



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL APPEAL NO. 14 OF 2020**

**THE REPUBLIC.....APPELLANT**

**VERSUS**

**GEORGE BOSIRE ANGWENYI.....RESPONDENT**

*{Being an appeal against the Judgement of Hon. A. C. Towett (Mrs.) – SRM Nyamira dated and delivered on the 7<sup>th</sup> day of May 2020 in the original Nyamira Chief Magistrate’s Court Criminal Case No. 839 of 2017}*

**JUDGEMENT**

This appeal arises from the respondent’s acquittal in Nyamira Chief Magistrate’s Court Criminal Case No. 839 of 2017.

In the court below the respondent was charged with six counts of forgery contrary to Section 345 as read with Section 394 of the Penal Code and six counts of uttering a false document contrary to Section 353 of the Penal Code. At the trial the prosecution called eleven witnesses and produced several documents and reports. The respondent also testified and called one witness.

After considering and evaluating the evidence from both sides the trial Magistrate acquitted the respondent for what she described as glaring contradictions which cast doubt on the prosecution’s case.

Being aggrieved by the acquittal, the prosecution has appealed on the following grounds: -

- “1. THAT the Honourable Senior Resident Magistrate erred in law and in fact by failing to consider that the respondent was charged with twelve counts bordering on forgery and uttering a false document C/S 345 as read with section 349 of the penal code and section 353 of the Penal Code respectively.**
- 2. THAT the Honourable Senior Resident Magistrate erred in law and in fact by failing to find that the prosecution called key witnesses who clearly demonstrated that the documents were forgeries.**
- 3. THAT the Honourable Senior Resident Magistrate erred in law and in fact by failing to consider that the prosecution called key witnesses who demonstrated that the respondent uttered the forged documents before them purporting them to be genuine.**
- 4. THAT the learned trial magistrate erred in law and fact by failing to take into account the provisions of the Evidence Act relating to Secondary Evidence.**
- 5. THAT the learned trial Magistrate erred in law and in fact by failing to find that the respondent did not call as a witness the author of a purported withdrawal letter from the Nyamira County Assembly seeking a withdrawal of the matter before court.**
- 6. THAT the learned trial Magistrate erred in law and in fact by failing to make a finding that the defence raised by the respondent was a more denial vis-a-viz the cogent and consistent prosecution case.”**

In the appeal, Senior Prosecution Counsel Mr. Desmond Majale acted for the appellant while Mr. Kaba Advocate, instructed by Ocharo Kaba & Company Advocates, represented the respondent.

The appeal proceeded by way of written submissions. Mr. Majale submitted that the respondent was employed by the County Government of Nyamira as the Chief Sergeant at Arms upon presentation of certificates and testimonials which were forged. Counsel submitted that the eleven prosecution witnesses gave corroborative and consistent evidence in support of the charge and that Pw10 was a document examiner

who confirmed receiving four examination documents which upon examination he found to be forgeries. Counsel stated that Pw10's report to that effect was produced as exhibit 20. Counsel submitted that there was evidence from the investigating officer (Pw11) that he obtained the documents from the Human Resource and Administrative Director Nyamira County (Pw3) who was the custodian of all staff personnel files at the County and that he (the investigating officer) subjected the documents to scrutiny from the different institutions from whence they were allegedly issued only to receive a response from the said institutions that the testimonials were not from those institutions. Counsel gave as an example Julius Kamau, a retired Senior Superintendent of Police (Pw4), who denied ever signing a certificate of discharge for the respondent when he exited the police service. Counsel contended that the said certificate of discharge was proved to be a forgery. Counsel stated that similarly Pw5, Pw7 and Pw8 denied knowledge of and or signing any of the documents purported to have been signed by them or coming from their institutions but which were presented by the respondent to the recruitment panel. Counsel submitted that the requirement for them to obtain the original documents from the respondent would have been an exercise in futility and the same is covered under **Section 68 (1) of the Evidence Act**. In relation to a letter produced by the defence as exhibit D6, Learned Prosecution Counsel maintained that it was not the County Assembly's duty to withdraw the charges as the investigation on academic transcripts was at the behest of the Ethics and Anti-Corruption Commission. Counsel submitted that the County Government's attempt to withdraw the case was immaterial. Counsel further submitted that the respondent's defence was a mere denial devoid of any weight to shake the prosecution's cogent and watertight case. He urged this court to allow the appeal, reverse the acquittal and convict and sentence the respondent.

For the respondent, it was argued that the prosecution did not prove its case beyond reasonable doubt. Mr. Kaba, Learned Counsel for the respondent, put reliance on the decision of the Court of Appeal in the case of **Joseph Mukuha Kimani v Republic [1984] eKLR** where the court held that for the offence herein to be proved: -

**“The prosecution must prove that:**

- (a) The document was false; in the sense that, it was forged.**
- (b) The accused knew it was forged.**
- (c) The utterer intended to defraud.”**

Mr. Kaba submitted that the prosecution did not prove that the respondent forged or was involved in the making of the purported forged documents and that his defence and documents was in itself proof that he had nothing to do with the subject documents. Counsel argued that the prosecution failed to establish a nexus between the purported forged documents and the respondent in that no sample handwriting was obtained from him and that the handwriting examiner's finding that there was nothing to show the handwriting and signatures were those of the respondent was sufficient to distance him from the purported forged documents. Mr. Kaba pointed out that the respondent had demonstrated there was bad blood between himself, Pw1 and Pw2. Further, that the respondent attended the interview where it is alleged he uttered the impugned documents on 27<sup>th</sup> October 2015 yet the documents the subject of the trial bore the county official rubber stamp which indicated they were received on 17<sup>th</sup> January 2017 several years after the interview. Counsel contended that this was a clear indication of the threat to fix the respondent. Mr. Kaba also pointed out that the respondent is still Chief Sergeant at Arms at the County Assembly of Nyamira and submitted that it was an indication that the case against him was perpetuated by malice. Counsel submitted that moreover the procedure outlined by Dw1 for obtaining documents from the County Government was not followed as even the investigating officer could not give a reasonable explanation as to the source of the impugned documents. Relying on the definition attributed to the word forgery in the cases of **Caroline Wanjiku Ngugi v Republic [2015] eKLR** and **R v Gambling [1974] 3 ALL ER 479** Counsel urged this court to find that it was not proved that the respondent forged the documents. He argued that the prosecution also failed to prove that the respondent secured his employment as a result of the purported forged documents and stated that the respondent produced documents other than those produced by the prosecution. Mr. Kaba submitted that no notice to produce was issued by the prosecution in line with **Section 69 of the Evidence Act**. Counsel urged this court to conclude that this appeal has no merit and dismiss it.

As the first appellate court my duty is to reconsider and evaluate the evidence in the trial court so as to arrive at my own independent finding while bearing in mind that I neither saw or heard the witnesses who testified – *see Okeno v Republic [1792] EA 32*.

There is no doubt that the documents the prosecution produced at the trial were forgeries. Indeed, in her judgement the trial Magistrate stated: -

**“It is not in dispute that the documents as exhibited by the prosecution were forged or falsified.....”**

The prosecution was required to prove beyond reasonable doubt that the documents were forged by the respondent and uttered by him when he appeared before the interview panel on 15<sup>th</sup> October 2015 as alleged by prosecution witnesses Joash Nyamache (Pw1) and Daniel Orina (Pw2) who were members of the panel.

The court heard that the respondent appeared before the panel which was sitting at the Guardian Hotel, on 27<sup>th</sup> October 2015 and that the documents he presented on that day were:

- **A national identity card.**
- **Diploma certificate from the Kenya Institution of Security and Criminal Justice (Exhibit 13).**
- **Kenya Certificate of Secondary Education (Exhibit 15).**
- **Kenya National Examinations Council result slip (Exhibit 17).**

- **University of Nairobi Degree certificate (Exhibit 10).**
- **Substantive promotion to rank of Inspector of Police Letter Ref. No. P/Conf/231165/3 dated 6<sup>th</sup> July 2007 (Exhibit 4).**
- **Letter of Appointment to act in the rank of Inspector of Police dated 19<sup>th</sup> November 2005 (Exhibit 3).**
- **Letter of promotion to the rank of Chief Inspector (Exhibit 5).**

It was alleged that the certificate of discharge from the police service was however presented later as it was presumed that the respondent was still in the police force. Pw1 testified that it was on the strength of those documents that the County Service Board hired the respondent as the Senior Sergeant at Arms of the Nyamira County Assembly and subsequently confirmed him to that position on 21<sup>st</sup> June 2016. The respondent produced the appointment and confirmation letters as Exhibit D2(a) and 2(b). Apparently prior to his appointment the respondent was a driver in the rank of Police Constable stationed at Garissa County Headquarters as evidenced by his letter of resignation marked Exhibit 8.

Having considered the evidence in its entirety it is my finding that save for proving that the documents were false hence forgeries the prosecution did not at all prove that the respondent forged the documents. Inspector Benard Cheruiyot (Pw10), the document examiner charged with examination of the documents, testified that he did not take the specimen handwriting and signature of the respondent. It was his evidence that his findings did not show that the impugned signatures and handwritings belonged to the respondent. It would appear that his brief was confined to only showing that the documents were not made/signed by the persons purported to have made/signed them but did not extend to proving they were made/signed by the respondent. I therefore concur with the submission by Counsel for respondent that the prosecution failed to prove the respondent forged those documents.

**Section 353 of the Penal Code** provides that a person who knowingly utters such forged documents is as guilty as the one who forged them and is liable to the same punishment. The question then is whether the respondent uttered the documents as alleged. Going through the documents and the reports produced by the prosecution I noted several discrepancies. Firstly, some of the documents make reference to George Bosire Momanyi and others to George Bosire Angwenyi. However, the prosecution did not prove there was a nexus between the two names persons. For instance, the letter (Exhibit 21) written by Inspector Jumba (Pw11) for verification of the letters marked Exhibit 3, 4 and 5 makes reference to a Chief Inspector George Bosire Momanyi whereas the letters themselves refer to George Bosire Angwenyi. It is instructive that although the verification letter by Maxwell Agoro dated 6<sup>th</sup> March 2017 (Exhibit 7) refers to Ex PC George Bosire Angwenyi (alias No. 231165 CI George Bosire Momanyi) Inspector Jumba did not himself try to create a nexus between the two names. The other documents with a discrepancy are the letter for verification of the Higher Diploma Certificate in Security and Disaster Management (Exhibit 12) which makes reference to George Bosire Momanyi while the Diploma certificate (Exhibit 13) itself bears the name George Bosire Angwenyi. No explanation was offered for these discrepancies leaving this court to doubt whether the verification done was in respect to the right documents. In the letter to the office of the Deputy Vice Chancellor (Academic Affairs) University of Nairobi (Exhibit 9), it is requested to verify whether the certificate was awarded to a Mr. George Bosire Momanyi yet the certificate (Exhibit 10) is in the name of Angwenyi George Bosire. How the two persons or names are connected was not explained either in the request or in this court. Further, as was reasoned by the trial Magistrate, there is nothing to demonstrate that the respondent indeed presented the said documents because whereas the interview is alleged to have been conducted on 27<sup>th</sup> October 2015 all the documents that bear the name George Bosire Angwenyi have a County Assembly of Nyamira stamp dated 17<sup>th</sup> January 2017. It is not clear who may have presented the documents to the County Assembly on 17<sup>th</sup> January 2017 but clearly there is no proof it was the accused. In any event the allegation against him is that he uttered those documents on 27<sup>th</sup> October 2015 which is doubtful given the stamp on the documents. Pw1 made reference to minutes of the meeting at which the respondent was recruited but the same appear not to have been tendered in evidence. There is therefore nothing to rebut the presumption raised by the received stamp exhibited on the documents. It was also very crucial for the prosecution to prove how the documents came into the possession of the Investigating Officer (Pw10). This was so as to rebut the allegation by the respondent that the same were received from elsewhere so as to fix him. The onus to explain the discrepancies pointed out by the trial court as well as by this court and which I agree cast doubt on the prosecution's case, lay with the prosecution. That onus was not discharged. It is trite that the benefit of doubt must in all cases be to the accused person. Contrary to Prosecution Counsel's submission, the respondent was not acquitted on account of the non-production of the original documents or because of the letter of withdrawal of the complaint by the County Assembly but because of lack of evidence. The prosecution's case was not as cogent or as watertight as submitted by Prosecution Counsel and in my finding the acquittal was based on a sound analysis of the evidence and the law. In the premises I find no merit in the appeal and the same is dismissed. The acquittal is upheld. It is so ordered.

**Signed, dated and delivered in Nyamira this 8<sup>th</sup> day of October 2020.**

**E. N. MAINA**

**JUDGE**

*Judgement delivered electronically via Microsoft Teams*