REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 802 OF 1997

(From Original Conviction And Sentence In Criminal Case No. 4740

ROBERT OBUOYO OYOO……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGMENT

The appellant, **ROBERT OBUDHO OYOO** was charged with six (6) counts of **FORGERY,** contrary to section 349 of the Penal Code; three (3) counts of **UTTERING A FALSE DOCUMENT** contrary to section 353 of the Penal code; and one count of **STEALING** contrary to section 275 of the Penal Code.

Following his trial, the appellant was convicted on all the six (6) charges of forgery, and on two (2) of the charges of uttering a forged document. He was however acquitted on one count of uttering a forged document, and also on the count of stealing. The learned trial Magistrate then sentenced the appellant to imprisonment for 18 months for each and every one of the charges in respect of which he had been convicted. The court then ordered that the sentences would run concurrently.

As the appellant was dissatisfied with both the conviction and sentence, he lodged an appeal to this court.

At the hearing of the Appeal, Mr. Maobe advocate appeared for the appellant, while learned State Counsel Mr. Ogetii represented the State.

In his submissions, counsel for the appellant pointed out that the official signatories to cheques issued by the Australian High Commission were two officers,namely Bruce Curley and Bernadatte Sieley. All the cheques in issue, in this case were purportedly signed by one or the other of the said officers, whilst in reality the signatures appended thereto were forgeries.

Apparently, the prosecution set out to prove that the appellant was responsible for all the forgeries.

It was the appellant's submission that the prosecution failed to prove the offence to the standard required by law. That submission is predicated upon the fact that the two Senior Officers whose signatures were said to have been forged, did not testify in court. The said officers were Bruce Curley and Bernadette Sieley.

On this aspect of the appeal, Mr. Ogetii learned State Counsel conceded that the two officers did not give evidence. He also conceded that the two officers would have been essential witnesses. However, in

his view, the learned trial magistrate acted reasonably by accepting the prosecution's

explanation for its failure to get the said officers to testify in court. Basically, the reason given by the prosecution was that the two officers had left Kenya permanently, prior to the commencement of the trial.

There is no doubt that if the two officers had left the country permanently, it would have been unreasonable to insist that they be present in court, to give evidence at the trial. However, in my considered view, even though the court may accept the explanation for the absence of an essential witness, that by itself ought not to be a reason to justify the exclusion of such evidence as the said essential witness may have been expected to adduce, if the absence of the witness would result in the exclusion of some essential evidence. Once the court comes to a conclusion that some essential evidence had not been adduced at a trial, the court ought not to convict the accused person.

In this case, the samples of the handwritings of the two officers were taken by the police officer who was investigating the offence. The said samples were then compared with the writings on the cheques in issue. That comparison exercise was conducted by PW4, Mackenzie Mwau, who is a document examiner. In his report, PW4 concluded that the writings did not match.

Under section 48 of the Evidence Act (Cap 80) the court is authorized to accept evidence from persons who are skilled in matters such as the identity or genuineness of handwriting or finger or other impressions. Thus the evidence of PW4 was properly admitted by the trial court. From the said evidence, the court could properly conclude that the writings on the cheques did not appear to have been made by the two officers, Curley and Sieley. However, in the absence of evidence from the said two officers, I believe that it would be impossible to state, with certainty, that they or either of them wrote the cheques. I say so because it is possible for one to have varying signatures, even when the same persons tries to write his or her own signature. I therefore believe that it is for that reason that the two officers were essential witnesses, so that they could at least have told the trial court that they had not appended their signatures to the cheques.

Furthermore, the prosecution would then have been required to prove that the signatures on the forged cheques were those of the appellant. To that end however, the expert witness did not give any evidence linking the appellant to the forged signatures. I hold that the failure to adduce evidence to link the appellant to the writings on the cheques constituted a fatal flaw to the prosecution case, on the counts alleging that it was the appellant who forged the signatures on the cheques.

Another factor which was canvassed by the appellant was that the bank did check the signatures on the cheques, and was satisfied about the authenticity of the signatories. That implies that, on the face of it, the cheques were authentic. Therefore, the question that arises is this: who established that the signatures were forgeries? That person appears to be PW4. I say so advisedly, because the alleged authors of the signatures not testify in court to disown the signatures, and also because PW4 did not link the appellant to the signatures on the cheques. Those omissions leave a gap in the prosecution case.

The next issue taken up by the appellant was the comments by the learned trial Magistrate to the effect that the appellant had delayed the trial of his case. The appellant submitted that the learned trial Magistrate misdirected herself by holding that the manner in which the appellant conducted himself was suggestive of guilt. If the trial court hadmade such a finding, I would not have hesitated to accept the appellant's submission, in that regard. However, on my perusal of the record, I find that the trial court did not cast any aspersions of the kind indicated by the appellant. At no time did the trial court hold that the delay in the trial was suggestive of the appellant's guilt. I therefore find no merit in that line of submissions.

However, the learned trial Magistrate did make the following observations, in the judgment:

> **"I find that in addition to PW1 and 4s evidence that the signatures were forgeries, the accused own conduct when the matter was discovered in the High Commission was that of a guilty mind. He disappeared from the office without having excused himself. Not to mention**

he disappeared on 26.11.94 and was only seen on 29.11.94, more than a month after. The accused did not address the issue of his disappearance."

The forgoing is clearly not a basis upon which the court was entitled to hold that the appellant was guilty of the offence he was charged with. The fact that an accused person may appear to have a reason to commit an offence, and an opportunity to do so, would not make him guilty unless the prosecution adduced either direct or circumstantial evidence that prove the involvement of the accused in the commission of the offence.Motive, without action cannot give rise to an offence. I therefore hold that there is merit in the appellant's criticism of the learned trial Magistrate's decision when she held that the conduct of the appellant was that of a guilty mind. That is a misdirection, as it effectively placed a burden on the appellant, whereas it is always the prosecution's burden to prove the guilty of the accused person. The accused person is not required to prove his innocence, by evidence, conduct, omission or commission.

Finally, the appellant submitted that the trial was fundamentally flawed as the trial court asked for and received written submissions from the appellant's counsel.

In Robert Fanali Akhuya versus Republic, Criminal Appeal No. 42 of 2000

(at Kisumu) the Court of Appeal addressed itself as follows, on this issue of written submissions;

"At the close of the defence case at the request of

the appellant, the trial Magistrate directed that both the

prosecution and defence file written submissions, which

from our reading of the record were to be submitted

to the court registry."

In this case, the record shows that both at the close of the prosecution case, and at the close the appellant's defence, his advocate requested that he should file written submissions. Thus the case was on all fours with that in the case of Robert Fanali Akhuya

"The trial procedures before the High Court are

covered under Part 1X of the Criminal Procedure Code

(CPC). The relevant provisions of that part give the prosecution

and the defence the right to address the court by way of submissions.

A careful examination of the said provisions clearly shows that

the submissions must be made in open court in the presence of the accused.

Sections 213 and 310 CPC use the phrase "address the court," which in ordinary

parlance means to talk to or lecture to an audience."

Having thus analysed the issue, the Court of Appeal proceeded to conclude that submissions ought to be made orally in court. They did so, in the following words:

"As we stated earlier, final submissions are by

dint of the provisions of the CPC supposed to be

orally made in open court at the close of the hearing

of the case of the prosecution and defence respectively.

The submissions, it would appear, are part of the trial procedures,

and are provided for in the CPC. The trial cannot be said to be complete

unless the record showsthat both sides were granted an opportunity

of addressing the court on the merits or otherwise of the case against

the accused."

The rationale for insistence on oral submissions was that if the submissions were in writing, the accused would be deprived of the opportunity to hear and understand the submissions. It was felt that when the accused is accorded the opportunity to listen to the submissions, he would have right to clarify any point raised or object to it being raised, where he considers it necessary for his benefit. For those reasons, the Court of Appeal felt, strongly, that it was no excuse that the appellant is the person who had requested for the written submissions. The failure to allow for oral submissions was held to be a fundamental irregularity, which was not curable under section 382 of the Criminal Procedure Code.

As this court is bound by the above cited judgment of the Court of Appeal, I do hereby hold that the acceptance of written submissions was a fundamental irregularity, which ought not therefore to be permitted to stand.

But then again, in the more recent decision by the Court of Appeal, **Erick Wambulwa Muchocho & Another versus Republic, Criminal Appeal No. 24 of 2003**, (at Nakuru), it was held that the High court could not compel the parties to address it verbally. In that case, the Court of Appeal held that:

"The High Court was not bound to hear the

appellants in any particular manner so long

as they were heard. The record of the High Court

clearly shows that the appellants were present before

the judges but each chose to provide the judges with

what they called "written submissions." The High court

could not compel them to address them verbally."

Notwithstanding the fact that the appellant, in that case had filed and relied on written submissions before the High Court, the Court of Appeal upheld conviction.

A perusal of this later case reveals that the court's attention was not drawn to the judgment in the **Robert Fanali Akhuya case**. Thus, it is not apparent whether or not the case was decided per incuriam. But nonetheless, the decision is equally binding on me. In the circumstances, it is difficult to decide which route to take.

On my part, I accept that the use of the word "address" in common parlance, denotes speech. However, I am not sure that that is necessarily the meaning subscribed to the said word, as used in the

statute books here. I subscribe to the view that the appellant must be accorded the opportunity to

put forward his arguments. If the court were to deprive the appellant of such right, the court would be deemed to have fundamentally violated the rights of the appellant.

However, if the appellant should decide that he wished to put forward his views in a written format, I believe that he would not be prejudiced, in the event that the court accorded him his wish. To my mind, there are those persons who put forward their thoughts better, in writing than through speech. Also by putting forward thoughts in writing, one may actually have more time and opportunity to put in greater thought to the matter. I cannot therefore visualize how such an exercise could occasion prejudice to an accused person, who chooses to use it.

I sincerely hope that this issue can be resolved by the Court of Appeal, by clarifying the legal position on written submissions. I say so because this, to my mind, is not just an academic issue, which requires no more than an analytical exposition. It is a real problem, which we encounter every day in the course of handling Criminal Appeals. Many appellants are not represented, and they tell us that they are unable to address the court orally. Indeed, when we tried to insist that they make oral submissions, they expressed the view that we were suppressing them. It is then that we appreciated the fact that our insistence on oral submissions was occasioning an injustice to many persons. It is in that context, and in an endeavour to do justice, that I deemed it prudent to interprete the word "address" more liberally. In doing so, I utilized **"Chambers 21st Century Dictionary"**, wherein it is recognised the word address could be used to imply the written word, as opposed to the spoken word. The said dictionary has the following example:

"address oneself to someone - to speak or write to them."

Of course, I appreciate that in the margin notes relating to section 213 of the Criminal Procedure Code, reference is made to "order of speeches." If that be deemed an accurate guideline to the meaning which is to be attached to the word "address", it would imply oral submissions, as their Lordships held in the case of **Robert Fanali Akhuya versus Republic Criminal Appeal No. 42 of 2000** (at Kisumu).

Might I therefore just be raising this issue as an academic exercise? The answer is in the negative. The issue, as I have already stated is borne out of my experiences with numerous appellants, who insist that they were unable to make oral submissions. I have a genuine fear that if the word "address" is construed strictly to mean oral submissions, the High Court too, would be deemed to have flouted the provisions of section 354(1), if we were to allow appellants to give us their written submissions. I consider my fear to be genuine because, by allowing written submissions, if the same are definitely unacceptable, regardless of the appellant's circumstances, the action by the High court would eventually lead to the automatic quashing of conviction and sentence, even if the evidence on record was otherwise sufficient to sustain conviction.

Whilst I appreciate the need for compliance with rules and the letter of the law, I also believe that justice may sometimes be better served by looking to substance. It is for those reasons that I do hold that in instances wherein the appellant asked the court to accept his written submissions, the court should have the discretion to accept the same as the said appellant's chosen mode of address to the court.

But in the meantime, for the reasons which I have set out herein, I find that there is merit in this appeal.

Accordingly, the appeal is allowed, conviction is quashed and the sentences set aside.

Dated at Nairobi this 18th day of October, 2004

FRED A. OCHIENG

AG. JUDGE

Delivered in the presence of Maobe for Appellant