



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.39 OF 2019

JEREMIAH KINYANJUI MUTURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein was charged with three counts as set out hereunder:-

COUNT 1: **Making a document without authority contrary to Section 357(a) of the Penal Code:** Particulars are that on 24th July, 2007 jointly with others not before court with intent to deceive and without lawful authority made a false document namely introductory letter from Kaplan & Stratton advocates company referenced FJA/20735 confirming the payment of shares from **Jumaa Farmers Company Limited** to the said firm, purporting it to be a genuine and valid letter from the said Kaplan & Stratton Advocates Company.

COUNT II: **False swearing contrary to Section 114 of the Penal Code:** Particulars are that on 19th day of September, 2008 at Rubua Ngure & Company Advocate's office, Nakuru town in Nakuru District of the Rift Valley Province before Rubua Ngure a person authorized to administer an oath swore falsely upon a matter of judicial proceedings that an introductory letter from Kaplan & Stratton advocates referenced FJA/20735 had originated from the firm of Kaplan & Stratton Advocates Company.

COUNT III: **Fabricating evidence contrary to Section 113(a) of the Penal Code.** Particulars are that on the 22nd day of September, 2008 at High Court Nakuru in Nakuru District of the Rift Valley Province; with intent to mislead a tribunal in Judicial proceedings namely Civil Suit No.181 of 2008 in the High Court of Nakuru knowingly made use of fabricated evidence by attaching a forged document namely introductory letter referenced FJA/20735 to his replying affidavit purporting it to had been made and originated from the firm of Kaplan and Stratton Advocates Company.

2. The appellant was acquitted of count 1. He was convicted for count 2 and 3 and sentenced to two years imprisonment on both counts.

3. Being aggrieved by the said conviction and sentenced, he filed this appeal on the following grounds:-

i. That the learned trial magistrate erred in law and fact when he failed to find and to hold that there existed no compelling evidence on the court record that was sufficient to convict the appellant for any of the charges in the charge sheet.

ii. That the learned trial magistrate erred in law and fact when he failed to consider and make a finding that the charge sheet was fatally defective and was incapable of securing a conviction against the appellant as drawn.

iii. That the learned trial magistrate erred in law and fact when he failed to note and make a finding that the charge sheet failed to demonstrate or to disclose in the slightest manner the particulars which were alleged to have constituted the offences and/or that the particulars thereof were too vague or lacing in the particulars to enable the appellant make a defence.

iv. That the learned trial magistrate erred in law and fact when he failed to declare the charge sheet bad in law for no-compliance with Section 214 of the Criminal Procedure Code and therefore, the appellant was misled and deceived by the proceedings.

v. That the learned trial magistrate erred in law and fact when he failed to find and to hold that the collapse of count 1 in the charge sheet automatically led to collapse of counts 2 and 3 as the subsequent counts were given life by the 1st count.

vi. That the learned trial magistrate erred in law and in fact when he failed to make a finding that count 2 of the charge sheet was devoid of mandatory particulars that constitute the ingredients of the alleged offence, and therefore he presided over a trial that was substantially and fundamentally prejudicial to the appellant.

vii. That the learned trial magistrate erred in law and fact when he failed to find, note and make a declaration that the particulars of count 3 of the charge sheet directly referred to an offence under **Section 113 (b) of the Penal Code Chapter 63 of the Laws of Kenya** whereas the appellant was required to answer to a charge under **Section 113 (a) of the Penal Code**, therefore he presided over a trial that was substantially and fundamentally prejudicial to the appellant.

viii. That the learned trial magistrate erred in law and fact when he ignored the express provisions of the law under **Section 150 of the Criminal Procedure Code** on summoning of witnesses therefore deliberately causing an injustice against the appellant.

ix. That the learned trial magistrate fell into grave error when he entirely rejected the evidence and testimony of the appellant and relied only on the evidence of the prosecution witnesses without any sound basis in law or fact.

x. That the learned trial magistrate did not properly direct his mind to the peculiar circumstances of the case and thereby failed to exercise his discretion properly causing an injustice to the appellant.

xi. That the learned trial magistrate misdirected himself and as a result misapplied the law on criminal justice causing an injustice to the appellant

xii. That the learned trial magistrate fell into grave error when he failed to find and to hold that the appellant was entitled to an acquittal on all three (3) counts owing to insufficient, inconsistent and non-convincing prosecution evidence.

xiii. That the learned trial magistrate fell into grave error when he made a finding against the appellant and thereafter wrongly sentencing the appellant.

xiv. That the learned trial magistrate misdirected himself when he applied the wrong principles of law in deciding the case.

4. **Mr. Onyango** for the appellant argued that, the charge sheet in both count 2 and 3 are defective. In respect to count 2 counsel argued that, **section 114 of the penal code** refer to an affirmation or declaration before any person authorized to take an oath or a declaration upon a matter of public concern whereas the charge talks of judicial proceedings; that the prosecution brought in an issue, which was not an issue in law. Further that the particulars are too vague.

5. Counsel referred to **Kakamega Criminal Appeal No.265 of 2003 Zablon Ochieng Senge Vs Republic [2005] eKLR** where the court held that the charge sheet ought to spell out what is alleged to be false for the accused to be able to know particulars of the offence in which he has been charged. Further, in the above case the court stated as follows:-

“The matter of public concern referred to in section 114 of the penal code required to be spelt out in particulars of the charge in the same way in which, in charge of theft, the particulars of property stolen are given...it was not enough to repeat matter of public concern without more as this did not in any way in the slightest manner demonstrate particulars which were alleged to have constituted matter of public interest.

...where the particulars do not show any offence, the charge is bad in law. In such cases, there cannot be proper conviction.”

6. In respect to count three, counsel submitted that the appellant was charged under **section 113 (a)** and submitted that the charge is defective for reason that if he was to be properly charged for fabricating evidence, it is provided under **section 113 (b)**.

7. He further submitted that under **section 214 of the CPC**, where a charge is defective, it should be amended before close of prosecution case on courts own motion or on application by the prosecution, which was not done in this case. He added that the prosecution have no powers to amend statute; statute can only be amended by parliament and the court can only make declaration on its constitutionality. He referred to **Nyeri HCCR No.199 of 2008**.

8. In response, the Ms. Rita Rotich for the state counsel conceded to the appeal on both count 2 and 3.

9. I have perused the charge sheet; I have also perused the court proceedings and do I agree with counsel of the appellant that the charges as drafted are defective. I confirm from proceedings that the charges were not amended. Conviction cannot lie on a defective charge.

10. FINAL ORDERS

a. Appeal is allowed

b. Conviction in respect of count 2 and 3 and sentences imposed are set aside accordingly

c. Appellant set free.

Judgment dated, signed and delivered at Nakuru this 22nd day of January 2020

.....

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer/Schola – Court Assistant

Onyango for the Appellant

Rita for the state