



REPUBLIC OF KENYA

High Court at Embu

Criminal Case 72 of 2010

FRANCIS NJOGU NYAGA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

*(Being an Appeal from the Conviction and Sentence by E.K. NYUTU Resident Magistrate Embu in Criminal Case No. 1190 of 2004 on 22<sup>nd</sup> December 2009)*

**J U D G M E N T**

The Appellant was charged with the following offences before the Chief Magistrate's Court Embu vide Criminal Case No. 1140/2004.

**FORGERY OF OFFICIAL DOCUMENT CONTRARY TO SECTION 351 OF THE PENAL CODE**

***FRANCIS NJOGU NYAGA: On diverse dates between 22 day of February 2003 and 9 day of April 2004 in Embu Municipality location, Embu District within Eastern Province, jointly with other not before this court forged an official document namely Duplicate Registration book S/No. C. No. 344856 for motor vehicle registration No. KAG 036W purporting to have been signed by the REGISTRAR OF MOTOR VEHICLE NAIROBI.***

Particulars as per the charge sheet were as follows:-

**COUNT II**

**MAKING A DOCUMENT WITHOUT AUTHORITY CONTRARY TO SECTION 357(a) OF THE PENAL CODE**

***FRANCIS NJOGU NYAGA: On diverse dates between 22 February 2003 and 9 April 2004 at unknown place in Embu District within Eastern Province, jointly with others not before Court, with intent to deceive or defraud, without lawful authority or excuse made a certain document namely registration book for a private vehicle duplicate s/no. C. No. 344856 purporting to be a certificate issued by KENYA REVENUE AUTHORITY.***

**COUNT III**

**UTTERING A DOCUMENT WITH INTENT TO DEFRAUD CONTRARY TO SECTION 357(B) OF THE PENAL CODE**

**FRANCIS NJOGU NYAGA:** *On the 9<sup>th</sup> day of May 2003 at Woods hotel in Embu town in Embu District within Eastern province, with intent to defraud or deceive knowingly uttered a certain document namely Registration book for a private vehicle S/No. 344856 to JAMES MWANGANGI KIVULYA which had been made without lawful authority.*

**COUNT IV**

**OBTAINING MONEY BY FALSE PRETENCE CONTRARY TO SECTION 313 OF THE PENAL CODE**

**FRANCIS NJOGU NYAGA:** *On the 9<sup>th</sup> day of May 2003 at Woods hotel in Embu town in Embu District within Eastern Province, with intent to defraud, obtained from JAMES MWANGANGI KVULYA the sum of Kshs.190,000/- by falsely pretending to sell a motor vehicle Registration No. KAG 036W, the vehicle he knew was unlawfully obtained.*

**COUNT V:**

**OBTAINING MONEY BY FALSE PRETENCE CONTRARY TO SECTION 313 OF THE PENAL CODE:**

**FRANCIS NJOGU NYAGA:** *On the 9<sup>th</sup> day of May 2003 at Woods Hotel in Embu town in Embu District within Eastern province, having been detained by No. 72540 police constable Kennedy Cheramboss a police officer as a result of the exercise of powers conferred by Section 26 of the Criminal Procedure Code, had in his possession of suspected stolen motor vehicle Reg. No. KAG 036W make Nissan Sunny 1200, suspected to have been stolen or unlawfully obtained.*

The matter proceeded to full hearing and he was convicted on all counts and sentenced with an order that the sentences run concurrently. He was therefore to serve a to a of 6 years imprisonment. And being dissatisfied with the Judgment he has appealed against conviction and sentence raising the following grounds:-

1. *The learned Magistrate erred in Law and facts in arriving at findings that were against the weight of the evidence.*
2. *The learned Magistrate erred in Law and facts in not finding that failure to produce motor vehicle Number KAG 036W as an exhibit in Criminal Case No. 1190 of 2004 was fatal to the prosecution's case.*
3. *The learned Magistrate erred in Law and facts in not finding that the prosecution failed to prove their case beyond reasonable doubt as by law required.*
4. *The learned Magistrate erred in Law in failing to state the points for determination and the reasons for her decision in Judgment, as by Law required.*
5. *The learned Magistrate erred in Law and facts in not specifying the offences and the sections of the Penal Code for which the Appellant was convicted as by Law required.*
6. *The learned Magistrate erred in Law and facts in convicting the Appellant on the basis of insufficient evidence.*
7. *The learned Magistrate erred in Law and facts in failing to comply with the Provisions of the Criminal Procedure Code relating to writing of Judgments as the Judgment in Criminal Case4 Number 1190 of 2004 is not signed and the same is therefore defective, improper and illegal and a conviction or sentence cannot therefore lie in respect of or on the basis of the said Judgment.*
8. *The learned Magistrate erred in Law and facts in not finding that there was duplicity of charges in respect of Counts 1 and 2 and that that was illegal, irregular and prejudicial to the appellant and further the same rendered the proceedings against the appellant defective.*
9. *The ingredients of the offences in counts 1 to 5 were not demonstrated or proved beyond reasonable doubt as by law required.*
10. *The learned Magistrate erred in Law and facts in not finding that the statements of the offences and the particulars of the offences in the charge sheet were at variance and therefore the*

- proceedings against the Appellant in Criminal Case No. 1190 of 2004 were defective.*
11. *The learned Magistrate erred in Law in not reading out all the charges to the accused person at the close of the prosecution's case and in not explaining to the accused person, the accused person's rights under Section 211 of the Criminal Procedure Code as by law required, an omission which was prejudicial to the Appellant and which rendered the proceedings in Criminal Case No. 1190 of 2004 defective.*
  12. *The sentences are excessive.*
  13. *The learned Magistrate erred in Law and facts in not finding that the Appellant raised a very good defence which ought to have been considered and on the basis of which the Magistrate ought to have found that serious doubts had been raised as to the guilt of the Appellant.*
  14. *The learned Magistrate erred in Law and facts in not finding that the long period during which PW1 Stayed with the used motor vehicle registration number KAG 036W, raised doubts as to whether the said motor vehicle was in the original form that it was at the time of the alleged sale or whether the particulars of the said motor vehicle like the chassis number and engine number had been or could have been tampered with which facts raised doubts and which therefore ought to have been treated in favour of the Appellant.*

When the appeal came for hearing Mr. Okwaro submitted reiterating the grounds of appeal. He cited a document EXB.7 which was not signed or authenticated. And that the Appellant was convicted on 4 counts yet he was sentenced on 5 counts. And that appellant's defence was credible. More so the sentences were excessive.

The State through Ms. Macharia State Counsel opposed the appeal. She submitted that under ground 1, 2, 3, 6 & 9 there was sufficient evidence from the 4 witnesses. The defence never opposed the production of the photos. And on grounds 4, 5 & 7 which deal with judgment. She submitted that the omissions are curable under Section 382 of the Criminal Penal Code. There was no duplicity she said, and all the offences were proved.

Ground 10 is also curable under Section 382 of the Criminal Procedure Code as it was not prejudicial to the Appellant. He produced nothing to confirm he bought the motor vehicle from somebody else. Section 107 Evidence Act was applicable here.

This being a first appeal this Court is enjoined to reconsider and re-evaluate the evidence and come to its own independent decision. I should not lose sight of the fact that I did not see nor hear the witnesses. I am guided on this by the following cases:-

1. *NGUI VS REPUBLIC [1984] KLR 729*
2. *SIMIYU & ANOTHER VS REPUBLIC [2005] 1 KLR 192*

The Prosecution had called four (4) witnesses to testify in this case. PW1 gave evidence to the effect that in May 2003 he was looking for a motor vehicle to buy. PW3 introduced him to the appellant who was selling a Datsun pick up Registration No. KAG 036W at Shs.190,000/=. He saw the motor vehicle, drove tested it and he liked it. It had an insurance sticker. He got the cash and PW3 drafted the agreement. It was executed and he paid the Shs.190,000/= in cash.

The appellant had no witness. His ID number in the agreement plus the one in the photocopy of the ID card tallied. (EXB.1&2). He also gave him the log book of the motor vehicle (EXB.3). The last owner was shown as **Francis Njogu Nyaga**. The inspection certificate was to be renewed. He paid for it at KRA on 19/2/2004. (EXB.14). Thereafter he took the motor vehicle for inspection. That is when he was told the engine number did not tally with what was in the log book. The KRA could not issue him with an inspection sticker. He then reported to the Criminal Investigation Department (CID). The computer print out showed that the motor vehicle belonged to somebody else (EXB.5). The discovery was on 19/2/2004.

PW2 an Assistant Commissioner at Roads & Transport Department KRA testified that on 28/4/2004 two CID officers came to his office. They produced a log book in respect of motor vehicle KAG 036W and wanted to know if it was a genuine one. He checked and confirmed to them that the information in

the computer did not tally with the one in the log book. He produced the copy of records as EXB.7 and print out EXB.15. He confirmed that the said log book (EXB3) was fake.

PW3 was the one who connected PW1 and the appellant over the sale of this vehicle. He witnessed the sale. After several months he learnt from PW1 that the chassis number did not match the one in the log book. He trusted the appellant since he was his friend. He confirmed that the log book (EXB3) is what the appellant gave to the complainant.

PW4 was the investigating officer. He produced photos of the vehicle as EXB6. The appellant in his defence denied the charges against him. He said he purchased the motor vehicle from a person in Nakuru at Shs.160,000/= and the vendor gave him all the documents. After one month he sold the vehicle to PW1 at Shs.190,000/= After using the motor vehicle for 9 months the numbers on the chassis and body were not matching. He said he was being framed up.

The learned trial Magistrate in her Judgment convicted the appellant on all counts and sentenced him to various sentences which were to run concurrently. I propose to combine grounds 1,2,3, 6 & 9 as one as they deal with the insufficiency of the evidence adduced in Court.

The evidence before Court i.e. (Prosecution and defence) confirmed that the Appellant herein sold the motor vehicle in question to PW1. An agreement was produced and PW1 and PW3 confirmed that. Even the appellant himself admitted that he sold the motor vehicle.

PW1 and PW3 also testified that upon the payment of the Shs.190,000/= the appellant gave to PW1 the log book (EXB3) and the vehicle whose photographs were produced herein (EXB6). It is this log book (EXB3) which was confirmed by PW2 (an officer from KRA) to be fake. Being fake means it was a forgery. The appellant never denied that being the log book he gave to PW1 since it is him who had possession of it, he must know its origin if he is not the maker.

The issue of the pick up not having been produced is not fatal to the case. The photos were produced with no objection from the defence side. Secondly it is the documents in Court which were the problems because they had been forged and pegged into a motor vehicle they did not belong to. Its existence was not denied by the appellant.

The evidence by the witnesses was straight forward and the said grounds have no merit. Grounds 4, 5, 7 deal with the Judgment of the learned trial Magistrate. In the introductory part of the judgment the learned trial Magistrate clearly sets out each count plus the relevant section and the particulars. At page 52 lines 16 – 19 she clearly sets out the issues for determination.

I have compared the hand written Judgment and the typed copy and I confirm that the same is dated 22/12/2009 and signed. She also indicated that she convicted the accused on all counts and went ahead to enumerate the 5 counts. The typist left out the 5<sup>th</sup> count. And this is not an omission by the learned trial Magistrate but by the typist.

The omission is therefore an error and is curable under Section 382 of the Criminal Procedure Code. I therefore find no flaw in the Judgment

On ground 8 - he was charged with forgery and making a false document contrary to Section 351 and Section 357(9) of the Penal Code respectively. I have a problem with count 2 where the particulars state;

***“With intent to deceive or defraud, without lawful authority or excuse”***

This count is duplex and no one can state for sure which of the two offences he committed. The particulars therein had also been covered by the facts in count 1. I therefore find that count 2 was actually defective.

It is evident that the appellant was not found in possession of this motor vehicle when he was arrested

on 9/4/2004. the particulars are therefore at variance with the charges. A conviction ought not to have been founded on that count.

### **Ground 11**

At page 48 (red) lines 11-13 the Court complied with Section 211 of the Criminal Procedure Code and Mr. Okwaro who was representing the accused then told the Court the accused would give an unsworn statement. The Court went further to have the charge read and explained to the then accused.

### **Grounds 13 – 14**

He who alleges a fact must prove it. The appellant stated in his defence that he had bought the said motor vehicle from someone in Nakuru who gave him all the documents. He then stayed with the vehicle for one month and sold it to PW1. It is only him who had those facts. Section 107 (1) and (2) of the Evidence Act places the burden on him. He produced no evidence in Court to support those facts. If he sold the vehicle within a month it means he still had the documents. He should have produced them.

The issue of PW1 having stayed with the vehicle for 9 months before raising the red flag does not mean he knew of the forgery. PW1 had no reason to suspect the appellant. He trusted him having been introduced to him by his good friend. And he had no reason to visit KRA before the date he went. He was simply going there to renew his inspection certificate which could not be given before the actual inspection was done. And it is the KRA officers who discovered the problem and rightly so. I therefore find no merit in grounds 13 and 14.

From the analysis above, I will allow the appeal on ground 10 in relation to Count 2 and Count 5. The convictions on those two counts are quashed and the sentences set aside. I do disallow the appeals on the other grounds save for ground 12. In essence the convictions on Count 1, Count 3 and Count 4 are confirmed.

Finally in ground 12 the appellant say the sentences are excessive.

- On Count 1 he got 6 years
- On Count 3 – 2 years
- On Count 4 – 2 years

The sentence for forgery is 7 years. The record shows that the appellant was a 1<sup>st</sup> offender and asked for leniency. As a result of his acts, PW1 lost his hard earned money amounting to Shs.190,000/=. The appellant should be completing his prison term next year. He has been in prison for almost 3 years and I believe he has learnt his lesson.

I therefore reduce his sentence on Count 1 to the period already served.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 1<sup>ST</sup> DAY OF NOVEMBER 2012.**

**H.I. ONG'UDI  
J U D G E**

**In the presence of:-  
Ms. Macharia for State  
Mr. Okwaro for Appellant**

**Appellant  
Njue CC**