



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 113 OF 2013**

**(Arising from conviction and Sentence of C.C. Kipkorir Resident Magistrate delivered on 15/12/2016 in Kitale Criminal Case No. 2735 of 2012)**

**MARTIN NYONGESA WANYONYI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

The appellant was charged with the following counts;

**Making a document without authority contrary to section 357(a) of the penal code.** The particulars of the offence were that on the 2<sup>nd</sup> day of September 2011 at unknown place within the Republic of Kenya, with intent to defraud without lawful authority made a resignation letter purporting it to be a resignation letter written by Hudson Masinde Malanga.

The accused was charged with the Second Count of **Making a document without authority Contrary to Section 357(a) of the penal code.** The particulars of the offence were that on the 2<sup>nd</sup> day of September , 2011 at unknown place within the Republic of Kenya, with intent to defraud without lawful authority made a resignation letter purporting it to be a resignation letter written by Rajab Kilwake Wanyonyi.

The accused was charged with the third count of **Making a Document without Authority Contrary to Section 357(a) of the penal code.** The particulars of the offence were that on the 2nd day of September 2011 at unknown place within the Republic of Kenya, with intent to defraud without lawful authority made a resignation letter purporting it to be a resignation letter written by Peter Wanjala Wanyama.

The accused was charged with the fourth offence of **Uttering a Document with intent to defraud Contrary to Section 357(b) of the penal code.** The particulars of the offence were that on the 28<sup>th</sup> day of September 2011 at Registrar of Companies offices Nairobi within Nairobi County, with intent to deceive knowingly uttered three resignation letters which had been made without lawful authority to the Registrar of Companies Colleta Maweu.

He denied the charges and the matter proceeded to full trial. The appellant was convicted and sentenced to 4 years imprisonment hence this appeal. The appellant has raised several grounds of appeal but it would be worthwhile to summarise the evidence as presented at the trial court.

**PW1 Charles Wafula Masinde** who is a shareholder of Tawai limited a company Incorporated in 1974 for purposes of purchasing land owns two parcels namely LR No. 5707 and 18551. In the said company are several shareholders who included one Hudson Malanga. It was discovered that in the year 2012 the share of the above Hudson Malanga were transferred to someone else. They followed up with the Registrar of Companies who by then had had Malanga's shares transferred pursuant to some minutes presented to her. They suspected that the same were transferred pursuant to a meeting that took place on 2/9/2011 where it is alleged that the said Malanga swore a declaration transferring his shares to one Tom Samuel Nasongo. Apparently the said Malanga had passed on on 1/9/2008.

He further testified that Peter Wanjala Wanyama and Rajab Wanyonyi Kilwake who had died on 6/7/2009 and 20/5/2013 respectively had transferred their shares too.

When the matter was reported to the police investigation were undertaken and the document examiner found that the signatures of the deceased were forged and that it was the appellant who had committed the offence.

**PW2 Jacob Mulali Wanyonyi** is the son to Rajab Wanyonyi Kilwake who confirmed that his father died on 20/5/2013 and he had shares at Tawai Ltd. He said that the appellant took the deceased title deed of the suit land at Tawai Ltd from the deceased on 20/10/2010 and he has failed to return the same. He only discovered later that his father's shares had been transferred to one Andrew Nyabongo Kilachi.

**PW3 Andrew Barasa Wanjala** is the son to the later Peter Wanjala Wanyama who died on 6/7//2009 and was also a shareholder at Tawai Ltd. He said that by the time the alleged sale and transfer of the deceased shares took place on 2/9/2011 his father had died. It was alleged that the shares was bought by one Philip Indika Keya

**PW4 Violet Nasimiyu Chesoni** is the daughter to the late Hudson Simiyu whom according to her was the vice chairman of Tawai Company Ltd. She denied that the deceased sold out his shares but instead blamed the appellant.

**PW5 George Malanga** is the brother to Hudson Malanga. He testified that PW4 called him and showed him some documents purporting that the deceased had sold his shares to one Tom Samuel Nasongo.

**PW6 Alfred Wanyonyi** also has shares at Tawai Ltd and he was a director. He was suspected of transferring the shares by forging the documents. He denied the same.

**PW7 Moses Mwanda** equally testified that he had share at Tawai Ltd. He was also suspected of transferring shares. He was part of the group that their signatures were collected for examination by the document examiner.

**PW8 Jacob Odiero** the document examiner testified that after analysing the sample of specimen signatures submitted to him by the investigating officer he formed an opinion that the same were done by the appellant. He said that the same "has similarities specifically in letter design and construction initial and formal strikes ink flow neutral pen lift and base line alignment."

**PW9 Peterson Wachira** from the Registrar of Companies produced documents on behalf of the Registrar of Companies. He produced the minutes of the meeting dated 2/8/2012 which revoked the alleged forgeries and restored the company to its initial status including the shareholding.

**PW10 P.C. Michael Olunga** carried out the investigation. He sent the alleged forged documents to the document examiner after summing and receiving specimens from the appellant. Patrick Makokha and Fred Muma.

After receiving the same and indicating that it was the appellant who was finally zeroed on he charged him with the offences. On cross-examination he however stated that he did not take statements from Keya as well as one Paul Musyoka and Colleta Maweu the Assistant Registrar of Companies. He

nevertheless relied on the evidence of the document examiner in charging the appellant.

When put on his defence the appellant gave sworn evidence denying the charge. He denied attending any meeting and that he saw the documents just in court. He stated that there were many wrangles bedeviling the company and as a matter of fact the complainants were his relatives.

This being a first appeal, this court is enjoined to re-evaluate the evidence afresh with a view to arriving at an independent finding with full knowledge that it did not have the benefit of taking the witness evidence during trial. The appellant has raised 16 grounds of appeal but has narrowed himself to 3 namely;

**a) That the learned trial magistrate erred in law and fact in shifting the burden of proof to the appellant.**

**2) that the learned trial magistrate erred in law and fact and failed to appreciate that the photocopies of alleged resignation letters were not credible pieces of evidence for which the court could rely on to convict the accused person.**

**3) That the learned trial magistrate erred in law and fact by attributing the appellant to the purported minutes of 2/9/2011 when no evidence was adduced to link the appellant to the said minutes.**

Both parties have submitted lengthy submissions together with the attendant authorities which I have had time to peruse. The respondent is of the view that the case against the appellant was watertight based on the findings of the document examiner, namely that the signature on the forged documents were at least written by him.

### **Analysis and Determination**

What is not disputed is that the Company Tawai Ltd does exist and that it was incorporated solely for land purchase. That as at the time of the suit its members had not been issued with titles but all that they had were share certificates. That the complainants to the suit had since died and those who testified included their children. Although they did not have the letters of administration it cannot be argued that they were not deceased children. The certificate of Death produced were sufficient enough to prove this.

It is also not in dispute that there was a ruling done by the Registrar of Companies pursuant to the complaint raised by the deceased's relatives which restored the shares to the original owners.

The first issue raised by the appellants is that the state (respondent) shifted the burden to the appellant. Having perused the proceedings I do not think so. The prosecution witness at least attempted to link the forgery to the appellant. The only issue is whether they succeeded. The appellants' defence simply denied the charges and indeed in law he fulfilled his obligation that he need not prove or explain anything else.

The matter really gravitated around the forged documents, which seemed to have resulted from the minutes of 2/9/2011. The said meeting was allegedly attended by the deceased complainants herein. The chairman was one Philip Indika Keya and the company secretary was one Alloy O. Kwengu. It was resolved that the deceased persons had sold their shares to the people earlier enumerated in the proceedings above. The same were signed by the chairman and the Secretary.

Subsequently and on the same day the deceased complainants swore a declaration on oath before one Paul Musyoka Kieni a commissioner for oaths transferring their shares.

Several issues were obviously later found to be wrong. In the first place Hudson Simiyu and Peter Wanjala Wanyama had already died. Secondly and more important the meeting took place at Kitale office whereas the witness Paul Kieni seemed to have signed the declaration in Nairobi on the same day.

Equally Philip Indika Keya and the said Paul Kieni did not record any statements. Neither did Tom Samuel Nasongo, Andrew Nyabego Kirage and John Albert Sambale the alleged beneficiaries of the sale and transfer. PW10 admitted that he did not take their evidences.

Neither did the Deputy Registrar of Companies Colleta Maweu. Essentially it was imperative that they ought to have recorded their statements as they were a party to the whole game.

Having stated so, was the reliance on the evidence of the document examiner sufficient. The appellant in their joint submissions think otherwise. The document examiner found that the handwriting of the appellant was similar to that of the appellant. *In Republic Vs Baskerville (1916) 2 KB 658 at 667* the court held that;

***“Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with crime, in other words, it must be evidence which implicates him, that is, which confirms in some material particular not only evidence that the crime has been committed but also that the person committed it, the nature of corroboration will necessarily vary according to the particular circumstances of the offence charged, it would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except which shows or tend to show that the story of the accomplice that the accused committed the crime is true, not merely, that the crime has been committed but factually it was committed by the accused.”***

The issue at hand was whether the evidence of the expert witness Under S. 48(1) of the Evidence Act corroborate the evidence of the other witnesses. There was no eye witness to the offence. Infact those who were allegedly in the meeting where the offence was grafted on 2/9/2011 were not called, and neither did their statements done. Infact there is nothing apart from his name to suggest that the appellant was indeed present at the meeting.

The parties herein agree that the document which was examined by the expert was not an original but a photocopy. No explanation was offered by the respondent why the original was not submitted to the forensic examiner. The examiner went into detail on how he arrived at his conclusion and the fact that essentially he did not explain his methodologies in the report.

No explanation was given why the photocopy was used by the examiner Ideally and as provided under section 67 of the Evidence Act Cap 80 Laws of Kenya all documentary evidence ought to be proved by primary evidence. Section 68 thereof provides instance when secondary evidence could be used. From the evidence as presented at the trial there is no reason why the document examiner did not use the original documents. Although the respondent as well as the trial court explained that there could be no much variation, in a situation such as this it is prudent to always submit primary evidence. Infact the Investigating officers offered no explanation why he only submitted a photocopy.

Neither will this court assume that there could be no difference between the original as well as a photocopy. I do believe that the legislature had every reason to indicate that when and where to use secondary evidence.

In the case of *Republic Vs Podmore (1930) 46T LR 365* relied by this court in *Samson Tela Akute Vs Republic (2006) eKLR*, the court stated as hereunder.

***“ ----- let me say a word about handwriting experts. Let everyone be treated with proper respect, but the evidence of handwriting experts is sometimes misunderstood. A handwriting expert is not a person who tells you, this is he handwriting of such and such a man. He is the person who habituated to the examination of handwriting, practised in the task of making minute examination of handwriting, directs the attention of others to things which he suggest are similarities. That and no more than that, is his legitimate province -----”.***

In the instant case PW8 stated as follows;

***“ The writing and signatures in A1 -A4 which I have printed out in red ink has similarities specifically in letter design and construction initial and formal strikes ink show neutral pen lift and base the alignment . Based at this similarities I did state A1 – A4 was made by the same person.”***

As found in ***Samson Tele Ateke (supra)*** the expert in my view failed to give particular details of the features of similarity or dissimilarity as regards the characteristics of construction initial and formal strike, pen lift or inkflow neutral.

Its trite law therefore that the evidence of an expert is a mere opinion and may not hold sway to the findings of the court. All that the expert stated herein is concluding that the same hand that wnote the forged documents is that found in the specimen signature.

Significantly though the prosecution did not present any share certificates to indicate that the deceased complaints were shareholders at the company. This in my view was more important as it would have buttressed the sale of the shares to the alleged purchasers.

I think I have stated enough to show that this appeal ought to succeed. I am not satisfied that it was the appellant who forged or uttered the documents. Key witnesses including the commissioner for oaths were not called to testify whether he indeed witnessed the appellant signing the documents. No explanation was given by the investigation officer I take note of the fact that the said witness was an advocate and there was no reason why he failed to be called or was called and failed to record his statement or attend court to testify.

Equally the company Secretary Alloy was not called. I belief him and the advocate were neutral parties who would were perhaps buttressed the evidence of the document examiner.

Consequently, it would be unfair to sustain the charge based on the shaky evidence on record. The appeal is allowed. The appellant set free unless lawfully held.

Delivered this 9<sup>th</sup> day of March 2017.

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**H.K. CHEMITEI**

**JUDGE**

**In the presence of;**

**M/S Kakoi for Respondent**

**Barongo for Nyamu for Appellant**

**Kirong – Court Assistant**