



**Ombok v Republic (Criminal Appeal E094 of 2021)
[2024] KEHC 3248 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL APPEAL E094 OF 2021**

**GL NZIOKA, J
APRIL 8, 2024**

BETWEEN

FELIX OTIENO OMBOK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of; Hon. C. M Njagi, (Senior Resident Magistrate), delivered on, 30th September, 2021, vide Criminal Case No. 111 of 2018, at the Chief Magistrate’s Court at JKIA)

JUDGMENT

1. The appellant was arraigned before the court on 11th September 2018, charged with in the 1st count with the offence of; forgery contrary to; section 345 as read with section 349 of the Penal Code (hereinafter “the Code”).
2. He was also charged in the 2nd and 3rd counts with the offences of making a false document without authority contrary to section 357(a) of the Code and in the 4th count with the offence of, uttering a false document, contrary to section 353 of the Code. The particulars of each count are as per the charge sheet.
3. He pleaded not guilty to all counts and the case proceeded to full hearing. The prosecution called a total of ten (10) witnesses in support of its case. The prosecution case in brief is that, the appellant was employed by Kenya Airports Authority (KAA) as a procurement clerk stationed at Wilson Airport.
4. That on or about 27th March 2018, he created a Local Purchase Order (LPO) serial number 4500019688 in the sum of; Kshs 31, 900,000 in favour of Morven Kester (East Africa) Limited.



5. (PW9) Martin Mwiti Kaburiah, the Chief Executive officer and director of Morevn Kester (East Africa) Limited presented the LPO to Gulf Bank Limited as a security for a credit facility of; Kshs 20,000,000. However, the bank held the LPO and the letter head of KAA to be suspect.
6. As a result, two officials of the bank including; Abdul Majid visited Kenya Airport Authority (KAA) Wilson Airport branch to authenticate the LPO and letterhead. (PW1) Machio P. Harrison Airport Manager at Wilson Airport confirmed that the letterhead was not genuine.
7. He noted that the cell phone number and signature on the letterhead belonged to the appellant but it did not bear an employment number.
8. Further, Mr. Njaga, (PW2) an internal auditor in charge of information system examined the system that generated the LPOs and confirmed that the subject LPO was generated by the appellant.
9. Furthermore, (PW4) David K. Ngetich, the procurement officer, confirmed that the suspect LPO could not be traced in the system. Even then, the appellant did not have authority to incur expenditure above Kshs 500,000 as the same was only authorized by the procurement manager at the head office.
10. That on 4th April 2018, Mr. Kasaini, the General Manager instructed (PW8) George Mukiri Ngumi, a system administrator to terminate the appellant's access to the system and to deactivate his account, which he did.
11. That on 4th May 2018, (PW10) No. 57730 Corporal Kennedy Mwache, attached Directorate of Criminal investigation at Wilson Airport went to KAA procurement office where he met the appellant and after informing him of the purpose of the visit, the took possession the appellant desk monitor, Central Processing Unit (CPU) and invoice payment register.
12. Corporal Mwache (PW10) collected samples of appellant's signature, his known signature, certified copy of the purchase service orders, and documents with the logo of KAA which he forwarded to (PW7) No. 235221, Chief Inspector Bernard Cheruyiot, the document examiner, at the Directorate of Criminal Investigation Headquarters to ascertain whether the signatures were made by the same person, and in particular the appellant and whether the letterhead logo on the local purchase order was genuine.
13. PW7 examined the documents and established that the signatures were made by the same author and in this case the appellant. Further, the prints on the local purchase order were different from the prints on the documents containing the KAA logos and the letterhead.
14. The matter was reported to the police at Wilson Airport and the appellant arrested. At the conclusion of investigations, he was charged with the offences herein stated.
15. At the close of the prosecution case, the trial court ruled that, the appellant had a case to answer and placed him on his defence. He chose to give a sworn statement in defence and denied committing all the offences levelled against him.
16. He testified that he was arrested on 4th May 2018 and taken to DCI Wilson Airport and shown the subject LPO No. 4500019688 and a letter but denied authoring of the letter although it bore his name. That he did not have access to the company's letterheads as they were purchased from outside the company.
17. Further, his name was not on the subject LPO but only initials which could mean anything, and neither did indicate who prepared it. Further, the LPO was for the sum of Kshs. 31,900,000, that was above his



- grade, and could only be created at KAA head office. That, he could only raise LPOs for Kshs. 500,000 and below; and purchase requisition and issue items from the store.
18. The appellant argued that a person with super user rights could access the system and raise an LPO. He explained that passwords expired after thirty (30) days, however, his password expired before that period. That, he raised the issue with the IT officer at Wilson Airport and the same was reset and issued after four (4) to five (5) days.
 19. Further, his password was reset twice and claimed that anyone could reset his system. Furthermore, the system was new and they had issues with it. He denied knowing the witnesses from Gulf Bank and the owner of Morevn Kester (East Africa) Limited
 20. At the conclusion of the case the trial court delivered a judgment dated 30th September, 2021 and held that the prosecution had proved its case beyond reasonable doubt and convicted the appellant on count 1, 2 and 3 but acquitted him on count 4, due to insufficient evidence.
 21. The appellant was sentenced as follows:
 - a. Count I: a fine of Kshs. 100,000 and in default one (1) year imprisonment.
 - b. Count II: a fine of Kshs. 200,000 and in default two (2) years imprisonment.
 - c. Count III: a fine of Kshs. 200,000 and in default two (2) years imprisonment
 22. However, the appellant is aggrieved by the decision of the trial court and has appealed against it on the grounds as here below reproduced:
 - a. The learned magistrate erred in law and in fact in convicting the appellant of the offence of forgery while there was no evidence proving beyond reasonable doubt that the appellant could have committed the offences.
 - b. The learned magistrate erred in law and in fact in relying on uncorroborated incoherent circumstantial evidence to convict the appellant.
 - c. The learned magistrate erred in law and in fact in failing to consider the uncontroverted evidence to convict the appellant.
 - d. The learned magistrate erred in law and in fact in failing to appreciate the numerous gaps and doubts in the prosecution evidence and failing to resolve the same in favour of the appellant.
 - e. The learned magistrate erred in law and in fact in rendering excessive and punitive sentence to the appellant.
 23. However, the respondent opposed the appeal vide grounds of opposition dated 21st April, 2022, which that: -
 - a. The appeal lacks merit, is misconceived and unsubstantiated.
 - b. The appeal is an abuse of the court process since the appellant was properly convicted before the trial court and the prosecution discharged its burden of proof beyond reasonable doubt.
 - c. That the appeal lacks merit and the same should be dismissed in its entirety.



24. The appeal was disposed of vide filing of submissions. The appellant in submissions dated 18th May 2022, argued that, the prosecution did not prove its case beyond reasonable doubt and relied on the case of; Caroline Wanjiku Ngugi v Republic (2015) eKLR where the court stated that before an accused person is convicted his/her guilt must be proved beyond reasonable doubt.
25. That, in the instant matter the learned trial magistrate failed to consider the testimony of (PW7) Chief Inspector Cheruiyot, the document examiner, that the verification of documents was done by someone else, and that, he only examined the copies of the documents after verification was done, and not the originals. Further, there was no report on the verification process at the initial receipt of the documents, and in the circumstances sufficient doubt is created on the charge of forgery.
26. He relied on the case of Samson Tela Akute v Republic [2006] eKLR where the court held that the absence of the witness while a document was being photocopied and the fact that a photocopy's accuracy was dependant on machine and the skill of the person making the photocopy raised a possibility that the document could be manipulated or superimposed. That the court resolved the doubt on the authenticity of the document in favour of the accused person.
27. Furthermore, in this case, there was no evidence of fraudulently uttering a document nor of making a document without authority, as there was no evidence tendered to show that the appellant reaped and/or gained unfairly any benefit thus the essential elements of an intention to defraud or deceive were never established.
28. The appellant relied on the case of; Peter Wanjohi Gitonga v Republic [2020] eKLR where it was held that in the absence of the intention to defraud or deceive the charge of forgery contrary to section 349 of the Code could not be sustained.
29. The appellant submitted that, the learned trial Magistrate relied on uncorroborated, inconsistent and incoherent circumstantial evidence.
30. Further, that (PW8) Muriuki, testified that MFI2 payment of purchase order No. 4500029688 was not a system document while the (MFI1) purchase/servicer order was a draft and therefore both documents could not be shown in the system.
31. Further, PW6, Frank K. Muriuki could not ascertain the computer he accessed belonged to him and failed to verify who Nancy was. Furthermore, the witness admitted that, any person could access his emails and gain access to the password, then resets and could log into the appellant's computer.
32. Furthermore, PW6, Frank K. Muriuki confirmed that his account was closed due to numerous attempts to access it, which indicate that someone else other than him accessed his account.
33. The appellant further submitted that, there were numerous gaps and doubts in the prosecution's case. That, (PW8) Muriuki testified that, four (4) people could access the user profiles, which created a loophole and exposed the user profiles to access and manipulation.
34. Further, the document LPO did not show who logged onto the system and therefore could not pinpoint the appellant. Furthermore, the fact that his name appeared in the system did not automatically mean that he created the document.
35. That it was the evidence of PW6 Frank K. Muriuki that the LPO was created by Nancy, however, she was never investigated to establish how the appellant got the document.



36. In addition, it is possible that the appellant's account was hacked owing to the numerous times his password was changed, and that there were attempts to access the account that were locked. That, the trial court ignored the possibility of hacking, which created reasonable doubt that he forged the LPO.
37. He submitted that the trial court did not consider his defence that he did not create LPO as it was above his pay grade, and that he could not have appended his signature to a document he did not have authority to sign.
38. Finally, he submitted that, the consecutive sentence of five (5) years imprisonment is illegal, and that, the fine of Kshs. 500,000 is harsh and excessive. That, section 349 of the Code requires the circumstances of the offence to be considered.
39. He urged the court to allow the appeal, quash the conviction and set aside the sentence and judgment.
40. However, the respondent in submissions date; 21st June 2022 argued that the prosecution discharged the burden of proving its case beyond reasonable doubt. That, it was proved that the LPO No. 4500019688 was irregularly produced and recovered from an account that the appellant had control over. Further, the appellant modified the document and signed it.
41. Furthermore, the specimen signature availed by the appellant matched the signature in the documents as shown by the document examiner and that the appellant admitted that he did not have the authority to sign the documents.
42. That, while the original documents were not availed and Roseline, who provided the documents was not called to testify, the digital trace of the documents illustrated that, the documents were generated from the system by the appellant. Moreover, the LPO was a system generated document and a certified copy was produced in court and subjected to cross-examination thus no injustice was occasioned.
43. The respondent submitted that, the appellant's defence was a mere denial and did not offer a plausible explanation on how his signature was appended on the questioned documents. Further, despite the claim that the account may have been hacked, it was demonstrated that the user of the account requested for a password change.
44. Lastly, that the sentences are legal and proper and should not be disturbed. The court was urged to dismiss the appeal and uphold the sentence and conviction by the trial court.
45. At the conclusion of the hearing of the appeal and in considering the appeal, I note that, the role of the first appellate court is to re-evaluate the evidence afresh and arrive at its own conclusion, bearing in mind that the court did not have the benefit of the demeanour of the witnesses.
46. This role of the first appellate court was stated in the case of Okeno vs Republic [1972] EA 32 as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the



trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

47. To revert back to the matter herein; the appellant was charged in count (1) and convicted of the offence of forgery as provided for under section 345 as read with section 349 of the Code.

48. Section 345 states that; “forgery is the making of a false document with intent to defraud or to deceive”. On the other part section 349 of the Code states that: -

“Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.

49. The key ingredients of the offence of forgery are therefore; “intent to deceive or defraud”. However, the definition of “false document” is a part of the definition of “forgery” and the two must be read together. In that regard the provisions of section 347 of the Code states in part as follows:

“Any person makes a false document who—

(a) makes a document purporting to be what in fact it is not; or

(d) signs a document—

(i) in the name of any person without his authority, whether such name is or is not the same as that of the person signing”

50. Similarly, the provisions of section 348 of the Code that defines intent to defraud states that: -

“An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person ascertained or unascertained capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document”.

51. In the same vein, the Supreme Court of India in *Dr. Vimla vs. Delhi Administration* (AIR 1963 SC 1572), which is a locus classicus on forgery law held that, to sustain an allegation of forgery, there should be two ingredients, viz., (a) deceit and (b) injury. The court while dealing with the provisions of 463 and 464 of the Indian Penal Code stated as follows: -

“A reading of the above definition shows that when a false document is made with an intent to cause damage or injury to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud, only then, the offence of forgery will stand completed. Supposing a person merely practises the signature of another person without anything more, he cannot be prosecuted for forgery. Only if he uses such a forged document to cause either of the aforesaid harms, can he be prosecuted”.

52. The ingredients of the offence of forgery are therefore well settled as afore said and detailed in the trial court’s decision. The question that arises is whether; the appellant committed the offence as charged



- and whether the prosecution proved the same. I shall now analyse the evidence adduced in relation to the same.
53. The evidence adduced by (PW1) Machio P. Harrison was that the contents of the questioned letterhead made reference to the questioned purchase order number 4500019688 was signed by appellant. That, it had his cell phone number instead of that of the station. Further, it had no employment number.
 54. Further the procurement officer could not trace the purchase order in the system. However, Mr Njaga attached to ICT system Management confirmed that, the foot prints in the system showed the order was created by the appellant and after printing it, he deleted it from the system, although the trail showed who created and deleted it.
 55. (PW2) Peter Mwaura Njaga testified that upon inquiry from Mr Machio, he established that the subject purchase order had been generated by the appellant. That he previewed, printed and deleted. He stated that to generate the order, a purchase requisition had to support it but in this case there was none.
 56. Che-Guerara Ochieng Enest Agima (PW3) from Gulf Bank Limited told the court that, upon request from investigators of the case, he retrieved the subject purchase order and undated letter presented by preserved by Moven Kester East African Limited addressed to the bank confirming that KAA shall pay the order in the sum of; Kshs 31,900,000 through the payee's account. That, the undated letter was signed by the appellant.
 57. David K. Ngetich, (PW4) the procurement officer testified that purchase order in question serial number 4500019688 for Kshs 31,900,000 was raised by the appellant without authority to incur expenditure beyond Kshs 501,000, which could only be authorized by General Manager Procurement and Logistics and General Manager or Airport Manager.
 58. It suffices to note that the appellant stated in his defence that:

“I was restricted to LPO. LPO was carrying Kshs 31,900.00/=. This was above my grade. Anything above Kshs 500,000/= only created at JKIA KAA offices- I couldn't raise an LPO above Kshs 500,000/=”
 59. Mr Ngetich also testified that, the LPO had no telephone and bore wrong email address; infor@kenyairportauthority.go.ke instead of the genuine email address; infor@kaa.go.ke. Further only an individual can raise a purchase order with his credentials. That to use another person credentials you need their password and that the appellant never adhered to the procurement procedure while generating the subject order.
 60. Mr Ngetich further testified that the letter head accompanying the LPO had the wrong address instead of the correct address of; P.O. Box 19005-00501- Nairobi. He termed the letterhead as a forgery. In cross-examination by defence, he was adamant, appellant signed LPO.
 61. Further evidence was led by (PW6) Patrick K. Muriuki, the information security officer who testified that, he got approval and accessed the appellant's computer and conducted a search after recovery of the purchase order number from the appellant's profile. That, he got a draft order number 45000169688 and it showed that the document was authored by one Nancy and last modified by the appellant.
 62. In cross examination he stated that the appellant changed his password but “did not report hacking issue”. That the purchaser order was not on a shared folder and that it was created and modified at the same time.



63. Further evidence was led by (PW8) George Mukiri Ngumi a system administrator at KAA headquarters, who testified that, he de-activated appellant's account on request by investigators and noted that the purchase order in issue had not gone through all processes. That, it was not approved by General Manager for procurement who approves, prints and finally signs. That it was created by appellant on 24th April 2008 in the afternoon and that if someone used the appellant's credentials the system would show his name.
64. Based on the afore evidence, it is evident that, the subject purchaser order was generated and/or modified by the appellant. That, the amount therein was beyond the appellant's authority to generate and authorize expenditure. Further it was not supported by a purchase requisition order, thus it did not adhere to the procurement procedures. Generally, put, the local purchaser order was made without authority.
65. In the same vein, it is not in dispute that the letterhead on which the letter forwarding the local purchase order was made had several discrepancies as indicated herein and thus suspected to not to be genuine. The evidence of the witnesses is that the subject letter was signed by the appellant.
66. That leads to the evidence of the document examiner; (PW7) Inspector Bernard Cheruiyot who testified that the signature of questioned documents being; purchase/servicer order (pexh.1) and payment of purchase order No. 4500029688 (Pexh.2) were made by the appellant. Further the questioned logo on the letter heads was not genuine when compared to the genuine KAA letter head.
67. I note that the appellant submitted that the documents examined by the document examiner were not properly verified before the analysis and not properly handled. However, the document examiner ruled out the possibility of manipulation.
68. Furthermore, the Che-Guerara Ochieng Enest Agima (PW3) confirmed that he certified the copies of the purchase order and letter presented to the bank and the bank retained the originals.
69. The document examiner's evidence is expert evidence and the Evidence Act (Cap 80) Laws of Kenya, states that the evidence of an expert is admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.
70. As such there is no tangible evidence to rebut the evidence of the document examiner and as the report of the document examiner confirms the appellant signed the purchase order, then the appellant is liable on it unless he offers a satisfactory explanation on how his signature was appended on the order, which he has not done.
71. To the contrary the appellant while under cross examination stated; "that is not my signature though it is similar to it". I "gave specimen/known signature to police" and stated further "I am Felix Otieno Ombok. I don't use initials". These responses confirm inter alia that; the appellant gave his specimen signature and indeed there a signature on the questioned documents that as alleged "resembled his" but confirmed by the document examiner to be his signature.
72. The appellant further argues that, it was not proved with certainty that the computer picked up from his office belonged to him. However, (PW10) Corporal Kennedy Mwache testified that he took purchaser order register, invoice payment, purchase order in issue and seized appellant's CPU. The question is why would he plant the CPU on appellant, if he did not recover it from him?
73. Be that as it may, the appellant's afore submission hold no water as he in fact, testified in his own evidence in chief that "the officers from Wilson asked the computer I use and I showed them my desk"



- they said I stand aside and took documents from my desk. That, “they said we are Directorate of Criminal Investigations. They unplugged my computer as well. Can’t recall documents they took.”
74. He further argues that the purchaser order only indicated his initials and not his name and could mean anything and it does not show who prepared it. That argument is under the bridge in view of the evidence of the witnesses that he generated and/or modified the order in the system and deleted it.
 75. The appellant further submitted that he “had requested from IT officer at Wilson Airport that I had password issues” and the password was reset. However, he did not put it to any specific witness and neither does he disclose the name IT officer in question. In cross examination by prosecution he stated that he had no email to support request for password change or issues.
 76. Pursuant to the afore said, it is clear that the appellant generated and/or modified the purchaser order without authority, it was not processed through the procurement process, he signed it without authority and eventually supported it with a letter which was found to bearing a fake KAA logo, indicating it was fraudulent.
 77. Indeed, the documents ended up in the bank to be used as a security to advance Kshs 20, 000, 000 to the company in whose favour they were issued. Had the bank relied on the purchase order and accompanying letter it would have advanced credit facility on a worthless security and suffered loss. This is a clear case of issuing the subject documents with intent to defraud the bank. It falls squarely in the definition of a forgery and therefore the charge was sufficiently proved.
 78. It is immaterial that the other persons who may have been involved in creating the documents or presenting them to the beneficiary were not charged. Of course to that extent the investigators played under the table for unknown reason and can still pursue them but that does not exonerate the appellant from blame.
 79. The findings afore deal with the charges on count (2) and (3) and in particular the appellants admission that a purchaser order of Kshs 31,900, 000 was outside the scope of his authority and the document examiner’s evidence that the letter head was not genuine.
 80. Similarly, the failure to follow procedure in processing of the purchase order in question and the discrepancies noted in the process of generating it, and deletion from the system by the appellant negates authority to generate it.
 81. The resultant of the aforesaid is that the charges on count (2) and (3) were proved beyond reasonable doubt as the defence failed to displace the prosecution evidence of the presence of the appellant’s signature on those fraudulent documents.
 82. In view of the aforesaid, all the grounds of appeal to the effect inter alia that, there was no evidence to prove forgery, that the evidence of prosecution witnesses was uncorroborated, incoherent, and circumstantial and should have been resolved in appellant’s favour and further the trial court failed to consider the uncontroverted defence evidence are not tenable.
 83. Finally, the appellant argued that the sentence meted out was excessive. The sentence for the respective offences the appellant was charged with and convicted of is indicated herein. In my considered opinion, the sentence herein is lawful and/or legal. It is quite lenient for the offence. However, in the absence of a notice for enhancement and/or cross appeal I shall not interfere with it.
 84. The upshot of the aforesaid is that, the appeal herein is dismissed in its entirety. It is so ordered with 14 days right of appeal explained.

DATED, DELIVERED AND SIGNED THIS 8TH DAY OF APRIL 2024.



GRACE L. NZIOKA

JUDGE

In the presence of:-

Ms Swaka HB for Mr Kirimi for the Appellant

Mr Abwajo for the Respondent

Ms Ogutu Court Assistant

