



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 230 OF 2011

JOHN KARIUKI NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case Number 3737 of 2008

in the Chief Magistrate's court at Kibera – MRS. Nyakundi (PM) on 08/09/2011)

JUDGMENT

The appellant John Kariuki Njoroge was charged in count I with the offence of making a document without authority contrary to Section 357 (a) of the Penal Code. It was alleged in the particulars of the charge that on or before the 1st day of December, 2008 at unknown place with intent to defraud and without lawful authority or excuse, he made a certain document namely Githunguri Dairy Farmers Co-operative Society Limited local purchase order No. 1026 purporting it to be a genuine local purchase order issued by the society through Mr. Githae.

In count II he was charged jointly with another with the offence of attempted stealing contrary to Section 275 of the Penal Code as read with Section 389 of the Penal Code. After a full trial he was convicted of both counts and sentenced to 18 months imprisonment on each count and sentences ordered to run concurrently.

The evidence adduced before the learned trial magistrate was that the appellant's co-accused one George Odour Odenyo presented an LPO to P.W. 1 to procure some goods. P.W. 1 noticed some discrepancies in the LPO in terms of size and content and decided to contact the company. The company denied knowledge of the L.P.O which led to P.W. 1 calling the police who arrested the appellant's co-accused.

P.W. 2 received a call from P.W. 1 about the LPOs and denied that the same originated from the company. Subsequently the police visited the company, saw and compared the original LPO against the suspect LPO and found discrepancies on the logo set up and signatories. The contents were also different and therefore concluded the same was a forgery. According to P.W. 2 he had worked the appellant for five years as a milk recorder and later as a stores clerk. He was in a position to sign the order forms and according to him, no complaint had been raised against the appellant.

That notwithstanding, the appellant was also charged after the document examiner prepared his report. The appellant denied the offence in his sworn evidence in court, gave an account of how he came to be arrested, his duties and procedure of ordering goods for the company and how he received a call from

P.W. 1 inquiring about the LPO which had been presented by someone to the company. It is his evidence that he is the one who in fact advised P.W. 1 to stop the release of any goods against the said LPO PW 2 was familiar with the appellant's signature which however did not appear on the suspect L.P.O. The document examiner in his report appeared to clear the appellant from any blame. That notwithstanding the learned trial magistrate convicted the appellant.

Aggrieved by the said conviction he lodged this appeal and submitted that no charges were proved against him, and that the learned trial magistrate erred and misdirected herself in law and facts in failing to find that, the appellant had been exonerated by the prosecution witnesses. She also failed to consider the appellant's defence. The appellant also submitted that the expert evidence was contradictory and ought not to have been relied on by the trial magistrate.

As the first appellate court it is my duty to evaluate the entire evidence and come to independent conclusions. The relationship between the appellant and his co- accused has not been established by any evidence whatsoever. I say so because, that would be the genesis of both counts I and II. There was no complaint raised against him by his employer and as at the time of the trial, he was still working in the same company. P.W. 2 was familiar with his signature and confirmed that that signature did not appear on the suspect document.

Exhibit 5 was produced by the forensic document examiner but it is vague in content. Further, it appears to exonerate the appellant at least on the contents of the questioned document as related to specimen handwriting of the suspect. This is with particular reference to exhibit market A1 as compared to standard writing on exhibits market B1 to B8 where the witness said he found no agreement between the writings.

Exhibit marked A1 was also compared with the standard writing on exhibit D1 - D2 and C1-C2 where similarities existed and appeared to be by the same author. Those specimens related to the appellants co-accused. It is clear therefore that the evidence of the document examiner exonerated the appellant.

From the record I note that the appellant applied for bail pending appeal, and in that application Achode J agreed with both the learned counsel for the appellant and the Republic that the appellant's appeal had overwhelming chances of success. In that application the learned counsel for the Republic, Mr. Mulati conceded the application because the conviction and sentence were not sound and that evidence on record was not cogent enough. The learned counsel for the Republic submitted then that P.W. 3 stated clearly that the exhibit D1 and D 2 did not agree with the appellant's signatures. That exonerated the appellant. There was also no witness who testified to incriminate the appellant.

Having said so at the hearing of that application, any opposition to the appeal at this stage would be misplaced in the circumstances of this case. When the appellant's co- accused went to present the LPOs he was alone. He did not know and could not identify the person who handed them over to him. He did not know the appellant neither did the appellant know him. No common intention could therefore be drawn between the two. There is no way the appellant could be charged jointly with his co accused with the offence of attempted stealing.

The evidence as a whole did not support the charges against the appellant. The conviction was therefore not justified. Accordingly this appeal is allowed, conviction quashed and sentence set aside. I note that the appellant was released on payment of Kshs. 50,000/= awaiting the outcome of this appeal. Having succeeded in his appeal, the terms of his release are hereby vacated and the cash bail shall now be refunded to him.

Orders accordingly.

SIGNED DATED and **DELIVERED** in court this **9th** day of July 2014.

A.MBOGHOLI MSAGHA

JUDGE