



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 15 OF 2018

WILSON MAINA WANJOHI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence dated 23/03/2018 Nanyuki CM Criminal Case No 278 of 2017 – E Ngigi, SRM)

J U D G M E N T

1. The Appellant **WILSON MAINA WANJOHI** was charged with, tried for and convicted of the purported offence of **making a false document** contrary to **section 347(b)** of the **Penal Code**. On 23/03/2018 he was sentenced to two (2) years imprisonment. He appealed against both conviction and sentence.

2. On 25/07/2018 I heard the appeal. I allowed it in its entirety, quashed the conviction and set aside the sentence for reasons to be given in this judgment. I further directed that the Appellant be set at liberty forthwith unless otherwise held.

3. It is trite in our jurisdiction that a criminal offence will be created by statute, the common law or international law having the force of law. In other words, a criminal offence must be declared to be so by law. See **Article 50(2) (n)** of the **Constitution of Kenya, 2010**. See also the definition of **offence** in **section 4** of the Penal Code.

4. **Section 349** of the Penal Code creates the offence of **forgery** in the following words -

“349. Any person who forges any document or electronic record is guilty of an offence which unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.”

Forgery is defined as follows in **section 345** of the Penal Code in the following terms -

“345. Forgery is the making of a false document with intent to defraud or to deceive.”

5. The circumstances that constitute the making of a false document (that is, the definition of **making a false document**) are set out in **section 347** of the Penal Code.

6. Finally, **intent to defraud** is defined in **section 348** of the Penal Code.

7. From the above provisions of the law it can be seen immediately that **making a false document** as defined in section 347 of the Penal Code is one of the ingredients of the offence of forgery created by section 349 of the Penal Code and defined by section 345 of the same Code. It is the **actus reus** of the offence.

8. The other ingredient of the offence of forgery (**the mens rea**) is the **intent to defraud or to deceive** as defined by section 348 of the Penal Code.

9. Of itself, making a false document does not constitute a criminal offence, and section 347 aforesaid does not create an offence. Similarly, intent to defraud or to deceive does not of itself constitute a criminal offence, and section 348 aforesaid does not create an offence. It is only when the two come together, the **actus reus** and the **mens rea**, that the offence of **forgery, as created by section 349 of the Penal Code**, is disclosed.

10. It matters not, as submitted by the learned prosecution counsel in support of the Appellant's conviction, that there was a full trial, or that the Appellant was represented by counsel at his trial and no objection was raised. This could never make good a trial for a non-existent criminal offence. This was a fatal defect that could not be cured under **section 382** of the **Criminal Procedure Code**. As submitted by the Appellant's learned counsel, section 382 aforesaid cannot be invoked to create a non-existent criminal offence.

11. This was not a case of an error or irregularity that does not occasion a failure of justice. It is a case of an accused person being charged with, tried for and convicted of a non-existent criminal offence! That was a fatal error that cannot be cured.

12. It was for the above reasons that I allowed the appeal in its entirety on 25/07/2018.

DATED AND SIGNED AT NANYUKI THIS 16TH DAY OF OCTOBER 2018

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 18TH DAY OF OCTOBER 2015