



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO. 207 OF 2015

RAMADHAN HASSAN ATHUMANAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the judgment and sentence of Hon. S. M. Shitubi, Chief Magistrate, Mombasa in Criminal case No. 907 of 2014, delivered on the 11th December, 2015).

JUDGMENT

The Appellant was charged with the offence of forgery contrary to section 345 as read with section 352 (a) of the Penal Code. The facts were that:

“On diverse dates between 24.1.2014 and 25.1.2014 at an unknown place in Mombasa county within the Republic of Kenya, the appellant jointly with others not before court with the intent to defraud forged Kenya Bureau of Standards Goods Release Stamp Impression No. 816 (a) Mombasa Port purporting to be a Genuine Kenya Bureau of Standards goods release Stamp impression”.

The Appellant pleaded NOT GUILTY to the offence and the case proceeded to full trial whereby he was found guilty and convicted. He was then sentenced to serve three (3) years imprisonment.

Being aggrieved with the said conviction and sentence, the appellant filed a petition of appeal on 15th December, 2015 in which he cited the following grounds, which I will extract verbatim:

1. THAT the learned trial magistrate erred in law and fact in proceeding with the hearing and reaching a conviction on a charge that was fatally defective;
2. THAT the learned trial magistrate erred in law and fact in finding that the offence charged had been proved;
3. THAT the learned trial magistrate erred in law and fact in shifting the burden of proof and expecting the appellant to offer explanation to fill the gap;
4. THAT the learned trial magistrate erred in law and fact in finding that there had been fraud;
5. THAT the learned Trial magistrate erred in law and fact in relying on matters not adduced in evidence;

6. THAT the learned Trial magistrate erred in law and fact in failing to give the appellant the benefit of doubt;

7. THAT the learned Trial magistrate erred in law and fact in dismissing the appellant's defence;

8. THAT the learned Trial magistrate erred in law and fact in reaching a conviction against the weight of evidence;

9. THAT the learned Trial magistrate erred in law and fact in failing to appreciate the possibility of another person using the appellant's port pass.

The appellants prayer is that the conviction and sentence be set aside and he be set at liberty.

It is now trite law that the duty of this court is to submit the evidence that was tendered before this trial court to a fresh and exhaustive examination so as to reach its own conclusion on the facts. And in so doing, care must be observed because it did not enjoy the benefit of the trial court which had the advantage of observing the demeanor of the witnesses (See OKENO VRS REPUBLIC (1972) E.A 32)

The prosecution called four (4) witnesses.

Pw1 GASPER OYUGI MATU testified that he works with Kenya Bureau of Standards at Kilindini as an Inspection officer. He said his duties entail inspecting and releasing goods. His evidence was that on 14.10.2014 he received a call with information that his work stamp had been forged and a document had been found bearing a stamp resembling his. He explained that in releasing goods, a KBS stamp with a green stamp which has the users initials is used. He said that when releasing goods, the releasing order (MPRO) is stamped to enable the customer to release his luggage for the container Freight station. This procedure only enables the release of goods in to his station and not another's. He identified his station as BOSS FREIGHT STATION (CFS). The luggage was released from MCT (CFS) in Mombasa whose in charge was Lilian Subusaga. He denied retaining the goods where papers purported he had done so. He identified the MPRO for MCT which had a forged stamp and a photocopy of MPRO for Keicot CFS with his genuine one. He produced the documents with his genuine stamp as exhibit P2.

On being cross examined by the appellant, Pw1 said that MPRO documents Mf1-P1 was genuine. He said that there was no complaint from MCT and KRA that the stamps were forged. He said that he did not know who stamped the stamp purported to be his. He also said that he never saw the person who stamped or signed the documents.

Pw2, EDITH NKIROTE told court that she was an imports inspector with Kenya Bureau of Standards. She said that there is a stamp that releases luggage for Mombasa inland and Mombasa Terminal (MICT) yet it was not hers. She said she was not supposed to release. She also said that she was in charge MICT in January, 2014 and no one else could release goods from MICT except him. She denied being involved and said her responsibility was to account for what was in the list and what was leaving. She saw among the release stamps one that was not hers and alerted the officer in charge, Mr. Otiko Otieno, who followed up the matter.

In cross examination, Pw2 said that she works at the Mombasa inland Terminal which is different from Mombasa container Terminal. She then said that on 24.1.2014 she worked at Mombasa container terminal and did not know who stamped and signed.

Pw3, LILIAN IMALA SABUSAGA testified that she is an Inspection officer with Kenya Bureau of Standards based at Mombasa Inland cargo Terminal. She told court that in January, 2014 her duties were to confirm whether what was declared in the documents is what is in the container, checked labelling and quality of goods and to confirm whether any cargo is not of Kenyan standards and use stamps to release them. Pw3 said that on 21.2.2015 her boss ordered her by email not to retain some consignment under some clearing agents. She said that there were some black listed agents. Pw3 went to the office the following day and was asked to go and record her statements with Port police station where she was told

that some consignment had left the station with forged stamp. She was shown the release order and not one container had been retained. She recorded her statement. She said she saw her released orders but could not recall the Freight Agencies. She then checked and confirmed that the stamp used was not hers. She identified her stamp as 816 W and said that the one which was used was 816 G. She also told court that the signature was not hers.

In cross examination Pw3 said that they were 27 importation officers working in different stations, each with a different stamp with different numbers. She said that she did not know the stamps for the other officers and did not recognize the stamp or signature on the release order. She also confirmed that the officers from KRA and Mombasa container Terminal had not complained that their stamp had been forged.

Pw4, No 70940 Corporal SHUEB BARE of CID Headquarters, Kilindini stated that on 10.4.2014 he was in his office when the DCIO, Mr Makori called and asked him to investigate a case of reported forgery at the Kenya Bureau of Standards in Kilindini office. He said that it was being alleged that on 24.1.2014, a clearing agent, by the name Hangool investments had cleared a consignment of 1x40 feet container No. POTVUY541276 containing interliner textile material from Mombasa container Terminal. That Kenya Bureau of standards (KEBS) were claiming that the consignment had not been released by their officer and that the stamp and signature on the document releasing the container were forged. Pw4 said he investigated the matter by recording statements from Kenya Bureau of standards officers, seized the alleged forged documents and took the officers' stamp impressions and signatures; which they sent to the document examiner for analysis as questioned documents, specimen signature and stamp impressions. Pw4 also said that he arrested the appellant and charged him with the offence herein. He told court that the appellant was a clearing agent /port clearing who claimed the consignment. He identified a gate pass in the name of the clearing company, name of port clerk, the date and time it extended which he produced as Exhibit P1. He further produced the Exhibit memo form as Exhibit P2 and said that the goods were released but the stamps were never recovered. He also said that they never got the original stamp the CFS uses.

When cross examined, by the appellant, Pw4 said KEBS has a number of officers who deal with the release of goods but was only referred to the one for the stamp impression. He also said that the appellant was questioned because his name was on the GATE PASS. He identified the said gate pass to court and said that it only had the name and port pass number. He went onto state that he never interviewed the other officers who stamped and signed (Exhibit P1). He said that KRA has no signature and never forwarded the stamps. Further Pw4 stated that he never interviewed the officer who stamped and signed Kenya Bureau of Standards (KEBS) dated on 24.1.2014. Pw4 stated that none of the witness said that it is the appellant who took the stamp there for signing in. He also never sent the appellant's known signature and writing to the Document Examiner. He agreed with the defence counsel that the appellant was charged with the offence herein because his name and port pass number appear there. He further said that the appellant was not the owner of the clearing firm where he worked and he did not interview the company's official to confirm whether he was the one assigned to clear the consignment.

The appellant was placed on his defence after the prosecution closed their case.

According to the appellant RAMADHAN HASSAN ATHUMANI, he worked with Hangool Investment Limited as a clerk among other clerks. He confirmed that they go to the field to clear containers. He however said that on 24th January 2014 he was not on duty.

Dw1 said that his name was used but he did not know how as there is nowhere that it is signed on the gate pass, which only had his name. He also identified his port pas number and said that there was nowhere that he signed.

In her judgment the trial magistrate had this to say:

“This case is a bit different as it is clear from accused's own testimony that he was an employee in fact as clerk for the firm that cleared this consignment. That alone could raise some suspicion.

However, his name appears on the gate pass as the clerk to whom the consignment was retained. Ordinarily consignment with such high value are not just released to anybody using fictitious name.

I take judicial notice of the fact that normal business such consignment are released based on identifiable recipients. Having said this there is a very strong likelihood that being the person charged with receiving the goods then only the accused knows the origin of the forged stamp and signature. This coupled with the fact that such is meant to assist his clearing agency make, conclude that he not only had the opportunity, he also had reason to forge either by his hand or as own accomplice the questionable retainer order

A scribbled signature can be of anybody and he knows that person if he is not the one. To me the evidence though circumstantial point at just the accused and no other person”.

At the hearing of the appeal, both counsel submitted orally, with Ms Ocholla learned counsel for the state conceding to the appeal filed by the appellant through Mr Magolo, his learned counsel.

In determining this appeal, I have analyzed and re-evaluated the evidence that was adduced before the trial court afresh in terms of the grounds of appeal cited by the appellant, the submissions by both parties and the law. The issues to be determined are as follows;

(a) whether the prosecution proved its case against the appellant beyond reasonable doubt as required by law.

(b) whether the charge against the appellant was defective.

(c) whether the trial magistrate failed to consider the appellant’s defence

With regard to the first ground of appeal I wish to state that it is a cardinal principle of law that in a criminal trial the legal onus of proving the guilt of the accused always lies upon the prosecution and the standard of proof is beyond reasonable doubt.

Under section 107 of the Evidence Act, it is provided that;

“1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that these facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

The appellant was arrested, charged, tried and convicted for the offence of forgery vide section 352 (c) of the penal code.

From the evidence of the prosecution before the trial court there was a document known as Mombasa Port Release order (MPRO) which had forged stamp and signature. That it had a stamp and signature purported to belong to Pw1 an Inspection Officer with Kenya Bureau of Standards, which they (Pw1 and his colleagues) disowned.

According to the evidence on record, the said document with the forged stamp and signature belonged to a firm called Hangoor Investment Ltd, where the appellant worked as a clerk among others but the appellant was held suspect because the gate pass which was allegedly used by the person who cleared the consignment had his name and number.

According to Pw1, Pw2 and Pw3 who were all employees of Kenya Bureau of Standards (KEBS) confirmed that the document being Mombasa Port Release Order (MPRO) Exhibit. P1 was genuine but denied that the stamp and signature on it belonged to either of them. Also, they each testified that they

did not know who handled the said document, stamped and signed it and who it was presented to.

The evidence of the prosecution's witness at the trial court confirmed that the matter having been reported to the police, Pw4 and his colleagues investigated the matter upon which they arrested the appellant.

Pw4 admitted when cross examined that he arrested and charged the appellant because the gate pass which was allegedly used to clear the consignment had his name, the name of the clearing company he worked for and number. He confirmed that the appellant had not signed anywhere.

Pw4 also confirmed that he did not interview the clearing company officials and other clerks to establish if the appellant is the one who had been assigned to clear the alleged consignment.

And while Pw4 confirmed that he forwarded the alleged forged stamp and known handwriting and signature of Dw1 to the Document Examiner for analysis (Exhibit P2), he never

(i) forwarded the stamps and signatures of the other officials with Kenya Bureau of Standards.

(ii) forwarded the known signature and handwriting of the appellant

It is therefore clear that the Pw4 did not comprehensively investigate the matter to confirm the person who signed and handled the stamp that was used to clear the consignment.

I have read through the judgment by the trial magistrate and found that although she appreciated the discrepancies in the prosecution evidence and the fact that the same was purely circumstantial as against the appellant, she did not evaluate it in line with the law, so as to arrive at an informed decision. She, in fact, as cited in ground 5 of the grounds of appeal, relied on matters that were not adduced in the evidence. She set out her own hypotheses on why she believed the appellant must have been the one who forged the stamp and was therefore guilty of the offence. For instance, the trial magistrate in saying;

“Ordinary consignment of such high value are not just released to anybody using fictitious name. I take judicial notice of the fact that normal business such consignment are released based on identifiable recipients”.

Clearly these are hypotheses based on the trial magistrate's own thoughts and suspicions.

I find the evidence that led to the conviction of the appellant purely circumstantial that it did not meet or satisfy the legal requirements of circumstantial evidence to warrant or justify a conviction.

In the case of ABANGA Alias ONYANGO VRS REPUBLIC, CRMINAL APPEAL NO. 32 OF 1990 (UR), the court of appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. It was held;

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances for which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused, and

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human possibility the crime was committed by the accused and no one else.

In his sworn defence, the appellant denied the offence and pointed out that even though his gate pass was

used, he did not know how this happened as he did not sign anywhere. He also said that noone pointed him out as being the one they gave the documents. I find that his evidence raised issues that needed to have been addressed by the prosecution's evidence and interrogated by the trial magistrate but this did not happen. It was not the duty of the appellant as the defence to fill in the gaps for the prosecution's case.

In the case of SAWE VRS REPUBLIC (2003) KLR 364, The court of appeal held;

“Suspicion however strong cannot provide the basis for inferring guilt which must be proved beyond reasonable doubt”.

I therefore find that the evidence that was adduced against the appellant before the trial court ought not have been used to find him guilty and convict him for the offence he was charged with (forgery).

The next issue to be determined is whether the charge against the appellant was defective.

According to the appellant's counsel, the charge against the appellant was duplex. He stated that the appellant was charged with the offence of forgery under section 345 of the penal code, which was read together with section 352 of the penal code.

The appellant was charged with the offence of forgery contrary to section 345 as read with section 352 (a) of the Penal code.

Section 345 of the Penal code provides for the definition of forgery, being;

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

Section 352 of the penal code provides for forgery of, and other offences in relation to stamps. The appellant was charged under section 352 (a) of the Penal code which provides that;

“Any person who;

(a) Forges any stamp, whether impressed or adhesive, used for the purpose of revenue or accounting by any government Department.

I wish to state that the appellant was not charged with a duplex charge.

The provisions of section 345 of the penal code defines what would amount to an action being said to be a forgery.

Section 352 of the penal code then creates the offence of forgery and others and prescribes the penalty.

It therefore cannot be said that the two sections created two different offences.

By section 352 (a) of the Penal code providing for forging of a stamp or any instrument used for purposes of revenue collection, I find that the Kenya Bureau of Standards release stamp alleged to have been forged in this case, despite being a stamp to confirm the imported goods meet the maximum standards, the ultimate purpose for this is for revenue collection for the government. Therefore, the offence slightly fell under the section that was cited.

The third issue for determination was whether the magistrate failed to consider the appellant's defence.

Upon being placed on defence, the appellant opted to give sworn evidence in defence and called no witness.

In dealing with the first ground of appeal, I noted the appellants defence raised issues that needed to have

been addressed by the prosecution's evidence and interrogated by the trial magistrate but this did not happen.

I had earlier noted that although the trial magistrate appreciated the discrepancies in the prosecution's evidence and the fact that the same was purely circumstantial as against the appellant, she did not evaluate it in line with the law in arriving at the decision she did.

In a nutshell, I find that indeed the appellant's defence was not considered by the trial magistrate.

In conclusion, I find that the appellant's appeal has merit and allowed it.

In then proceed to quash the conviction and set aside the sentence of three (3) years that was imposed against the appellant.

The appellant is accordingly set at liberty.

It is so ordered.

Judgment read, signed and dated this 10th day of March, 2017.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state- Present

Mr Magolo for the Appellant – Present

Appellant – Present

C/clerk- Kiarie