



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CRIMINAL APPEAL NO. 6 OF 2021**

**ALBION NDEGE KANYAMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in criminal case No.109 of 2014*

*of the Principal Magistrate's Court at Oyugis by Hon. J.P. Nandi – Principal Magistrate)*

**JUDGMENT**

1. Albion Ndege Kanyambo the appellant, was convicted in two counts. In count one the offence was conspiracy to commit a felony contrary to section 395 (f) of the Penal Code while in count two, the charge was giving false information to a person employed in the public service contrary to section 129 (a) of the Penal Code.

2. The particulars of the offences were that on diverse dates between 5<sup>th</sup> June, 2001 and 11<sup>th</sup> July, 2001 at Rachuonyo District Registrar's office in Homa Bay County jointly with another conspired to make a certificate of death Serial number 500101214 in the name of Nyatogo Opondo, deceased, in order to receive or gain benefits from the property of the said Nyatogo Opondo. On 11<sup>th</sup> July, 2001 at Chabera Chiefs office he issued a letter in respect of Succession Cause number 417 of 2001 for the late Nyatogo Opondo thereby causing the Deputy Registrar of High Court at Kisumu to issue letters of administration intestate a fact he knew to be false.

3. The appellant was sentenced to serve one year imprisonment on each count. He was dissatisfied and appealed against conviction. He was represented by the firm of Omagwa Angima & Company Advocates. He raised four grounds of appeal as follows:

- a) That the learned magistrate erred in law and in fact when he proceeded with hearing of the appellant's case notwithstanding objections by the appellant who had been tried and convicted before him on related offences.
- b) That the learned magistrate erred in law and in fact by irregularly substituting the charge in count one *suo moto* and proceeding to convict the appellant on an offence which he had not been charged and tried and in respect of which no evidence was adduced.
- c) That the learned magistrate erred in law and in fact when he convicted the appellant on insufficient evidence.
- d) That the learned magistrate erred in law and in fact when he shifted the burden of proof to the appellant.

4. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

5. Section 138 of the Criminal Procedure Code provides:

**A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence.**

The conviction must be of the same and not similar charge. The appellant in his first ground of appeal contended that he was convicted of related offences. This cannot be a basis for to plead the doctrine of *Autrefois Acquit*.

6. The copy of proceedings in Oyugis Criminal case number 1364 of 2005 cannot be of any assistance to this court for the same do not disclose the charge or charges he was facing. The appeal cannot therefore turn on the first ground.

7. The appellant complained that the learned trial magistrate irregularly substituted the charge in count one *suo moto* and proceeded to convict the appellant on an offence which he had not been charged and tried and in respect of which no evidence was adduced. Section 179 of the Criminal Procedure Code Provides:

**(1) When a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**

**(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.**

The offence under section 395 (f) is a minor offence compared to the sentence prescribed under section 393 of the Penal Code. The action of the trial magistrate was therefore not irregular. He correctly invoked section 179 of the Criminal Procedure Code.

8. The appellant was the chief at Chabera. His co-accused approached him for a letter which he issued to him. This letter was used by his co-accused to obtain a death certificate in the name of Nyatogo Opondo. A Succession Cause number 417 of 2001 in respect of the estate of Nyatogo Opondo was filed using the certificate of death by his co-accused.

9. When the appellant was placed on his defence, instead of telling the court his side of the case, he went on to state what the prosecution did not prove. The evidence tendered by the prosecution therefore was unchallenged. I therefore find that the appeal lacks merit and the same is dismissed.

**DELIVERED AND SIGNED AT HOMA BAY THIS 8TH DAY OF JUNE, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**