



**REPUBLIC OF KENYA**

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

**CORAM: D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 64 OF 2015**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**KULTHUM ABDILLAHI OMAR ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. G. O. Kimanga, RM dated 15<sup>th</sup> May 2014 at the Chief Magistrate's Court at Mombasa in Criminal Case No. 1072 of 2012)*

**JUDGMENT**

1. The appellant has appealed against the acquittal of the respondent, **KULTHUM ABDILLAHI OMAR**, who was charged with the following three counts. The first count was forgery contrary to **section 349** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that on or about 21<sup>st</sup> April 2010 the Respondent with intent to deceive and without lawful authority or excuse made a letter for Notification of Approval of the application for Development Permission, purporting it to be a genuine letter issued, stamped and signed by the Director of Town Planning and Architecture on behalf of the Town Clerk of the Municipal Council of Mombasa.
2. The second count was making a false document without authority contrary to **section 357(a)** of the *Penal Code*. The particulars were that on or about 21<sup>st</sup> April 2010 with intent to deceive and without lawful authority or excuse, she made a letter of Notification of Approval of the application for Development Permission purporting it to be a genuine letter issued, stamped and signed by the Director of Town Planning and Architecture on behalf of the Town Clerk of the Municipal Council of Mombasa
3. The third count was uttering a document with intent to defraud/deceive contrary to **section 357(b)** of the *Penal Code*. The particulars were that on 21<sup>st</sup> April 2010 with intent to deceive, she knowingly uttered a letter of Notification of Approval for Development Permission to Kiarie Kariuki of *Kiarie Kariuki and Company Advocates* without lawful authority.
4. The genesis of this case is a dispute between Quassim Abumado (PW 1) and the respondent. PW 1 alleged that the respondent had constructed a building on a property that did not belong to her. He gave her notice of intention to demolish the building and then moved the court in Mombasa High Court Civil Case No. 304 of 2010 for orders restraining the respondent from further constructing the plot. According to Kiarie Kariuki (PW 4), who was her advocate, the respondent filed a replying affidavit which contained an Exhibit KAO-3 which was the document titled, "Notification of Approval of the Application for Development Permission" ("Notification of Approval") dated 21<sup>st</sup> April 2010 signed by the Director Town Planning and Architecture on behalf of the Town Clerk and endorsed with a stamp of the Town Planning and Architecture Department of the Municipal Council of Mombasa. PW 4 later realized that the Notification of Approval was not genuine hence the proceedings against the respondent.
5. A Planning Assistant at the Mombasa Municipal Council, PW 2, Christanthis Mwadime, testified that the Notification of Approval is issued after the Development Plan has been approved. He told the court that the signature on the Notification of Approval resembled his signature but that it was not his. He told the court that such a Notification of Approval could be issued by anyone in the Department.
6. The Chief Building Inspector, Charles Omwato, PW 3, testified that the Notification of Approval is issued at the end of a process. He recalled that on 8<sup>th</sup> August 2010, he was informed of an illegal development whereupon he sent PW 1 to the site. He also looked at the documents that were brought to him which appeared genuine. He stated that he did not check whether all the processes were followed before the Notification of Approval was issued. In cross-examination, he accepted that the approvals given by NEMA and the Old Town Conservation Unit were genuine.
7. The document examiner, Inspector Geoffrey Charia (PW 4) told that court that he examined the Notification of Approval and specimen

signatures together with the stamp impressions. In his report, he concluded that the signature on the Notification of Approval and specimen signatures were made by different persons. He also found that the stamp impression on the document was made by a different instrument.

8. The appellant denied the charge in her defence and she stated that when she wanted to develop part of her property, she applied for permission and obtained approval from the Municipal Council by a letter dated 21<sup>st</sup> April 2010. She also produced the map.

9. After hearing the case, the trial magistrate concluded that the witnesses from Mombasa Municipal Council, PW 2 and PW 3, admitted that the document complained of originated from their officers and the signatures appeared genuine and that in her defence, the respondent produced the approval from the NEMA and Old Town Museum including receipts for payment of approvals and the original plan which showed that the document complained of was likely not a forgery.

10. The appellant, in its petition of appeal, contended that the trial magistrate acquitted the respondent despite overwhelming evidence of forgery and despite the key witness, PW 2, stating that the signature was not his. The appellant further urged that the trial magistrate erred in disregarding the evidence of the document examiner, PW 4, who confirmed that the document was a forgery.

11. The central issue in this case is whether the respondent forged the letter of Notification of Approval. In order to prove the first count, prosecution had to prove that the respondent made the Notification of Approval. PW 2, who is purported to have signed the Notification of Approval, disowned it. He did not tell the court whether the respondent could have signed it or prepared it and neither did the handwriting expert nor indeed the investigating officer. Likewise, no sample of handwriting from the respondent was taken to show that she is the one who forged the document. While it is possible to conclude from the evidence of PW 4 that the document was a forgery, there is no evidence to show that the document was made by the respondent.

12. Proof of the third count depends on whether the respondent knew that the document was a forgery and intended to use it. PW 2 and PW 3 testified that the Notification of Approval is the final document issued after a culmination of processes. All the witnesses did not contest the process of approval and indeed confirmed that the approvals obtained by the respondent were genuine. In light of the approvals obtained by the respondent, there is doubt that indeed the Notification of Approval was a forgery and that the document was uttered in the manner stated in the charge.

13. Having re-appraised the evidence afresh, I have come to the conclusion that there was insufficient evidence to convict the respondent. The appeal is therefore dismissed.

14. The appellant and her sureties are discharged from these proceedings.

**DATED and DELIVERED at MOMBASA this 6<sup>th</sup> day of September 2018.**

**D. S. MAJANJA**

**JUDGE**

Mr Masila, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the appellant.

Ms Wambani, Advocate for the respondent,