REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 56 OF 2012

CONSOLIDATED WITH HCRA NO. 57 OF 2012

DIRECTOR OF PUBLIC PROSECUTION.....APPELLANT

VERSUS

CYRUS NJERU IRERI.....1ST RESPONDENT

NYAGA KIANYA.....2ND RESPONDENT

J U D G M E N T

1. The respondents were jointly charged and acquitted before Embu Resident Magistrate Hon. E.K. Nyutu of the offence of forgery contrary to Section 349 of the Penal Code and that of conspiracy to defraud Section 317 of the same code. Upon the acquittal of the the respondents, the appellant was dissatisfied with the judgment of the learned trial magistrate and lodged appeals No. 56 and 57 both 2012 which were later consolidated.

2. The following grounds are relied on in the petition of appeal:-

(a) That the learned magistrate solely relied on the evidence of the expert witness and ignored that of the other prosecution witnesses.

(b) That the trial magistrate erred in applying the wrong principles in dealing with the expert evidence.

(c) That Section 48 of the Evidence Act was not taken into consideration in dismissing the evidence of the expert.

(d) That the trial magistrate failed to evaluate the entire evidence tendered by the prosecution.

(e) That magistrate erred in her finding that a *prima facie* case had not been made up.

3. This appeal was argued by way of written submissions filed by both parties. Ms. Nandwa represented the appellant while Mr. P.N. Mugo was for the respondents.

4. In its submissions the appellant argued that the prosecution proved the ingredients of the offence of forgery and conspiracy to defraud as is clearly demonstrated by the evidence of the complainant PW3 that there existed an agreement dated 15/06/2006 which was purportedly signed by him. The said agreement was flawed in that it did not contain the key particulars of a land sale agreement for instance that the vendor received the consideration.

5. It was further argued that the magistrate failed to evaluate the evidence of the prosecution witnesses and only dealt with that of the expert. Further that the evidence of the expert considered together with that of the other with that of the other witnesses was sufficient to support the charge and made up a *prima facie* case.

6. Ms. Nandwa further argued that Section 48 of the Evidence Act explains how the evidence of an expert ought to be treated and that these provisions were ignored by the court.

7. In evaluating the evidence, the appellant argue that the learned magistrate completely ignored the evidence of PW2, PW3 and PW4 and therefore reached an erroneous finding that a *prima facie* case had not been made.

8. The respondents opposed the appeal in their submissions stating that there are two concurrent proceedings, civil and criminal going on in different courts.

9. The respondents dwelt extensively the proceedings before Ong'udi, J. where she allowed the appellant to appeal out of time. These proceedings are not relevant to this appeal for it dwelt with preliminary issues while this appeal is against the ruling of Hon. E.K. Nyutu whereas the respondents were acquitted. The respondents ought to have appealed against the honourable judge's ruling for this court should sit on appeal on the said ruling.

10. As regards the appeal, the respondents submit that the appellant has not shown or evaluated what other evidence there was in the trial apart from that of the handwriting expert. It is argued that the complainant contradicted herself for she admitted having sold the portion to the 1st respondent and even pursued survey process in regard to the transaction.

11. It is further contended that the evidence in support of the charge was not sufficient to to make *prima facie* case. The respondents urge the court not to order a retrial because the complainant is deceased.

12. The issue for determination in this appeal are as follows:-

(i) Whether the magistrate evaluated all the evidence on record;

(ii) Whether the evidence of the handwriting expert was correctly evaluated;

(iii) Whether the learned magistrate erred in making her finding of no case to answer.

13. The complainant's evidence was that on 18/9/1994, he entered into a sale agreement with the 1st respondent to sell him 0.15 ha. out of his land Gaturi/Nembure/2847. He allowed the 1st respondent to take possession of the land and that he started living there. Upon execution of the agreement, the 1st respondent paid Shs.78,000/= leaving a balance of Shs.4,000/= which he had not paid even during the hearing of the case.

14. Later on the complainant learnt that the 1st respondent had another agreement purporting that the complainant sold him 0.32 ha. out of the same land L.R. Gaturi/ Nembure/2847 for Kshs.242,000/=. The questioned agreement was signed on 15/06/2006 by the 1st respondent as the purchaser and by the 2nd respondent as the witness. It was also purportedly signed by the complainant as the vendor.

15. In his evidence, PW3 denied that he ever entered into any such agreement and neither did he sign it as alleged on 15/06/2006. He also denied receiving any money from the 1st respondent for sale of land as shown in the said agreement. PW3 later reported the matter to the police for investigations.

16. PW2 a Banking Fraud Personnel testified that he received the report of the complainant, investigated it and charged the respondents with forgery and conspiracy to defraud. He sent specimen signatures of the 2nd respondent to the document examiner for examination together with the relevant documents.

17. PW4 took over the matter from PW2 upon transfer of PW2 to Mombasa. He proceeded with the investigations and recorded the statement of the 1st respondent.

18. In her ruling, the learned magistrate evaluated part of the complainant's evidence that he admitted the first agreement for sale of 0.15 ha. PW2 denied the second agreement for sale of 0.32 ha. In regard to the offences of forgery and conspiracy to defraud, it was important to evaluate all the relevant evidence of the complainant. For example, PW3 denied entering into the agreement purportedly signed on 15/06/2006; he denied signing it; denied receiving the money and denied knowledge of the survey plan shown to him by the defence during cross- examination.

19. The agreement in question does not state that the purported consideration of Kshs.242,000/= was ever received by the complainant or even show who was the complainant's witness since the 1st respondent had the 2nd respondent as his witness. The evidence and especially the authenticity of the agreement and the witnessing by the 2nd respondent were important and key to the ingredients of the two offences but it was not evaluated by the trial magistrate.

20. The evidence of PW2 who investigated the matter was very crucial in that he collected evidence which led him to charge the respondents. The process and challenges faced by PW2 in his attempt to obtain the original agreement dated 15/06/2006 was also relevant in this case. The evidence of PW2 as a whole was not evaluated by the learned magistrate.

21. The magistrate relied heavily on the evidence of the handwriting expert which she evaluated and subsequently rejected. The appellant challenges the manner of evaluation of this evidence and the finding reached by the trial magistrate.

22. The court in rejecting evidence of the handwriting expert relied on the case of ***WAKEFORD VS LINCOLD (BISHOP) [1921] 90 LJPC 174*** and on that of ***SAMSON TELA AKUTE VS REPUBLIC [2006] eKLR.*** In applying the decisions, the appellant argued that the magistrate failed to first satisfy herself that the document in question was a forgery. She was also faulted for hastily relying on the expert evidence without reaching her own independent finding.

23. Section 48 of the Evidence Act provides:-

> *(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.*
>
> *(2) Such persons are called experts.*

24. As for this case, the trial magistrate said:-

> *The document examiner merely concluded that the writing on the disputed signature on the alleged sale agreement was similar to the writing in the signature of the 1st accused. He did not specify how he arrived at this conclusion so as to assist the court in making up its mind on what weight to attach to his evidence. The evidence of an expert is not binding on the court. The court is required to make its own conclusions.*

25. As the trial magistrate had stated in her ruling, the she ought to have evaluated the evidence on record to satisfy herself whether there was sufficient evidence to support the charges irrespective of whether she had rejected the expert evidence. He independent conclusions should have been made before arriving at the finding that a *prima facie* case had not been made. The magistrate therefore erred in failing to make her own independent conclusion as was held in the ***SAMSON AKUTE*** case (supra).

26. The document examiner's evidence was in two limbs:-

(a) That he found no agreement between the signature of the complainant (MFI 2) and the one in the contested agreement (marked A or MFI 1).

(b) That the question of signature on the agreement MFI 1 was similar and indistinguishable from the sample signatures of the 2nd appellant Nyaga Kianga marked C1, C2 and C3.

27. The case of ***HASSAN SALUM VS REPUBLIC [1964] EA pg. 128*** was cited in the ***SAMSON AKUTE case*** where the court held:-

> *In saying that he (the expert had no doubt that the forged signature had been written by the appellant, he was going far beyond the proper limits. I think the true answer was given by the expert in Bishop of Lincoln Case [1921] 90 LJPC 174 that it is not possible to say definitely that any body wrote a particular thing. I think an expert can properly say, in an appropriate case, that he does not believe a particular writing was by a particular person. On the positive side. However the most he could ever say is that two writings are so similar as to be indistinguishable and he could, of course, comment on unusual features which make similarity the more remarkable. But that falls for short of saying that they were written by the same hand....*

28. In the case before me, it was not necessary for the document examiner to specify how he arrived at his conclusion. His report as it was should have been taken as comprehensive as it was. The court had in its possession the questioned agreement and the signature sample of which PW2 had sent to the document examiners.

29. The report of the document examiner read together with the exhibit forwarded to him leads to the following conclusions:-

(a) That the complainant (PW3) did not sign the questioned agreement dated 15/06/2006.

(b) That the said agreement was signed by the 2nd accused as a witness.

30. The evidence of PW2 was very clear that the 1st respondent had admitted that the questioned agreement was in his own handwriting and that he had signed it as the purchaser. PW2 explained that for this reason, he did not find it useful to send the handwriting and signature of the 1st respondent for examination.

31. Section 48 provides that opinions of an expert are admissible if made by persons specially skilled in the field in question in order to identify the genuineness of handwriting or finger or other impressions. PW1 testified that he was a document examiner trained in Israel, France and Tanzania and that he had seventeen (17) years experience on the job.

32. For the trial magistrate to say that the witness *"did not explain how he arrived at this conclusion...."* was a misdirection considering the qualifications and experience of the witness. During the hearing, the court should have put questions to the witness if there was an issue unclear in the report. Based on the provisions of Section 48, it is my considered opinion, the expert evidence was wrongly rejected.

33. Had the magistrate evaluated the evidence of PW1, PW2, PW3 and PW4 thoroughly scrutinized the exhibits, she would have arrived at a different finding. It is my considered view that there was sufficient evidence for the 1st and 2nd respondents to be put on their defence on the offence of forgery and conspiracy to defraud.

34. I therefore find that the magistrate erred in failing to evaluate all the evidence on record and also in misinterpreting and disregarding PW4's evidence which resulted in the wrong finding.

35. The ruling of the trial magistrate delivered on 14/10/2011 is hereby set aside and substituted with one of case to answer.

36. The case will then proceed for defence hearing before the Chief Magistrate.

37. The appeal is allowed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF FEBRUARY, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Nandwa for Appellant

Ms. Muriuki for P.N. Mugo for the Respondents