Count 1. But when it came to Count 2, again there was no evidence that the appellant made the said document. The only case prosecution had was that the documents related to the appellant and hence he must have made it. Then the learned magistrate concluded, despite the lack of evidence, that "it is the appellant who made the said letter after dismissal"

With all due respect to the learned Trial Magistrate this was an error in arriving at that conclusion in the absence of any evidence to support the same.

Looking at the entire evidence and the proceedings, the prosecution case collapsed the minute it was shown that even though the specimen writing and signature of the appellant were taken, they were not given to the expert document examiner, as was done with those of P.W. 1. Of what value then was such specimen from the appellant? Of what value was it that the signature was not that of P.W. 1 when there was no expert opinion to link the same signature with that in the appellant's specimen? These are the questions to which without clear answers the conviction of the appellant could not be sustained.

Without repeating myself, showing that the signature on the document was not that of P.W. 1 does not in any way mean that it was by the appellant.

It must always be kept in mind that in all Criminal Cases, the burden of proof lies on the prosecution, and that to the required standard – beyond any reasonable doubt

I conclude by referring to J 3 where the Learned Magistrate concluded: **"I find that he (appellant) was involved in making of the said document and intention of the same was to deceive or defraud." There was no evidence to show how the appellant was involved in making the disputed document.**

I find the trial magistrate's conclusion without any evidence to support the same. There were many doubts in the prosecution evidence, and that doubt, however slight must go, and should have gone to the appellant. The lower court did give that benefit of doubt to the appellant as required by law.

All in all therefore, the appeal is allowed, the conviction is quashed and the sentence set aside.

DATED and delivered in Nairobi this 9th Day of May, 2005.

O.K. MUTUNGI

JUDGE