Nyambura v Republic (Criminal Appeal E003 of 2023)
[2024] KEHC 5052 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5052 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E003 OF 2023

DKN MAGARE, J

MAY 9, 2024

BETWEEN

ANN NYAMBURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the Hon. J. Macharia SPM given in Nyeri SPMCC 1144 of 2018)

JUDGMENT

1. This is an Appeal from the Decision of the Hon. J. Macharia SPM given in Nyeri SPMCC 1144 of 2018. The Appellant was charged with 6 counts of obtaining by false pretense. The offences were said to have been committed between 8/1/2018 and 10/2/2018. The initial charge sheet had a total of 6 complainants on 6 different dates. The charge sheet was substituted on 22/10/2018.

2. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> "On a first Appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment Appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not

which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

3. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first Appeal:

> " 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."

4. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

5. In the case of R vs. Lifchus {1997}3 SCR 320 the Suupreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure

that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

6. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

7. the standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

Charge sheet

8. The charge sheet was initially amended on 22/10/2018 to increase charges by adding counts 7 and 9. On 11/3/2019, the state amended charges and dropped 2 charges. They remained 7 charges.

9. The second charge sheet had a total of 9 counts. The amounts alleged to have been obtained were as follows: -

    a. Alice Makena 17,000/=

    b. Welson Murimi 100,000/=

    c. Peterson Maina Kariuki 65,000/=

    d. Magrate Wanjiru Ndungu 100,000/=

    e. Ann Rose wanjiku Rimiru 100,000/=

    f. Joseph Muriithi wachira 200,000/=

    g. Naftally Maina Gakure 200,000/=

    h. Purity Wachira Ndirangu 100,00/=

    i. Margaret Wanjugu Kihagi 100,000/=

10. From the Amendment rather claims by Naftally Maina Gakure, Purity Wachira Ndirangu, Margaret Wanjugu Kihagi were dropped. A new count 7 was added. Plea was taken. A new charge of forgery was introduced The Appellant denied all the charges. The Amendment was done after PW3 testified. I shall revisit the question at the fail end of the judgment.

11. The prosecution case was initially that she got the money to secure employment at the Kenya Defence forces, a fact she knew to be false. All these was. Plea was taken and she pleaded not guilty. She was then released on bond. The charge sheet was amended and re-amended. Finally, after trial the court found her guilty. She was found guilty and sentenced to 2 years on each count.

12. The court indicated the sentence was to run concurrently. This was, according to the court because the offences were committed in the same transaction. This was an error but it has been Appealed. The offences were against different people on different persons. Nevertheless, the prosecution did not Appeal. We shall not dwell on this.

13. My duty is to look at the Appeal was filed in court. After conviction the Appellant filed a petition of Appeal and set forth the following Grounds of Appeal.

    a. The learned Senior Principal Magistrate erred in law and in fact in convicting the Appellant on sufficient inconsistent and contradictory evidence and failed to give adequate weight to the submission of learned counsel then on record or be seen to have considered the said submissions at all. Prejudice was occasioned to the Appellant.

    b. The learned Senior Principal Magistrate erred in law and in fact in writing judgment that did not conform to Section 169 (1) of the CPC hence coming to an erroneous finding against the Appellant. A miscarriage of Justice was occasioned to the Appellant.

    c. The learned Senior Principal Magistrate erred in law and in fact in failing to fully evaluate the entire evidence from the prosecution and the defence not in isolation but in their totality and in the process failed to notice that the prosecution had amended their charge sheet to reflect 6 counts on 26/9/2018 which were later added to 9 on 29/10/2018 and later amended on 11/3/2019 and seven counts were retained. Yet the Appellant was erroneously convicted on (9) counts. A miscarriage of justice was occasioned to the Appellant.

    d. The learned Senior Magistrate erred in law and in fact in failing to appreciate that every vital witnesses were never availed by the prosecution to shed light one way or another thus arriving at an erroneous finding. Prejudice was occasioned the Appellant.

14. From the grounds the following issues arise: -

    a. Whether evidence was contradictory.

    b. Whether the finding was contrary to Section 169 (1) of the Criminal Procedure Code

    c. Whether there was an erroneous conviction in 9 instead of 7 counts.

    d. Whether vital witnesses were not called.

15. Predictably the Appeal is on conviction only. The Appeal was opposed except on the conviction on 9 instead of 7 counts.

16. Section 169 of the criminal procedure provides as follows: -

> "(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.

17. Other than failure to determine count 7 and determine 3 non existing charges, the court determined each of the other charges. The only question was whether there was proof beyond reasonable doubt. This will be a matter to determine in this Appeal.

Evidence

18. PW1 Joseph Muriithi Wachira was the first to testify. He testified in relation to Count 6. She testified that she was approached by Alice Makena that she had someone who could help get need people into Kenya Defence Force. The following day the witness then contacted Margaret Wanjiku, Rose Wanjiku and brothers in law.

19. She had been introduced to the Appellant by Alice Makena, PW4. He contacted the other complainants when they met on 18/12/2017 for the first time. She was to assist in having their children join the military though the Nyandarua governor who was reportedly her relative.

20. On 18/12/2017 they went to the went to the Appellant's house. she met two people and stated that she was to get back after a week. She stated she had given the witness and witness and others a list of what to buy for their children whom she was assisting to join the military. They stated then that there was a project the governor wanted to partner and the governor wanted 100,000/= from each beneficiary.

21. On 10/1/2018, he gave her the money for the projects. The appellant was using the fact that she had served Kenya Defence Force Jobs for the complainants to pay for project.

22. They discovered that Kenya Defence Force recruits had been recruited and reported. She asked for Patience. She never refunded the money for she had done a similar offence to other people. The witness reported. On cross examination, he stated he gave 200,000 in the presence of Alice Makena (PW4). Two other ladies gave 400,000/= each.

23. PW2 Margaret Wanjiru Ndungu testified that she saw the appellant because of this case. She was informed by her cousin PW1 that the Appellant was a relative of the Governor Kimemia and could have them engage into projects and have needy children in the military. They met her with other people on 7/1/2018. She told them the military was free. She stated for projects they must pay Ksh. 100,000/=. She had no paper regarding projects. She was with PW1 and PW4 when she gave the Appellant 100,000/= in their presence.

24. The Appellant later switched off her phone. No projects were initiated and the youth did not join Kenya Defence Force. On cross examination it was stated that the money as not for Kenya Defence Force but for projects. No question was asked on the identity of the parties.

25. PW3 Ann Rose wanjiju Rimiri testified that she knew the Appellant before the case and had known her for 10 years. In 2017 her cousin, PW1 called her stating that the Appellant was relative of the governor and could assist children of single mothers. She stated she is a single mother. This is a concept where a Lady has children but is not living with her partner.

26. She gave money for the project. She sold her two cows and gave her 100,000/= she promised to refund the money within 3 months. On 7/1/2018 she told us that the children have been admitted. She asked

for Ksh. 5000/= for fare to take the child. On cross examination she stated that the money was for a project.

27. The charge sheet was amended at this point. Subsequently Alice Makena testified. she hid know the Appellant for 20 years. She stated that on 15/12/2017 she phoned the witness and waited to meet she stated that she was given a chance in Kenya Defence Force by Nyandarua governor. She said she told her she had 3 chances. She asked, for a certificate of good conduct and form 4 slip. The witness was tasked to look for 2 other people. This turned out to be PW1, PW3 and PW5. She was given PMFI a list for purchase. It had Kenya Defence Force stamp.

28. They were to pay 100,000/= while the witness was to pay Ksh. 17,000/= for introducing others. She accompanied others to pay Ksh. 100,000/= per child. Maina paid Ksh. 65,000/=. The money was to assist their children after going through Kenya Defence Force. The children were over taken and there was no refund.

29. PW5 Welson Murimi Wanderi testified that he is a retired teacher. He knew the Appellant PW1 called him and told him about a vacancy. The Appellant was doing the connection. He availed to the child. On 7/1/2018 she asked for Ksh. 100,00/= to assist children. The witness paid in cash. The money was to be refunded. The children were also not recruited.

30. On cross examination she stated that the money was to start a dairy project to help children when they come from Kenya Defence Force.

31. PW 6 Margaret Wanjiku testified that on 22/12/2017 PW1 told her about recruitment into Kenya Defence Force as she had a child who had completed form 4. She was asked for documents. They went to the house with PW1 and PW3. She Appellant undertook to take documents to Hon. Kimemia. On 28/12/17 she talked of the dirty project run by Governor Kimemia. Each was to pay Ksh. 100,000/=. She gave the money to the Appellant. On cross examination she stated that children were to benefit from the project.

32. PW7 Peterson Maina Kariuki testified. Peterson Maina Kariuki testified that on 16/12/17 he was at the place of work. She went to PW4's house who told him that there was a lady looking for youth to join Kenya Defence Force. She mentioned the Appellant. He had a son. He agreed to go to the appellant's house on 17/12/2017.

33. He availed documents on 16/1/2018 for the admission into KDF. He was told to contribute 100,000/= per child for a share. He gave 65,000/=. He was cross examined. He stated that he gave 65,000/= in cash in the presence PW1, PW4 and PW5.

34. PW8 – Annu Githinji testified that he had been a county Advocates and speaker for Kirinyaga for 5 years. She was a manager with 5 years standing. She had been a legal adviser for 10 years. She stated the governor had no project. There was no cross examination.

35. PW9 Cpl Michael Njagi DCI Embu East Testified that on 24/9/2018 he was called and found a group in the of CIP Raymond. They had provided children to be employed through the Appellant who was a relative of the Nyandarua governor. Kenya Defence Force was asked and denied ever writing, exhibit 1. He stated that the Nyandarua county governor also denied knowing the appellant or a dairy project.

36. On cross examination the witness stated that a total of Ksh. 982,000/= was taken for recruitment to KBF. He stated that the charge sheet has 10 counts. On put on her defence she choose to remain silent.

37. The court found her guilty. I note that counts VII, VIII and (IX) are not in the charge sheet. They were removed. Consequently, I shall set aside conviction on counts VIII, VIII and IX.

38. However, the court did not deal with count VII as it is in the charge sheet. The count reads: -

> " Count VII
>
> Forgery of stamps contrary to Section 345 as read with section 342(a) of the penal Code
>
> Ann Nyambura: On the 2/1/2018 at an unknown place within the republic of Kenya jointly with others not before the court with intent to defraud forged Kenya defense forces stamp impression purporting to be genuine Kenya forces impression."

39. The count has two options to return the file for the Appellant to be dealt with or to convict the same. Unfortunately, the court did not make any finding on the charge of forgery. Perusal of the court file, the offences of forgery was proved. PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8 stated that the letter from Kenya Defence force was given by the Appellant. No challenge was given to that testimony.

40. Forgery is defined in Black's Law Dictionary II Edition as

> " The act of fraudulently making a false document of altering a areal one to be used as if genuine."

41. This is usually with intent to deceive. The Appellant gave out a letter that was not authorized by Kenya Defence Force. The complainant were led to believe that the letter was genuine.

42. I have perused the learned trial magistrate's judgement on this issue. I note that in order to determine whether forgery in terms of Section 349 of the Penal Code has been proved, one must answer the issue whether the prosecution proved the ingredients of the said offence. In the case of Phillimore L.J broke down the definition of forgery in R v Dodge and Harris [1971] 2 All ER 1523 as:

> " A document is false... if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it or authorize its making ... or if, though made by or on behalf of or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, ... is falsely stated therein; and in particular a document is false:- (a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein; (b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; (c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorized it."

43. The Court of Appeal in Joseph Mukuha Kimani v Republic (Criminal Appeal No. 76 of 83) [1984] eKLR held:

> " The prosecution must prove that:
>
> (a) the document was false; in the sense that, it was forged
>
> (b) the accused knew it was forged
>
> (c) the utterer intended to defraud.

44. In the case of KILEE v REPUBLIC [1967] EA 713 at p 717, it was stated that:

> "The false document must tell a lie about itself and not about the maker. We think the position is better put, by stating that, the false document is forged

if it is made to be used as genuine. To defraud is, by deceit, to induce a course of action: Omar Bin Salem v R[1950] 17 EACA 158, and to defraud, is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, see Samuels V Republic[1968] 1."

44. In that regard, Mativo J in Caroline Wanjiku Ngugi v Republic [2015] eKLR held that:

> " Forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud. Thus the elements of forgery are:-
>
> i. False making of – The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. "Writing" includes anything handwritten, type written, computer generated or engraved.
>
> ii. Material alteration – the person must have taken a genuine document and changed it in some significant way. It is meant to cover situations involving false signatures or improperly filing in blanks on a form or altering the genuine contents of the document.
>
> iii. Ability to defraud – The document or writing has to look genuine enough to qualify as having ability to mislead others to think its genuine.
>
> iv. Legal efficacy – the document or writing has to have some legal significance.
>
> v. Intent to defraud – the specific state of mind for forgery does not require intent to steal but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting, through the use of type writer or a computer."

45. Therefore, there is need to prove that the person charged was indeed the one who put ink to paper and created the document deemed a forgery. This is further reaffirmed in R v Gambling [1974] 3 All ER 479 where the court held that:

> " ...'forgery is the making of a false document in order that it may be used as genuine.' This definition involves two considerations: first, that the relevant document should be false; and secondly, that it was made in order that it might be used as genuine. [...]
>
> Given [...] that each application was 'false' was it made 'in order that it might be used as genuine'? Indeed, what do these words involve in the context of the present case? Clearly they require proof of an intent on the part of the maker of the false document that it shall in fact be used as genuine. We think that they also involve that the untrue statement in the document must be the reason or one of the reasons which results in the document being accepted as genuine when it is thereafter used by the maker. It is this concept which we think is sought to be expressed in the aphorism – as to the usefulness of which views may differ strongly – that the document must not only tell a lie, it must tell a lie about itself. [...] If this is correct, then it seems to us to follow that in cases such as the present in which the falsity of a document arises from the use of a fictitious name or signature, or both, then that document is a forgery only if, as counsel for the appellant contended, having regard to all the circumstances of the transaction, the identity of the maker of the document is a material factor. [..]

> In many cases the materiality of the identity of the maker would be so obvious that evidence would be unnecessary: for example, when the document is a cheque or a bill of exchange and the purported signature of the drawer, or endorser, or the acceptor has been written by the someone other than the person whose signature it purports to be. In other cases, such as the present, evidence would be required, and the materiality or otherwise of the identity of the maker of the document must be a matter for the [court]."

46. Based on foregoing, I am scrupulously perused the record of appeal and have no doubt the Appellant committed the offence of forgery. I find and hold that the offence of forgery contrary to Section 345 of the Penal Code was proved.

47. The Appellant had already mitigated. She was sentenced to 2 years for each of the related offence. For the offence that was skipped, I equally find that 2 years are sufficient. The rest of the charges are running concurrently.

48. However, the office of forgery shall run consecutively from the rest of the charges. This is because it is not related to the other offences dealing with obtaining in respect of the dairy project. The forgery of the military letter brought suffering to people and affected families. It is a source of despondency among the complainants and Kenyans.

49. I do not find from the evidence tendered that the Appellant was able to shake the rock solid evidence by the state. The evidence was tendered that the Appellant received money from: -

    a. Alice Makena Ksh. 17,000/=

    b. Welson Muriu Ksh. 100,000/=

    c. Peterson Maina Kariuki Ksh. 65,000/=

    d. Margaret Wanjiru Ndundu Ksh. 100,000/=

    e. Ann Rose Wanjiru Rimiru Ksh. 100,000/=

    f. Joseph Muriithi Wachira Ksh. 200,000/=

50. This money was obtained in the pretext that the Appellant will be securing a partnership for dairy farming. In the cause of this she lured the complainants to contribute a huge amount which she was not restituted.

51. The evidence was tendered by PW1, pW4 and PW5 corroborate each other's evidence. The scheme to defraud started with an innocent introduction to Kenya Defence Force letters. Thereafter, Dairy Farming was the sweetener that was given to lure complainant.

52. I dismiss the Appeal on Counts 1- 6 as set out in the charge sheet of 11/3/2019.

53. I concur with that charges for count 1 – 6 shall run concurrently. Having set aside counts (VII) (IX), the court made a decision that current Count VII was proved. A sentence of 2 years running consecutively with the rest suffices.

Orders

54. The Appeal herein lacks merit except: -

    a. Counts (VII) – (IX) as set out in the judgment are nonexistence. Conviction and sentence is accordingly set aside.

b. In lieu thereof I substitute with conviction on the offence of forgery contrary to Section 345 as read with Section 352 of the Penal Code.

c. There conviction for forgery shall attract. 2 years imprisonment which shall run consecutively with the convictions in Count 1 - (vi) which are running concurrently.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF MAY, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms Muniu for the state

Appellant present in open court

Court Assistant- Brian