



**Okindo v Republic (Criminal Appeal E056 of 2021)
[2023] KEHC 2183 (KLR) (Crim) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E056 OF 2021
JM BWONWONG'A, J
MARCH 16, 2023**

BETWEEN

DANIEL MAYAKA OKINDO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction recorded by Hon. M.W Njagi, SPM, on 8th June 2021 in Nairobi City Court Criminal Case No. 2002 of 2018 Republic vs Daniel Mayaka Okindo)

JUDGMENT

1. The appellant has appealed against his conviction in respect of the offence of uttering a false document contrary to section 353 of the [Penal Code](#) (Cap 63) Laws of Kenya.
2. The appellant filed a petition of appeal, in which he raised fourteen (14) grounds of appeal.
3. The main grounds of appeal are as follows. In grounds 1 to 4 and 13, the appellant faulted the trial court in convicting him on a defective charge. In grounds 5 to 12, the appellant faulted the trial court in convicting him on insufficient evidence. In ground 14 the appellant faulted the trial court for failing to consider the defence evidence.
4. At the trial, the prosecution called four (4) witnesses in support of their case. After the close of the prosecution's case, the appellant was found to have a case to answer. He was put on his defence and gave sworn testimony and called one (1) witness. After mitigation, he was convicted in count II and acquitted on the charge of forgery contrary to section 345 as read with section 349 of the Penal Code.
5. As this is the appellant's first appeal, the role of this appellate court is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs R* [2013] e-KLR that this court is duty-bound to revisit the evidence tendered before the trial court



afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

6. Edwin Motari (Pw 1) testified that on October 23, 2018, he discovered that there was a purported succession cause instituted without his knowledge and consent. Secondly, the signature appended therein was not his. He told the court that there was a purported meeting that took place on September 22, 2004, which he did not attend. However, the minutes of the meeting indicate that he attended the meeting and signed accordingly. He identified the appellant as his uncle, who was to be elected as the administrator pursuant to that meeting. He maintained that he did not renounce his right of inheritance in that succession and did not sign the minutes of the meeting held in 2004.
7. In cross-examination, he testified that he was born in 1984 and not 1987 as alleged. He testified that he obtained the minutes from the court proceedings in the succession case of his deceased father.
8. Edna Nyakerario Onguti (Pw 2) testified that she is the elder sister of the complainant. She told the court that when their father died, a family meeting was held in Utawala, where she was in attendance. She told the court that she did not attend the meeting of September 22, 2004.
9. No xxxx C I Alex Mwongela (Pw 3), a document examiner testified that on 31st August 2018 he received exhibits forwarded as shown in the exhibit memo form. He was required to determine whether the signature samples obtained from the complainant matched the known signature of the appellant. The examination was conducted by his colleague IP Vincent Cherango. His opinion was that the signatures were made by the same author. IP Vincent Cherango signed the report dated September 11, 2018 which was produced in court as an exhibit.
10. No xxxx CPL Morris Njige (Pw 4) the investigating officer told the court that a report was made by the complainant alleging forgery of his signature. He received a copy of the document alleged to have the forged signature and summoned all the people alleged to be in the meeting in 2004. They were the complainant's grandfather, his two uncles and his sister. That he took their specimen signatures to be compared with the disputed ones to the document examiner. It was established that the complainant's signature did not match the one he provided in the document.

The appellant was later arrested and charged.

11. In cross-examination, he told the court that he could not identify who made the questioned signature. Further, he did not investigate whether the document was used to obtain letters of administration or not. He also told the court that the complainant had indicated that he obtained the said letters of administration from the pensions department.
12. When put on his defence, the appellant gave sworn testimony. He told the court that after the death of his brother in 2003, the family of the deceased organised a meeting. The meeting was held on September 22, 2004, where the complainant and his sister (Pw 2) were in attendance. The purpose of the meeting was to discuss the affairs of the family and provision for the children, since their mother had already passed on in 2001. Pw 2 was the secretary. He told the court that at the time, the complainant was under the age of 18 years.
13. It was decided that he would be the administrator of the estate, until the children of the deceased were adults. Further, they processed all succession documents within the law until the grant was issued. In 2006, the complainant's sister was appointed as the administrator to take over from him. He denied forging the complainant's signature.



14. Victor Bundi Okindo (Dw 2) testified that the appellant is his brother and the complainant is his nephew. He reiterated the evidence of the appellant. He confirmed that he attended the meeting of 2004 and was part of the signatories. He added that in 2018, another meeting took place among family members. It was agreed that the appellant would take up the administration of the estate to enable the distribution of the estate. He maintained that in 2004, the complainant was too young and had no locus standi to sign documents.

Analysis and determination.

15. In grounds 1 to 4 and 13, the appellant challenged the charge sheet on account of being defective. He submitted that the offence of uttering a forged succession letter is not known in law and was not supported by evidence.
16. From the record, the appellant was charged with the offence of uttering a false document contrary to section 345 as read together with section 349 of the Penal Code. The particulars of the offence are that on September 22, 2004 at unknown time and place within the Republic of Kenya, with others not before court with intent to defraud, forged a succession letter for the late Nelson Okindo Onguti's estate purporting to be genuine succession letter of the late Nelson Okindo Onguti's estate.
17. A charge sheet may be defective for not disclosing an offence known to the law, thus affronting the principle of legality enshrined in article 50 (2) (n) of the *Constitution* of Kenya. I find that the charge sheet was not defective. The grounds therefore fail and is hereby dismissed for lacking in merit.
18. In grounds 5 to 12, the appellant challenged the totality of the prosecution evidence upon which the conviction was based. He submitted that the trial court erroneously concluded that the complainant's signature was forged, because there was a variance in the signatures. Secondly, the handwriting expert who examined the signatures was not called to testify. The expert who produced the report failed to indicate the factors and variances that cause changes in handwriting over long period of time as is the case herein. It was his case that the trial court failed to consider the testimony of the expert witness against all other available evidence.

Section 353 of the Penal Code provides that:

'Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.'

The word 'utter' is defined under section 4 of the Code as follows:-

' Utter means and includes using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal, or act upon the thing in question.'

19. According to the section and the definition above, it is an offence if one knowingly and with intent to defraud utters a false document, that is, uses, deals with, or attempts to use or deal with, or attempts to induce some other person to use, deal with or act upon the document or thing uttered to him. That is, the person who utters, must do so knowingly that the document is false and must have, in the course of uttering, the intention to defraud. That is, the person to whom the document is uttered, is made to take action or steps or fail to take steps or action which save for the thing uttered to him, he would not have taken or vice versa.
20. From the record, Pw 3, the expert witness produced a report to show that there was a variance between the signature of the complainant and the signature that was allegedly forged. As submitted by the appellant, these variances were not explained. The causes of such variance were not explained. In addition, the maker of the report was never called as a witness by the prosecution. An expert witness



whose document was relied on to convict the appellant was a crucial witness in the case. His absence was not explained by the prosecution. His testimony was therefore crucial considering the weight placed upon the report by the trial court.

21. I find that the prosecution failed to adduce evidence that the alleged document was forged. In addition, the prosecution failed to adduce evidence to show that the appellant knew that the document was false and that he intended to use it to defraud. Knowledge and intention were key in proving the offence of uttering. In the case before the trial court, the prosecution was not investigating whether the appellant misused funds and assets obtained from the estate of his deceased's brother and the trial court was not determining that issue either. The issue of how the funds were used and managed is a dispute to be determined by the probate court.
22. In *Kepha Moses Mogoi v Republic [2014], eKLR*, the Court of Appeal stated that the offence of uttering a false document under section 353 of the Penal Code is proved if a person knowingly and fraudulently utters the document.
23. The prosecution failed to prove that the document was false. They also failed to prove that appellant knew that it was false and that he intended to use it fraudulently, the offence of uttering a false document was not proved as required by law. The trial court again fell in error when it convicted the appellant on this count.
24. I have re-assessed the entire evidence as a first appeal court. I have also considered the submissions and the applicable law. As a result, I find that the prosecution did not prove beyond reasonable doubt that the offence in respect of which the appellant was convicted.

Consequently, this appeal succeeds and is hereby allowed.

I therefore quash both the conviction and the sentence of probation.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF MARCH 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua court assistant

Mr. Rotich for the appellant

Mr Mutuma for the respondent

Appellant, No appearance

