



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 183 OF 2015

CHARLES OKELLO MWANDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. E. Juma SPM

delivered on 15th June 2015 in Kibera CM CR. Case No. 1430 of 2013)

JUDGMENT

The Appellant, Charles Okello Mwanda was charged in count one with the offence of making a document without authority contrary to Section 357(a) of the Penal Code. The particulars of the offence were that on 6th August 2012 at unknown place within the Republic of Kenya with intent to deceive, without lawful authority, the Appellant made a certain document namely a Letter of Clearance referenced EACC.8/3/5 VOL IV/(09) dated 6th August 2012 purporting it to be a genuine letter duly signed and issued by Henry Mwithia of Kenya Anti-Corruption Commission.

The Appellant was charged in count two with the offence of forgery contrary to Section 349 of the Penal Code. The particulars of the offence were that on 6th August 2012 at unknown place within the Republic of Kenya with intent to deceive, the Appellant forged a certain signature purporting it to be a genuine signature of Henry Mwithia, a Senior Forensic Investigator with Kenya Anti-Corruption Commission.

The Appellant was charged in count three with the offence of uttering a false document contrary to Section 357(b) of the Penal Code. The particulars of the offence were that on 17th April 2012 at the Anti-Corruption Court No.1 at Milimani within Nairobi County, with intent to deceive, the Appellant knowingly uttered a false document namely a Letter of Clearance referenced EACC.8/3/5 Vol IV/(09) dated 6th August 2012 purporting it to be a letter duly signed and issued by Henry Mwithia of Kenya Anti-Corruption Commission.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged in count II and III. He was sentenced to pay a fine of Ksh.300,000/- and in default of the same to serve one (1) year imprisonment in count II. In count III, the Appellant was sentenced to pay a fine of Ksh.400,000/- and in default of the same to serve one (1) year imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was of the opinion that the prosecution's evidence was not sufficient to sustain a conviction. He faulted the trial magistrate for failing to acknowledge that the prosecution gave inconsistent evidence with regard to the date when the offence was alleged to have been committed. He was aggrieved by his conviction stating that the ingredients of the offences were not proved by the prosecution. He complained that his defence was not considered by the trial court in arriving at its decision. He was of the view that the trial magistrate shifted the burden of proof to the defence. He took issue with his conviction asserting that it was based on inconsistent evidence by the prosecution witnesses. He was aggrieved that crucial prosecution witnesses to whom the false document was allegedly uttered were not called as witnesses. He asserted that the sentence given by the trial court was harsh and excessive in the circumstances. He faulted the trial court for violating his Constitutional right as enshrined under Article 50 of the Constitution. In the premises therefore, he urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, both parties filed their respective written submissions. This court also heard oral submissions from Mr. Wathuta for the Appellant and Ms. Sigei for the State. Mr. Wathuta asserted that the charge as drafted was defective since the evidence adduced did not match the particulars of the charge. The date of the letter quoted in the charge sheet was dated 6th August 2012 while the letter adduced in evidence was dated 12th August 2012. He submitted that the person to whom the letter was allegedly uttered ought to have been availed in court as a witness. He averred that the trial magistrate wrongly shifted the burden of proof to the defence. He was of the view

that the prosecution failed to establish that the Appellant authored the letter. He stated that the Appellant was acquitted of the charge of making a false document yet he was convicted of forging the signature on the said document. He was of the opinion that the prosecution failed to establish its case to the required standard of proof beyond any reasonable doubt. In the premises, he urged this court to allow the Appellant's appeal.

Ms. Aluda for the State opposed the appeal. She averred that circumstantial evidence implicated the Appellant in the offences. She submitted that the Appellant produced a fake letter purported to be from the Ethics and Anti-Corruption Commission in court to exonerate himself from an offence. PW1 denied signing the said letter. She pointed out that PW1 and PW2 stated that the letter was dated 6th August 2012 and not 12th August 2012. She averred that the prosecution was not able to produce the original letter in court since the same emanated from the Appellant. She stated that the evidence of the document examiner established that the letter was a forgery. She was of the view that the prosecution discharged its burden of proof. She asserted that the sentence was proper and the same ought to be upheld. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW2, Gideon Mokaya, was an investigator at the Ethics and Anti-Corruption Commission. Sometime in the year 2011, he was instructed to investigate a complaint regarding abuse of office at Tana and Athi Rivers Development Authority (TARDA) involving the Appellant. He completed his investigations in August 2011 and forwarded the file (KACC/1/Inq./2011) to his superiors. The same was forwarded to the Director of Public Prosecution. In March 2013, the Commission was instructed to charge the Appellant. They proceeded to charge the Appellant before the Anti-Corruption Court in Nairobi. When the Appellant was arraigned before court to plead to the charges, he produced a letter from the Ethics and Anti-Corruption Commission purportedly clearing him of the offences he was being charged with. PW2 stated that the said letter contained a different reference number from the one the Commission used with regard to the Appellant's case. He stated that the said letter produced in court by the Appellant was not genuine.

PW1, Henry Mureithi Mwangi, used to work at Ethics and Anti-Corruption Commission as a Senior Forensic Investigator. He retired on 1st April 2013. On 22nd April 2013, his former colleague inquired from him whether he had written a letter clearing the Appellant of corruption allegations. He went to the Commission's offices and was shown the letter that was allegedly authored by him. It was dated 6th August 2012 and referenced EACC.8/3/5/vol.IV(09). PW1 told the court that he was not the author of the said letter. He stated that the signature on the said letter was not his. He testified that the Commission did not ordinarily send letters to inform suspects that they had been cleared of any allegations.

PW3, Margaret Wangui Mwangi was a Records Manager at the Ethics and Anti-Corruption Commission. She was in charge of filing and storage of all documents and records at the Commission. On 19th April 2013, she received a letter from an investigator at the Commission. She was asked to confirm whether the said letter was authentic. The said letter was allegedly authored by PW1. The letter purported to clear the Appellant from corruption allegations that the Commission was investigating. She noted that the reference number quoted on the letter was not the same reference number the Commission allocated to the Appellant's file. The reference number quoted on the letter was EACC.8/3/5 VOL.IV(09). PW3 stated that the said reference number was non-existent.

CPL Jacob, PW4, was a document examiner attached at the CID Headquarters. On 23rd April 2013, he received documents from an investigating officer from the Ethics and Anti-Corruption Commission (PW6). He was instructed to examine whether the signature on the letter matched specimen signatures of PW1 provided. After examination, he concluded that the signature on the letter did not match the specimen signature provided.

PW5, CIP Robert Kyaa, was the prosecutor at the Anti-Corruption Court at Milimani. He was present in the said court on 17th April 2013. The Appellant was arraigned before the said court to plead to charges against him. Before the Appellant could plead to the charges, his advocate produced a letter in court purported to be from the Ethics and Anti-Corruption Commission. The said letter was dated 6th August 2012. The reference number on the said letter was EACC.8/3/5 VOL.IV(09). He confirmed that the said letter was produced by the Appellant before the Anti-Corruption Court. He forwarded the letter to PW2 to confirm whether the same was authentic.

Sophie Mjaibu, PW6, was an investigator at the Ethics and Anti-Corruption Commission. On 17th April 2013, she received a letter (Ref. No. EACC.8/3/5 VOL.IV(09)) from her superiors. She was instructed to investigate whether the letter was authentic. The said letter was alleged to have originated from the Commission. It was produced in court by the Appellant. PW6 inquired from the records manager (PW3) who confirmed that the letter did not originate from the Commission as the reference number quoted was incorrect. The letter was purportedly signed by PW1. She called PW1 who denied signing the said letter. She afterwards forwarded the letter together with specimen signatures from PW1 to the document examiner (PW4).

This case was investigated by Sgt. Samson Gatake (PW7). The complaint was made by the Ethics and Anti-Corruption Commission. He interrogated the witnesses and recorded their statements. After his investigations, he proceeded to charge the Appellant with the present offences.

The Appellant was put on his defence. He stated that he was employed by Tana and Athi Rivers Development Authority (TARDA) between the years 2009 and 2013. On 12th April 2011, he was suspended to allow for investigations regarding tenders that were issued for supply of certain machines. His interdiction was lifted by a letter dated 10th July 2012. He was reinstated awaiting a clearance letter from the Ethics and Anti-Corruption Commission. He received the clearance letter from the Commission on 3rd September 2012. The letter was received by his Secretary and forwarded to him. The said letter was the subject matter in the present appeal. The Appellant told the court that he did not author or sign the said letter.

DW2, Olivia Awuor told the court that on 28th August 2012, a gentleman from the Ethics and Anti-Corruption Commission delivered a letter that was addressed to the Appellant. She stated that she received the letter on behalf of the Appellant. The Appellant was away from office on official duties at Homabay. She gave the letter to the Appellant a week later when he came back to the office. DW3, Martin Esaku, was a forensic document examiner working at a private firm known as Global Forensic Security Services. He stated that he received documents

from the Appellant's advocate on 4th September 2014. He was instructed to compare whether the signature on the document was the same as the specimen signature of PW1 provided to him. He examined the same and concluded that the signatures were authored by the same person.

This being a first appeal, this Court is mandated to re-evaluate afresh the evidence presented before the trial court. The Court of Appeal in the case of Gabriel Kamau Njoroge –vs- Republic (1987) eKLR stated this on the duty of the 1st Appellate court;

“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”

In the present appeal, the issue for determination is whether the prosecution established the Appellant's guilt on the charges preferred against him to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. The Appellant is alleged to have forged the signature appearing on the letter (*Prosecution Exhibit No.1*) subject matter in the present appeal. Forgery is defined under Section 345 of the Penal Code as “making a false document with intent to defraud or to deceive”. The onus is on the prosecution to prove that the document is forged, that the accused person forged the said document and that the accused person forged the document with intent to defraud or deceive.

In the present appeal, PW1 who was alleged to have signed the said letter denied signing the same. Each party availed a forensic document examiner who gave contradictory evidence. The prosecution availed a Government Document Examiner (PW4). PW4 testified that he examined the signature on the letter and compared the same to PW1's specimen signature provided to him. *After his analysis, he came to the conclusion that PW1 did not sign the said document. The Appellant on the other hand availed a private document examiner who after his analysis concluded that the document was signed by PW1.*

Due to the contradictory evidence of the document examiners, this court will rely on the evidence before court to establish whether the document was a forgery. PW1 who is alleged to have signed the letter (Prosecution Exhibit 1) denied signing the same. PW3 who is records manager at the Ethics and Anti-Corruption Commission stated that the reference number quoted on the letter was non-existent. The letter did not originate from the Commission. The letter was therefore a forgery. This court is of the opinion that the prosecution was able to prove that the letter (*Prosecution Exhibit No.1*) was not genuine.

Was the document forged by the Appellant with intent to defraud? It is the prosecution's case that the Appellant forged the letter and produced the same in court in a bid to exonerate him from the charges he was facing at the Anti-Corruption Court. The Appellant on his part denied being the author of the said letter. On re-evaluation of the evidence adduced before the trial court, it was clear to this court that the Appellant was the beneficiary of the contents of the said letter. Even though the prosecution did not establish to the required standard of proof that he authored the letter, this court holds that the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant caused the said letter to be forged so that he could present the same to the court with a view to exonerating himself from the criminal charges that Kenya Ant-Corruption Commission (KACC) intended to present to court against the Appellant. The prosecution was able to establish to the required standard of proof that the letter in question did not emanate from the KACC and neither was KACC in the habit of writing such letters to suspects to clear them from charges. This court was not persuaded by the thrust Appellant's defence which was essentially an insistence that the letter was indeed written by an officer of KACC and therefore the same was, for all intents and purpose, genuine. The Appellant's appeal against conviction on this count (Count II) therefore lacks merit and is hereby dismissed.

The Appellant was further charged in count III with the offence of uttering a false document contrary to Section 357(b) of the Penal Code. The said Section provides as follows:

“Any person who with intent to defraud or to deceive knowingly utters any document or electronic record or writing so made, signed or executed by another person is guilty of a felony and is liable to imprisonment for seven years.”

In the present appeal, PW2 told the court that he was investigating a case of abuse of office at TARDA. After his investigations, he proceeded to charge the Appellant herein before the Anti-Corruption Court in Nairobi. The Appellant was arraigned before the said court for purposes of plea taking. PW5 who was the prosecutor in the Anti-Corruption Court told the court that the Appellant, through his advocate, presented before court a letter (*Prosecution Exhibit No.1*). The said letter, alleged to originate from the Ethics and Anti-Corruption Commission, purported to clear the Appellant of the allegations he was facing at the Anti-Corruption Court. As established earlier in this judgement, the said letter was not genuine. It was a forgery.

In his defence, the Appellant did not deny being in possession of the said letter. He admitted that he produced the same before the Anti-Corruption Court. He told the court that he received the letter at his office through his secretary (DW2) on 28th August 2012. DW2 testified that the letter was delivered to the Appellant's office by someone from the Ethics and Anti-Corruption Commission. She received the same and forwarded it to the Appellant. DW2 did not avail any records to show that she received the letter on the stated day. There is no doubt that the letter was produced by the Appellant. The Appellant stood to benefit from the forged letter. The prosecution established that the uttered document was made to be used as genuine document to the advantage of the Appellant. The letter was purported to be a clearance letter from the Commission clearing the Appellant from the charges he was facing at the Anti-Corruption Court. The Appellant was in possession of the letter. He produced the letter before the said Court in a bid to stop the proceedings at the Anti-Corruption Court. He therefore had the intention to deceive the said Court and absolve himself from the charges he was facing. The Appellant's defence was merely evasive and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses. This court is of the view that the prosecution established the elements of the offence of uttering a false document contrary to Section 357(b) of the Penal Code to the required standard of proof beyond any reasonable doubt.

In the premises therefore, this court finds no merit with the appeal lodged by the Appellant with respect to both counts that he was convicted of. His appeal against conviction is hereby dismissed. The sentence that was imposed on him fitted the crime. This court will not interfere with the same. The appeal against sentence is similarly dismissed. The conviction and the sentence of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF JUNE 2019

L. KIMARU

JUDGE