



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 85 OF 2018

REPUBLIC.....APPELLANT

-V/S-

ANDREW MWINZANGU.....RESPONDENT

(Being an appeal from the decision of the Hon. C. N. Ndegwa (PM)

on 15th August 2018 in Mombasa Criminal Case No. 2831 of 2013).

JUDGMENT

Background

1. The Respondent ANDREW MWINZANGU and his co-accused RUMBA NYAMAWI (the late) were jointly charged with the offence of forgery of judicial documents contrary to Section 351 of the Penal Code.
2. The first count was particularized that on or about 30th June 2009 in Kaloleni District within coastal region with others not before court with intent to defraud made false court proceedings in Kaloleni DMCC No. 26/1977 without lawful authority from the judiciary.
3. The second count was particularized that on or about 30th June 2009 in Kaloleni District within Coastal Region with others not before court with intent to defraud and without lawful excuse uttered false document namely court proceedings of Kaloleni DMCC No. 26/1977 purporting to have been uttered and signed by judicial office namely Kaloleni Magistrate.
4. The Appellant put 4 witnesses to the stand who testified and at the close of the prosecution case the Honourable Magistrate Hon. C. N. Ndegwa analysed the evidence and exhibits and acquitted the Respondent under Section 210 of the Criminal Procedure Code as no *prema facie* case had been established.
5. The Appellant was aggrieved by the decision and preferred an appeal herein for the ruling to be set aside on a case to answer and reinstate the charge sheet, and for a retrial before a different magistrate on the following grounds:-
 - 1) That the learned trial magistrate erred in law and in fact by arriving at a conclusion that the documents held by the Respondent were genuine in total disregard of the evidence before him.
 - 2) That the learned trial magistrate erred in law and in fact by reaching a finding of fact that the accused had genuine documents whereas there was no original copy of court file from Kaloleni Law Court produced before him.
 - 3) That the learned trial magistrate erred in law and in fact by believing the accused's document and disregarding all testimony by the prosecution witnesses whereas he had no evidence before him from the Defendant to the contrary.
 - 4) That the learned trial magistrate erred in law and in fact by ignoring the evidence of the Document Examiner in the absence of any other evidence to the contrary and in particular copy of the original court file and any testimony from another Document Examiner on behalf of the Defence.
 - 5) That the learned trial magistrate erred in law and in fact by ignoring to make a finding on the evidence of PW3 whose recollection of events was unchallenged.

6) That the learned trial magistrate erred in law and in fact by taking into consideration irrelevant matters and coming to recommendation that it is the complainant who ought to have been charged with the offence before him hence an observation which was premature and in excess of his duty at the stage of the trial.

7) That the learned trial magistrate erred in law and in fact by reaching a finding based on evidence not tendered in court hence miscarriage of justice.

Brief Background

The genesis of Criminal Case No. 2831 of 2013 on forgery at the trial court came about as a result of the case in Mombasa High Court Civil Suit No. 95 of 2011 which ordered that the court file No. DMCC No. 26 of 1977 at Kaloleni be forwarded to the Criminal Investigation Department (Mombasa) for investigation as to the circumstances that led to two judgments by two different magistrates, one delivered on 17/12/1981 by M.C. Randu DM 11 and the other one delivered on 8/11/1977 by D. Mwangulu DM II, and whether one judgment is falsified and for the culprits to be charged with relevant criminal offences. After completion of investigations, the file was forwarded to the DPP Mombasa which led to the accused person being charged in the trial court with the offence of forgery.

Appellant's Submissions

6. The Appellant submits in respect to ground 1, 2 and 3 that in the absence of the original file or record from the lower court proceedings in Kaloleni DMCC No. 26 of 1977, the learned trial magistrate could not possibly make a finding that the documents held by the Respondent were genuine or pronouncing that the complainant was the guilty party.

7. The Appellant submits that the trial court had made an order for the Deputy Registrar Mombasa Law Court to avail the original court file on the next hearing date. This order was however not complied with and the original record was neither produced in court as an exhibit nor was the file seen by the trial court.

8. The Appellant submits that the learned magistrate heavily relied on the testimony of the investigating officer who had compiled a report in the High Court case. The learned magistrate however completely failed to take into account the evidence of all the prosecution witnesses.

9. The Appellant submits that at the very least, the magistrate should not have pronounced himself on the matter in the absence of the lower court record. In a matter involving forgery of court documents, it was the barest minimum to require that the original court file in Kaloleni DMCC No. 26/1977 be availed and considered by the court in its decision.

10. The Appellant submits on ground 3, 4 and 5 that the state takes issue with the fact that evidence of the document examiner (PW2) and the Chief Mariakani location (PW3) were never considered in the court ruling. Before lodging the High Court case HCCR 95/2011, the complainant had sought help from the chief using one of the judgments and the order of the court in Kaloleni DMCC No. 26/1977. The chief was adamant that he confirmed from the Kaloleni court record that the judgment had been made in favour of the complainant.

11. The Appellant submits on ground 6 and 7 that the trial court took into consideration matters that were not in issue and failed to render a decision based on the evidence before it. The trial court simply made pronouncements that were not backed by the facts.

Respondent's Submissions

12. The Respondent submits that the Appellant should have produced the original court file and the purported court proceedings for comparison by the Honourable Court but which duty was never discharged by the Appellant. The Respondent further submits that to prove an offence of forgery, the two documents ought to have been availed to the court so that the genuine one is distinguished from the forged one.

13. The Respondent submits that the charges the Respondent was facing at the lower court was about forgery of court proceedings and not about a parcel of land. No evidence was tendered to prove the alleged offence of forgery. The case about ownership rights over a parcel of land was addressed by the High Court while the case on forgery was addressed by the lower court and the impugned ruling is about forgery.

14. The Respondent submits on grounds 1, 2 and 3 that the burden of proof always rests with the Appellant/Prosecution under Section 107 of the Evidence Act. The Honourable magistrate while discharging his duty under Section 210 of the Criminal Procedure Code was only required to make reference to the exhibits and testimony given by the witnesses during the hearing.

15. The Respondent submits on ground 4 and 5 that the ruling by the Honourable magistrate was well reasoned and the recommendation that the complainant be charged for forgery was based on the sound testimony of the Investigating Officer (PW4).

16. The Respondent submits that the charge sheet was defective because a deceased person was jointly charged with the Respondent herein. The charge sheet was never amended to expunge the name of the deceased person from the charge sheet. The Investigating Officer and the Appellant were well aware of this. The Respondent relied on the Nyeri Criminal Appeal No. 80 of 2018.

17. The Respondent submits that the prosecution never met the requirements of a prima facie case as set out in the Nigerian case of *Alake v the State* which was cited in Siaya High Court Criminal Case No. 123 of 2017 where the court listed the following as the ingredients of the offence of forgery:-

i. That there is a document or writing

- ii. That the document or writing is forged;
- iii. That the forgery is by the accused person;
- iv. That the accused person knows that the document or writing is false; and
- v. That he intends the forged document to be acted upon to the prejudice of the victim in the belief that it is genuine.

18. The Respondent submits on ground 6 and 7 that the trial court considered all the evidence tendered before it. The Investigating Officer addressed the court about the report submitted to the High Court.

Analysis and Determination

19. This being a first appeal, the mandate of the court is as was aptly set out in the case of *Okeno v 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.”

20. Issues for determination

- i. Whether the documents held by the Respondent were genuine
- ii. Whether the evidence of the prosecution witnesses was considered by the learned trial magistrate
- iii. Whether the learned trial magistrate reached a finding based on evidence not tendered in court

Whether the documents held by the Respondent were genuine

21. Whether anyone of the alleged judgments in Kaloleni Civil Case No. 26 of 1977 was a forgery would be established by the prosecution calling the court administrator to produce the file in Kaloleni Magistrate’s Court Civil Case No. 26 of 1977 for the trial court to peruse and compare hand written and typed proceedings. In the alternative, the magistrates alleged to have been in conduct of the proceedings ought to have been called as witnesses. Additionally, the prosecution ought to have established whether a magistrate by the name P. J. D. Mwangulu DM III ever existed. The prosecution failed to prove that the documents held by the Respondent were a forgery.

22. In *Dennis Binyenya v Republic* [2018] eKLR the court held that;

“...the offence constitutes the following ingredients;

- i. proof of the making, signing or execution of a document and that the same was done by the accused**

Whether the evidence of the prosecution witnesses was considered by the learned trial magistrate

23. In the absence of the court file, it could not be concluded that the documents held by the Respondent were genuine or not.

24. The lower court proceedings show that four prosecution witnesses were called upon to testify: PW1, Shangwa Ngala Chome, who is the complainant; PW2, No. 231371 Senior Superintendent of Police John Muinde, the document examiner; PW3, Joyce Wakiti Kome, Chief Mariakani Location; and PW4, No. 23655 Inspector Elvis Charo, the investigating officer.

25. The documents presented to court were the Court Order in Mombasa High Court Civil Suit No. 95 of 2011 by the Deputy Registrar Mombasa High Court dated 16th May 2013, Exhibit Memo Form sent to the Document Examiner presenting two judgments in Civil Case No.26/1977 marked ‘A’ and ‘B’, Forensic Document Examiner’s Report, Case Work Reference No. CID/ORG/8/3/1/106 with a submission date of 05/02/2014 and an examination date of 08/02/2014 signed by John Muinde the Forensic Document Examiner, and Letter from the Chief’s Office Mariakani to the District Commissioner Mariakani regarding the Ketraco Project signed by Joyce W. Kombe, Senior Chief Mariakani on 27/7/2012.

26. The learned trial magistrate in the decision delivered on 15.8.2018 stated that from the evidence on record, it is the prosecution case that the proceedings and judgment that was relied on by the accused and the deceased in High Court Civil case No. 95 of 2011 were a forgery hence the reason why the accused was charged with three count. Further, the learned trial magistrate stated that it is however clear from the evidence that the proceedings that the accused is alleged to have forged are in fact the genuine proceedings which were certified as a true copy of the original by the resident magistrate Kaloleni. Also, the Investigating Officer’s report to the High Court in Civil Case No. 95 of 2011 pointed to the possible involvement of PW1, Tsangwa Ngala Chome in forging the proceedings he was relying on in the High Court case. From the foregoing, it is clear that the learned trial magistrate in her decision was guided by the evidence on record that had been

presented by the prosecution.

27. In respect to the 3rd count of uttering a document, no witnesses from Mombasa High Court Civil Case No. 95 of 2011 attended court to testify that the accused uttered the document to them.

Whether the learned trial magistrate reached a finding based on evidence not tendered in court

28. As much as the trial magistrate had no basis for finding that the proceedings that the accused is alleged to have forged were genuine because she did not see the original file and she also had no basis to find that proceedings purported to have been conducted by M. C. Randu DM III were a forgery, it was the duty of the prosecution to establish that either of the proceedings were a forgery.

29. Further, the High Court Civil Case No. 95 of 2011 ordered investigations to establish if Kaloleni DMCC No. 26 of 1977 was genuine, the court administrator in Kaloleni ought to have appeared as a witness and produced the file in Civil Case No. 26 of 1977.

30. In the circumstances, I do find that the trial magistrate properly found that there was no evidence to warrant the accused person to be placed on defence. The appeal has no merit and is dismissed.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 8TH DAY OF OCTOBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Ms. Karanja for Appellant

Mr. Ondaba for Respondent

HON. LADY JUSTICE A. ONG'INJO

JUDGE