



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 78 OF 2019

SARAH TAABU ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction of the Chief Magistrate's Court at Kisumu

-(Hon. C. Yalwala PM) dated the 12th February 2020 in Kisumu CMCCRC No. 318 of 2015]

JUDGMENT

The Appellant, **SARAH TAABU ONYANGO**, was convicted for the offences of **FORGERY** contrary to **Section 349** of the **Penal Code** and **UTTERING A FALSE DOCUMENT** contrary to **Section 353** as read with **Section 345** of the **Penal Code**.

1. For the offence of Forgery she was sentenced to a Fine of Kshs 40,000/=, or in default 12 Months Imprisonment.
2. For the offence of Uttering a False Document, the Appellant was sentenced to a Fine of Kshs 30,000/=, or in default 9 Months Imprisonment.
3. The trial court ordered that the sentences would run consecutively, if the Appellant failed to pay the fines.
4. In her Memorandum of Appeal the Appellant raised Six Grounds, which can be summarized as follows;

1) The prosecution evidence was full of contradictions, and was not corroborated.

2) The source of the forged affidavit was not established.

3) The Charge Sheet was duplex, as it contained 22 Counts.

4) The Appellant should not have been convicted on the 2 Counts because the trial court had already dismissed the counts upon which the said 2 counts were dependant.

5) The Appellant was not informed, in advance, about the evidence which the prosecution intended to produce at the trial.

6) The sentences were harsh in the circumstances.

5. In respect to the offence of Forgery, the particulars of the charge were that On or about 9th May 2005, at an unknown place in Kenya, with intent to deceive, the Appellant forged an **AFFIDAVIT** purporting it to be the affidavit of **ISAAC WINGFIELD OKELO AGUTU**.

6. In respect to the offence of uttering a false document, the particulars were that on 21st September 2006, the Appellant uttered the forged Affidavit, at the High Court, Kisumu.

7. When canvassing the appeal, the Appellant submitted that the affidavit in issue was not part of the documents filed in court, in respect to the Succession Cause.

8. Secondly, the Appellant submitted that although it was proved that the affidavit was not signed by Isaac Wingfield Okelo Agutu, (deceased), there was no evidence that showed that it was the Appellant who had signed it.
9. Thirdly, the Appellant submitted that it was contrary to the requirements for a fair trial, to have charged her with 20 counts, in one charge sheet.
10. In any event, the Appellant said that it was never proved that she uttered the forged affidavit.
11. Finally, the Appellant submitted that the sentences handed down to her by the trial court, were too harsh in the circumstances.
12. At the trial the prosecution called 9 witnesses.
13. **PW6, MIDURA NDEGE**, is a Police Officer, who doubles-up as a Document Examiner. He testified that the signature on the affidavit in issue herein was not that of Isaac Wingfield Okelo Agutu.
14. He said that he did not know where the affidavit was obtained from.
15. During cross-examination, **PW6** said;

“Of the specimen signatures given to me for examination, none were for Sarah Taabu, the accused herein.”

16. When the accused was being cross-examined, she confirmed that the Forensic Document Examiner and the Investigating Officer did not obtain a specimen of her handwriting.
17. In my considered opinion, the nexus between the forgery and the Appellant could only have been verified through a forensic examination of her handwriting, and then comparing such handwriting to the signature on the affidavit.
18. In this case the learned trial magistrate addressed the issue thus;

“There is no way the deceased could have and keep in his briefcase a document forged in his name. In the premises I find the accused person herein was the source of the said forged affidavit. Given that she was the source of the affidavit, and given that this court has found, as a matter of fact, that she did not get it from the deceased’s briefcase, it follows that she is the one who forged it.”

19. It is my considered opinion that the conclusion made by the trial court, (cited above) does not flow from the preceding analysis.
20. I appreciate the fact that the Appellant may have had an interest in getting an affidavit which could help her demonstrate to the court which was handling the Succession case, that she was a widow of Isaac Wingfield Okelo Agutu.
21. Since the affidavit was a forgery; and because the Appellant stood to benefit from it, those facts make her stand out as the first suspect. That is logical.
22. However, it is well settled that conviction can only be properly founded upon sound evidence. Suspicion, however strong it may be, does not constitute evidence.
23. I find that the trial court relied on logical reasoning to convict the Appellant, whereas there was no actual evidence that served to prove the case beyond any reasonable doubt.
24. As regards the offence of uttering a false document, the trial court had held as follows with regard to the other counts;

“..... I find that though the documents referred to under counts 21 and 22 were forged and were indeed uttered at the Kisumu High Court registry, there is no proof to the required standard, that the accused person herein was part of the forgery thereof and hence knew of the same and/or that she is the one who uttered the same at the High Court registry on the material date, and not her step son, Alfred John Onyango Okelo (PW1).”

25. In my considered opinion, the trial court was right to have given to the Appellant, the benefit of doubt in respect to those 2 counts, because there was no proof that it is the Appellant who uttered the documents relating to the said counts.
26. I have carefully re-evaluated all the evidence on record, but I found no evidence that proved that it is the Appellant who uttered the forged affidavit at the High Court registry.
27. I have also given a close look at the forged affidavit. Unlike the other exhibits, which bear a date stamp that appears to have been embossed at the High Court registry, the affidavit bears no such stamp upon its face.
28. **PW9** testified that he obtained the affidavit from the court file. However, he conceded that the affidavit did not have a

“rubber stamp of the court, as having been filed in court. I however obtained it from court. I don’t know why it doesn’t have a stamp.”

29. It is curious that the one contentious document, was allegedly uttered at the High Court registry, yet it did not bear the stamp of the said court; whilst the other documents all had the requisite stamp.

30. Furthermore, there is no witness who testified that it is the Appellant who uttered the affidavit at the High Court Registry.

31. I find that the evidence on record fell short of proving that the Appellant uttered the forged affidavit.

32. In the result, there is merit in the appeal. I quash the conviction and set aside the sentences.

33. If the Appellant had paid the fines or any part thereof, she is entitled to a refund.

34. Finally, I find that if I had upheld the convictions, I would also have upheld the sentences as the same were not harsh at all.

DATED, SIGNED and DELIVERED at KISUMU This 4th day of February 2021

FRED A. OCHIENG

JUDGE