



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 169 OF 2017

DENNIS BINYENYA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(An appeal from the conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 3946 of 2011 delivered by Hon. S. Jalang'o, SRM on 4<sup>th</sup> December, 2017).*

JUDGMENT

Background.

1. The Appellant herein was charged in the Count I 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 unknown date, time and place in the Republic of Kenya, jointly with others not before court, with the intent to deceive and without lawful authority or excuse made a certain certificate Serial Number [particulars withheld] purporting it to be a genuine certificate issued by the Kenya National Examination Council. In count II he was charged with the offence of uttering a document with intent to deceive contrary to **Section 357(b) of the Penal Code** in that on 13th May, 2011 at General Service Unit Training school in Nairobi County within the Republic of Kenya, with intent to deceive, knowingly uttered a certain document namely Kenya Certificate of Secondary Education Serial Number [particulars withheld] to Mr. Joseph Kodi, Assistant Commissioner of Police, which had been made without authority.

2. The Appellant was found guilty in both counts. He was sentenced to pay a fine of Kshs. 50,000/- in default serve one year imprisonment in each count. Being dissatisfied with both the conviction and sentence, he proffered the instant appeal. He set out his grounds of appeal in a Petition of Appeal filed 18th December, 2017. They were that; (i) the learned magistrate erred in finding that the certificate in question had been falsified, (ii) the trial magistrate erred by shifting the burden of proof to the Appellant, (iii) the honorable magistrate erred in finding that the certificate was made by the Appellant, (iv) the trial magistrate erred in allowing the production of an electronic record in evidence without compliance with Section 106B of the Evidence Act, (v) the honorable magistrate erred when he found that the Appellant had uttered a document with intent to deceive, (vi) the learned magistrate erred in failing to pay sufficient regard to the Appellant's submissions and authorities.

Submissions

3. Both parties filed written submissions. The appeal was canvassed before me on 8<sup>th</sup> October, 2018. Learned counsel, Mr. Nganga for the Appellant relied on written submissions filed on 24<sup>th</sup> June, 2018. Mr. Kamau, holding brief for him highlighted the submissions. Mr. Momanyi for the Respondent relied on submissions filed by prosecution counsel, M/s Akunja on 8<sup>th</sup> October, 2018.

4. Mr. Nganga collapsed the grounds of appeal into two, the first being that the making of a false document was not proved. He submitted

that there was no finding that the Appellant had signed, made or executed the document, a school certificate. Further, that the certificate bore signatures which were not proved to be in the handwriting of the Appellant. He relied on **Kepha Moses Mogoi v. Republic[2014] eKLR** to buttress the submission. He submitted that in the judgment, the trial magistrate had shifted the burden of proof upon the Appellant by requiring him to state the grades he had scored during the examination, which was against cardinal principle I criminal trials. He relied on **R v. Geoffrey Njoroge Matheri alias Fongo[2016] eKLR** and **Hassan Salum v R[1964] EA 126** to buttress this submission.

5. His second argument was that crucial witnesses were not called. He pointed to the failure to call the investigating officer who he submitted would have adduced a genuine copy of the certificate. Further, that no witness was called to prove that the handwriting on the certificate belonged to the Appellant. He relied on **Bukenya & others v.Uganda[1972] EA 549** and **Said Awadhi Mubarak v. Republic[2014] eKLR** to argue that the failure to call these witnesses meant that had their evidence been adduced the same would have been adverse to the prosecution case.

6. He then proceeded to submit that PW2 was an officer whose attempt to produce a verification report was objected to as she was not the author. The reason she was to produce the document was that the author had retired. As such the admission of the document did not meet the provisions of Section 33 of the Evidence Act. He relied on **Ndolo Ndilu Ndolo v. Republic[2002] eKLR** to buttress this submission. He concluded by urging the court to quash the conviction, set aside the sentence and refund the fine of KShs. 100,000/-.

7. Mr. Momanyi argued that the prosecution proved the offences to the required standard. He stated that it was not in dispute that the Appellant presented a certificate that was a forgery. That a verification report was produced by PW2 which confirmed the actual grades that were attained by the Appellant. He submitted that the Appellant was the beneficiary of the forgery and he could therefore not turn around and claim not to know how the same was acquired.

8. On the submission that crucial witnesses were not called, he submitted that under Section 143 of the Evidence Act, the prosecution was only enjoined to call only the witnesses that were sufficient to prove their case, which they did.

9. He added that the prosecution sufficiently laid a basis for PW2 to produce the verification report under the provisions of Section 33 of the Evidence Act. He submitted that the failure to produce an original result slip in court was explained by PW2 who submitted that the Kenya National Examination Council does not retain an actual copy of the result slip but only maintained an electronic data. He submitted that the Appellant failed to explain how he came to be in possession of the forged certificate and when the opportunity arose he failed to dispute the evidence of PW2 in cross examination. He submitted that the appeal is unmeritorious and urged that the same be dismissed in its entirety.

### **Evidence**

10. **PW1**, Commissioner of Police **Joseph Kodi** was stationed at GSU training school as an officer commanding the junior training wing. He recalled that on 12<sup>th</sup> May, 2011, he received 1331 recruits who had enlisted to the Kenya Police Service on 29<sup>th</sup> April, 2011. On 13<sup>th</sup> June, 2011 he collected their academic certificates and forwarded them to Kenya National Examinations Council for verification. On 29<sup>th</sup> July, 2011 he received a letter from Kenya National Examinations Council that 27 recruits from the GSU and Kenya Police College, Kiganjo had presented forged certificates. Amongst them was No. [particulars withheld] recruit Constable Dennis Binyenya, the Appellant herein. The letter indicated that the contents of the Appellant's certificate were altered particularly the grades. After receipt of the letter they terminated the services of the Appellant. He then handed over the certificate presented by the Appellant to the DCIO-Embakasi for further action.

11. **PW2**, **Francis Kwedo** was a senior examinations secretary with the Kenya National Examinations Council. He produced the aforesaid verification report. Tec same had been made by a colleague, one Linus Ligina Shikemi. The report established that the Appellant sat his KCSE examination 2003 and that the grades appearing in the copy forwarded had all been altered. He also produced a printout showing the Appellant's correct results.

12. In his brief sworn defence, Appellant testified that he did his KCSE at Karima Secondary School in the year 2003 and was issued with a certificate in 2004 after the results were released. That the exhibit produced in court was the certificate he was issued with and he had not altered the grades on the certificate.

### **Determination**

13. It is now the onerous duty of this court to reevaluate the evidence on record and make independent conclusions. See **Okeno v. Republic [1972] EA 32**. I have accordingly considered the evidence on record and the respective rival submissions. I find that the following issues arise for determination:

- i. Whether the rules of evidence were infringed in the production of the exhibits.*
- ii. Whether crucial witnesses were not called.*
- iii. Whether the offences were proved beyond reasonable doubt.*

### **Whether the exhibits were properly produced.**

14. With regards the production of the verification report by PW2, counsel for the Appellant submitted that the witness was not the author of the document and that therefore the provisions of Section 33 of the Evidence Act were not complied with before the document was admitted into evidence. It was argued that the trial court erred in allowing the production of an electronic record without due regard to the provisions of Section 106B of the Evidence Act.

15. There no doubt that the verification report as authored by one Linus, a colleague of PW2. Before its production, the prosecution had argued that the person who signed the report no longer worked for the Kenya National Examinations Council and they could not easily avail him in court. The court in reaching its decision found that the witness had established that the report originated from the department where he worked and secondly that given that the trial commenced in 2012 it would be difficult for the prosecution to avail witnesses. The court found that disallowing the admission would cause further delay.

16. The report was signed by the Council Secretary/Chief Executive Officer, Kenya National Examinations Council. PW2 was a senior examinations secretary. He testified that the report was made by one Linus and simply signed by the Council Secretary. Therefore, the Council Secretary was not the author of the document and this is clear from Exhibit 3 which indicated that the exhibits originated from The Archives and Records Unit for The Secretary. The witness worked alongside the maker of the report, which accords with Section 77 of the Evidence Act. The same provides that;

***“(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***

***(2) The Court may presume that the signature to any such documents is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed.***

***(3) when any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.***

17. The report was made by a Government officer who carried out an analysis on the validity of the certificate. PW2 worked with the author and the law does presume that the signature of the maker was genuine. This ground is thus dismissed. I hold, in the circumstances that the report was properly admitted as evidence.

18. The second limb of this submission relates to the examination certificate from Kirima Secondary School class of 2003 and their respective scores produced by PW2. The Appellant contended that the same was an electronic record that was not produced pursuant to the provisions of Section 106B of the Evidence Act. Section 106B(1) may better explain the requirements before production of electronically produced documents. It provides as follows;

***“Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, store, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein there direct evidence would be admissible.”***

19. One of the conditions set out above is in sub-section (2) (a) which states as follows;

***“the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer.”***

20. In the present case, the printing of data was in the custody of the Kenya National Examinations Council. PW2 testified that after results are released the certificates are all remitted to the schools and candidates, with the Council simply keeping a record of the data. This augurs with Section 106E of the Evidence Act which states that:

***“A court shall take recognizance of every electronic record purporting to be the official Gazette, or purporting to be electronic record directed by any law to be kept by any person, if such electronic record is kept substantially in the form required by law and is produced from its proper custody.”***

21. The said section accorded then with 10 of the Kenya National Examinations Council Act, Chapter 225A of the Laws of Kenya(repealed). The same allowed the Council under its mandate to grant certificates and deal with matters incidental thereto. For avoidance of doubt, the same read as follow;

***“The Council shall have, for the furtherance of its objects and purposes, the following powers and duties-***  
***(a) to conduct such academic, technical and other examinations within Kenya as it may consider desirable in the public interest;***  
***(b) to award certificates or diplomas to successful candidates in such examinations;***  
***(c) to invite anybody or bodies outside Kenya, as it may think fit, to conduct academic, technical and other examinations within Kenya or to conduct these examinations jointly with the Council and to award certificates or diplomas to successful candidates in these examinations;***  
***(d) to advise anybody or bodies invited under paragraph (c) upon the adaptation of examinations necessary for the requirements of Kenya and to assist any such bodies to conduct such examinations;***  
***(e) to make rules regulating the conduct of examinations and for all purposes incidental thereto.”***

22. No doubt then the record of the results adduced in court was kept by the National Examinations Council in accordance with the law. It was produced from its proper custody having been signed by Linus L. Shikami on 10<sup>th</sup> November, 2011 and stamped by The Archives Record Unit. This limb of argument also fails.

**Whether crucial Witnesses were called.**

23. The Appellant submitted that there was a failure to call crucial prosecution witnesses, namely; the investigating officer, signatories of the Appellant's certificate and expert witnesses. The Respondent countered this argument by stating that under Section 143 of the Evidence Act the prosecution was not under a duty to call a certain number of witnesses.

24. The court recognizes that it is usually necessary to call the investigating officer as he is responsible for piecing up the evidence of all the witnesses thus aids in crystalizing the basis on which an accused is charged. However, his attendance may be dispensed with where his evidence is ably covered by other witnesses. In the present case, his role was diminished by the fact that, as per the evidence of PW1, when the matter was forwarded to the police the evidence relating to the authenticity of the certificate was also forwarded. The investigating officer's role would not therefore have been required to go out of his way to collect further evidence. His role was rather relegated to that of overseeing the case. His failure to testify therefore did not vitiate the strength of the prosecution case.

25. Equally, the failure to call the signatories of the certificate or expert witnesses did not also affect the validity of the documents as I have enunciated above. Furthermore, what was clearly in contention was not whether the signatures in question were genuine or false, rather the contents of the document, a fact that did not require the signatories to testify nor an expert called to compare the handwritings. As such, the witnesses in question were not crucial and I dismiss this ground of appeal.

**Whether the offences were proved beyond a reasonable doubt.**

26. The offence of making a document without authority is set out in **Section 357(a)** as follows:

***“Any person who, with intent to defraud or to deceive:***

***(a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing.”***

27. From the definition, the offence constitutes the following ingredients;

*i. proof of the making, signing or execution of a document and that the same was done by the accused,*

*ii. proof that the making, signing or execution was without lawful authority or excuse and*

*iii. proof that the making, signing and execution was with the intention to defraud or deceive.*

28. It was clear that the Appellant was a candidate during the 2003 KCSE examinations and he was therefore not authorized or was in a position to issue his own certificate. From the particulars of the offence was not disclosed where the certificate was made and with whom the Appellant had produced the certificate. But it is doubtless that the certificate was received from the Appellant and submitted for purposes of his recruitment to join the disciplined forces. The same was thereafter forwarded to the Kenya National Examinations Council for verification. At the Council the document was found to differ with the information produced by the Council leading to the conclusion that the grades in the individual subjects as well as the mean grade were altered. Undoubtedly then, the certificate held false information regarding the grades attained by the Appellant as can be clearly seen from comparing them with the grades apparent in exhibit 3. This alteration of the results meant that the certificate was not a genuine document. This leads to the inference that the Appellant he was either involved in the alterations or he procured the making of the alterations.

29. His assertion that he obtained that certificate from the school was not true. He so presented it with a view to securing a job. His grades had been changed from [particulars withheld] to [particulars withheld]. This amounted to deceit and was intended to defraud the employer's mind that he had acquired the requisite grades to join the National Police Service. I accordingly find that the offence under Section 357(a) of the Penal Code was proved beyond reasonable doubt.

30. As regards the offence of uttering a false document, the same is defined under Section 357(b) of the Penal Code as;

***“Any person who, with intent to defraud or to deceive***

***(b) knowingly utters any document or electronic record or writing so made, signed or executed by another person”***

31. I cannot belabor in restating the fact that the Appellant in presenting the certificate to PW1 knew the same to be false and he so did it with the intention of deceiving so that he could procure a job. However, a key element herein is the proof that the document was made by another person. In this case, I have found that it is either the Appellant who made the false certificate or aided in the making of the same which vitiates the proof of this key element. His conviction in this count was not safe.

**Conclusion:**

32. The sum total of my findings is that only Count I was proved beyond a reasonable doubt. The sentence imposed therein was legal and proper. I uphold both conviction and sentence in its respect. I however quash the conviction in Count II and set aside the sentence therein. The fine paid in that respect shall be refunded to the payee. It is so ordered.

**DATED and DELIVERED 15<sup>TH</sup> DAY OF NOVEMBER, 2018.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

***In the presence of:***

1. *Kori h/b for Mr. Ng'ang'a for the Appellant.*
2. *Mr. Miiri and Momanyi for the Respondent.*