



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL APPEAL NO. 1358 OF 1998**

**(From Original Conviction and Sentence in Criminal Case NO. 3066 of 1997  
of the Senior Resident Magistrate's Court at Nairobi S. Ndambuki Esq.)**

**ELIJAH JOMO OCHARO.....APPELLANT**

**versus**

**REPUBLIC.....RESPONDENT**

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

When the application for bail pending appeal came up for hearing it transpired that the appeal had been filed and on calling for the appeal file it was noted that the same had been admitted to hearing. Both learned counsel agreed to have the appeal heard and therefore that judgment relates to the said appeal.

The appellant was originally charged with nine counts. Count one relates to making a document without authority contrary to section 357 of the Penal Code. In the remaining counts two to nine has was charged with the offence of stealing contrary to section 275 of the Penal Code.

I note from the particulars of the charges that the appellant in count one(1) was alleged to have committed the offence jointly with others not before the court and in the rest of the charges; jointly with another not before the court.

After a full trial, the appellant was convicted of the offence of making a false document without authority in count one. He was then sentenced to a (9) nine months imprisonment. He was acquitted of all the other charges of stealing.

In the said count one upon which the appellant was convicted, only one receipt was found to be connected with the appellant. The learned trial magistrate said in that respect:-

***“ Though there was a bunch of other receipts which were found not to be genuine PW3 who said that one of them had been issued to him did not say whether it was the accused who issued or gave it to him. The court only finds that it was the receipt which was issued on 13/11/97 ( MFI-1) which the accused involved in issuing. He went and obtained a receipt which he gave PW2 purporting it to be a genuine receipt issued by the city council.....”***

There is evidence to show that documents were forwarded to the document examiner. The document examiner was never called as a witness and there is no reference at all of his report in the judgment of the learned trial magistrate. It was not enough to produce the documents gathered during investigation.

The receipt produced may have been proved not to be genuine but the key words in a charge of this nature are “making a document”. The prosecution had the duty to prove beyond any reasonable doubt that it was the appellant who did so. The best evidence in such a case is that of the document examiner. In the absence of that evidence the charge must fail.

It will be noted that the appellant gave a sworn statement of defence thereby opening himself up for any attack on what he said. But look at questions put to him by the prosecution. Nothing suggested that he was guilty of making the said receipt.

In my judgment, the charge was not proved to warrant a conviction. Accordingly, the appeal is allowed, conviction quashed and sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

**Order accordingly.**

**Dated at Nairobi this 21st day of December, 1998.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

**Mr Mogikoyo for the appellant**

**Miss Kagwe for the state.**