REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

crim apps 235,236,238 of 90

GARI & 2 OTHERS……..……..PLAINTIFF

V

REPUBLIC…….……DEFENDANT

ed)

(From Original Conviction and Sentence of the Principal Magistrate's Court at Kisumu (C.O. Ong'undi, Esq, P.M.) in Criminal Case No 189 of 1989) Evidence – secondary evidence – notice to produce a document – Evidence Act (cap 80) section 69 – to whom such notice is given – when such notice can be dispensed with – party who does not have power over the document or who is outside of the process of court exempted from notice.

Evidence – expert evidence – evidence of document examiner and handwriting expert – how such evidence should be treated by the court Crimes – fraudulent false accounting— Penal Code (cap 63) section 330(a) – entries in a book of accounting not in themselves sufficient evidence – Evidence Act (cap 80) section 37

The appellants had been separately charged with two offences: fraudulent false accounting and stealing by a person employed in the public service contrary to sections 330(a) and 280 of the Penal Code (cap 63). The appellants were employees of the Immigration Department.

The charges related to certain monies which it was alleged had been collected for the registration of aliens. Receipts from the Immigration Department which were tendered in evidence showed that the amount of money reflected on the quadruplicate was lower than the one shown as having been collected on the original. The receipts, however, did not show the specific purposes for which the money was paid and no evidence was led on what the prescribed fee was for the various services.

In their appeals, the appellants argued that the trial court had contravened section 69 of the Evidence Act (cap 80) in admitting copies of the original receipts and that it was wrong for the Document Examiner to use copies for his analysis. They argued that the trial magistrate had wrongly found that the circumstantial evidence was satisfactory.

Held: 1. A notice to produce secondary evidence under section 69 of the Evidence Act (cap 80) is given to an adverse party who has the document in question or under whose power the document is. In this case, the original documents were not in possession or under the power of the accused.

2. In any case, the section allows copies to be produced without giving notice where the document is

possessed by a person who is out of reach or not subject to the process of the court and in any other case in which the court may think fit to dispense with the requirement. The people who were paying the money in this case were aliens and it may have been difficult to get some of them.

3. The most that an expert on handwritng can properly say is that he does not believe a particular writing was by a particular person or that the two writings are so similar as to be indistinguishable. A magistrate is entitled to accept or reject the opinion of a handwriting expert.

4. There was nothing to show that on the particular dates each appellant was alleged to have committed the offences, he was then one collecting money from members of the public. There was also no evidence to show that the appellants had received any money.

5. Entries in a book of account regularly kept in the course of business are admissible for matters which the court has to inquire but such statements alone are not sufficient evidence to charge a person with liability.

6. The evidence was inadequate and it was unsafe to convict on it.

Appeals allowed, convictions and sentences quashed.

Cases

1. Muzeyi v Uganda [1971] EA 225

2. Salum v Republic [1964] EA 126

3. Onyango v Republic [1969] EA 362

Statutues

1. Penal Code (cap 63) sections 280; 330(a)

2. Evidence Act (cap 80) sections 37, 69(vi), (vii)

Advocates

Mr O Aluoch for the 1st and 2nd Appellants

Mr Wasilwa for the 3rd Appellant

Mrs Muinde, State Counsel, for the Respondent

November 30, 1990, Khamoni J delivered the following Judgment.

There are three appeals, number 235 of 1990 filed by Samson Gari who was accused one in the lower court; appeal number 236 of 1990 filed by Isaiah Kipkemoi Cheruiyot who was the fourth accused in the lower court; and appeal number 238 of 1990 filed by Zadock Erude Keya who was the second accused in the lower court. For the purpose of hearing these three appeals, they were consolidated. In this judgment therefore I may also be referring to the appellant in criminal appeal number 235 of 1990 as the first appellant; the appellant in criminal appeal number 236 of 1990 as the second appellant and the appellant in criminal appeal number 238 of 1990 as the third appellant.

Mr Olago Aluoch appeared for the first and second appellants while Mr Wasilwa appeared for the third appellant. Mrs Muinde, a state counsel, appeared for the state – respondent.

The appellants have appealed against their conviction and sentence by the learned principal magistrate in

criminal case number 189 of 1989 in the principal magistrate's court at Kisumu – where they faced various counts. The first appellant faced one count alleging fraudulent false accounting contrary to section 330(a) of the Penal Code; and faced a second count which alleged stealing by a person employed in the public service contrary to section 280 of the Penal Code.

The second appellant faced four counts each alleging fraudulent false accounting contrary to section 330(a) of the Penal Code and also faced a similar number of counts each alleging stealing by a person employed in the public service contrary to section 280 of the Penal Code.

The third appellant faced one count alleging fraudulent false accounting contrary to section 330(a) of the Penal Code, and also faced another count alleging stealing by a person employed in the public service contrary to section 280 of the Penal Code.

The first appellant was a senior clerical officer who used also to assist the third appellant who was an executive assistant and in charge of the running of the office and safe keeping of money. The second appellant was a clerical officer who was working as a cashier. All were employees of the Immigration Department.

During the hearing of the case before the learned principal magistrate a receipt number 122791 was tendered in the evidence showing that on 12th August 1988 a sum of shs 200/= was collected on the original while a different sum of shs 100/= was collected according to the quadruplicate.

It was alleged that the receipt was written by the second appellant who therefore stole shs 100/-. From the evidence the money was paid on account of alien registration. But that evidence does not specify whether the money was paid for a new alien certificate or for a renewal. The assistant principal immigration officer in charge of Western, Mr Shadrack Maseno, who gave evidence as PW1, had told the Court the fees for a new alien certificate was shs 200/= and that the fees for a renewal of such a certificate was shs 100/= per year. Unfortunately that is all he said about the fees payable at his office and throughout the proceedings therefore the court was given various figures of the fees or money paid without indication as to the prescribed fees that was required to be collected. It was not also being specified as to the specific nature of the transaction the money was paid. As I have stated above, it was not shown that when receipt No 122791 was issued on 12th August, 1988, the money was for a new alien certificate so that a sum of shs 200/= should have been expected or the money was for a renewal so that a sum of shs 100/= should have been expected. Was the prescribed fees fixed? There was no evidence to that effect. I will however proceed to refer to the receipts that were relied upon in the prosecution's case.

Receipt No 122772 was tendered in the evidence showing that on 9th August, 1988 a sum of shs 3,000/= was collected according to the original while a different sum of shs 100/= only was collected according to the quadruplicate. It was alleged the receipt was written by the second appellant who therefore stole shs 2,900/=. The money was said to have been paid on account of registration of aliens or renewal. That is according to the evidence of PW1 and as can be seen again that evidence does not make it clear or specific whether the money was for a new alien certificate or for a renewal or for a special pass. PW1 did not say how much fees was payable for a special pass.

A receipt No 124246 was tendered in the evidence showing that on 31st May, 1989 a sum of shs 2,800/= was collected on the original while a different sum of shs 100/= only was collected according to the quadruplicate. Here triplicate and duplicate were also tendered in the evidence each showing that a sum of shs 100/= was collected. It was alleged the receipt was written by the second appellant who therefore stole shs 2,700/=. The evidence is that the money was paid for registration of aliens or renewal for re-entry passes and registration or renewal of aliens. Once again that evidence is not clear as to the specific purpose for which that money was paid. It is not also stated as to the specific fees which should have been paid as PW1 said that the money was paid by 5 people. Mr Samson Wato; PW3, told the Court, concerning the same receipt, that the money was paid by 8 people. It was however not explained how 5 or 8 different applicants could be issued with one receipt after each has paid fees for his application. A receipt No 123270 was tendered in the evidence showing that on 14th February, 1989 a sum of shs 4,800/= was collected according to the original while a different sum of shs 100/= only was collected

according to the quadruplicate. It was alleged that the receipt was written by the second appellant who therefore stole shs 4,700/=. It was said that the money was paid by 21 people. It was not clarified whether the fees was for a new alien certificate or for a renewal. It was not also explained how one receipt could be issued to 21 different applicants.

A receipt No 123791 was tendered in the evidence showing that on 11th November, 1988 a sum of shs 200/= was collected according to the duplicate while a different sum of shs 100/= only was collected according to the quadruplicate. It was alleged the receipt was written by the third appellant, Zadock Erude Keya, who therefore stole shs 100/=. PW1 said that the fees was for registration of aliens. But he did not specify whether the fees was for a new alien certificate or for a renewal.

A receipt No 123791 was tendered in the evidence showing that on 17th November, 1988 a sum of shs 200/= was collected according to the original while a different sum of shs 100/= only was collected according to the quadruplicate and triplicate. It was alleged the receipt was written by the first appellant Samson Gari. Mr Maseno said that the fees was for renewal of alien's certificate. But does not explain why the fees of shs 200/= should have been collected instead of shs 100/= he had said was the prescribed fees for a renewal.

In relation to the receipts inquestion Mr Alfred Lidolo, PW2, claimed in his evidence that he was familiar with handwriting of the second appellant.

Mr Samson Watoi, PW3, and Mr Lukas Otieno Orando, PW4, also said the same thing. In fact Mr Lukas Otieno Orado added that he was also familiar with the handwriting of the first and third appellants.

In relation to receipt No 123270, Mr Lukas Otieno Orando told the Court that he had indicated the receipt for shs 200/=. What he means here is not clear in view of the evidence of Mr Maseno that that receipt was issued for 4,800/= and the quadruplicate showed shs 100/=. Mr Lukas Otieno Orando appears to use the word "receipt" to include some documents which are not issued from normal receipt books and therefore that makes his evidence in that respect ambiguous.

There was evidence of the investigating officer, Inspector Kennedy Wabwoga who gave evidence as PW6. The document examiner gave evidence as to his findings after he had examined and compared the handwritings that were sent to him.

The appellants did not accept that they committed the offences alleged against them.

In the appeals before me therefore, it has been argued for the appellants that they did not have exclusive custody of accountable documents, that the original receipts issued ought to have been produced in the Court and that copies should not have been produced without complying with section 69 of the Evidence Act as to the notice to produce a document and that the people who were paying the fees should have given evidence.

It was further argued that it was wrong to have taken to the document examiner copies instead of originals of the receipts and that the copies which were sent to the document examiner were faint and could not produce good results.

It was also argued that it was wrong for the learned magistrate to hold that the circumstantial evidence before him was satisfactory, and that the charge was bad because it did not include the relevant subsidiary legislation which prescribed the fees payable.

It was added that the learned magistrate erred in not making a finding on the value of the evidence of the document examiner whose opinion was based on an examination of copies and documents without originals and specimen handwriting and that the handwritings of the other employees should also have been examined and excluded by the document examiner.

In view of the above, the learned counsels for the appellants submitted that the convictions were unsafe

and should be quashed. They also submitted that the sentences were harsh and excessive.

The learned state counsel in reply stated that at the time each appellant committed the offences against him, he was in exclusive possession of accountable documents; and that it is not true that all documents were copies as it was only in the case of the appellant Zadock Erude Keya that all documents were copies as the original was not found and that when the copies were used, the learned counsels for the appellants were present but did not raise objection; that the evidence of the document examiner supported the evidence of PW1 who said was familiar with the handwriting of each appellant. Here perhaps the learned state counsel meant the evidence of PW4. However the state counsel continued to argue that the handwritings which the document examiner found to be faint he did not compare them. He compared only those he could read.

As to what fees was to be paid, the learned state counsel submitted that PW1 had said that the fees was shs 200/= on an application and shs 100/ = for the renewal. There was therefore no need to produce subsidiary legislation.

On the sentence, the learned state counsel submitted that since the maximum was 7 years imprisonment, the sentence of 2 1/2 years imprisonment was neither harsh nor excessive. The amount of money stolen does not matter. What matters is that the offence was committed and the mitigation should be looked at in the light of the offence committed.

Starting with the arguments on the production of documents it is difficult to understand. Mrs Muinde was not present during the trial. Mr Olago- Aluoch and Mr Wasilwa were present. They both say that copies were relied upon in disregard of the provisions of section 69 of the Evidence Act. As Mrs Muinde pointed out, the learned advocates were present in the Court but there is nothing on the record to show that they raised any objection. It should be noted that section 69 requires notice to be given to an adverse party who has the document in question or under whose power the document is. In this case the original documents were not in possession or under the power of the accused. I do not see how a notice to produce copies should have been given to accused persons or their advocates.

In any case section 69 through paragraphs (vi) and (vii) allows copies to be produced without given notice. That is when the document is possessed by a person who is out of reach of or not subject to, the process of the Court. Notice is also not required in any other case in which the court thinks fit to dispense with the requirement.

The people who were paying money were aliens and it may have been difficult to get some of them especially if they left Kenya.

On the other hand it appears to me that that point was important only in respect of the third appellant where the original receipt No 123761 was not traced. In respect of the other appellants, the relevant original receipts were produced in the Court as exhibits in addition to their copies which were before the Court. I do not therefore see the point. The argument against reliance on the copies has been extended to what the document examiner did. It has been said that he used copies. It has also been said that he had no specimen signatures of the appellants.

Looking at the lower court's record, there is no place the learned counsels for the appellant, challenged the evidence of the document examiner on those points. In fact the record suggests that the document examiner had the original receipts with the exception of that affecting the third appellant.

The record also suggests that there were specimen writings with the document examiner. The investigating officer talked of these. The document examiner himself never used the words "specimen writings" but perhaps his use of the words "Standard Writings" covered specimen writings. He was never challenged on that and the documents, including what were referred to in the exhibit list as specimen handwritings were produced as exhibits. When the learned trial magistrate wrote the judgment he does not appear to have been faced with the problem of the absence of original documents or specimen handwritings.

If no specimen writings were examined then as stated in the case of Muzeyi v Uganda (1971) EA 225, the conviction could not stand.

Proceeding on the premises that the documents were available to the document examiner, both originals, copies and specimen handwritings, what do we make out of that report? He spoke of having found individual characteristics such as figures “2”, “8” capitals “G”, “M”, “N”, figure “3”, small letter “d”, “s” and the word “2”. It appears he was speaking in general terms perhaps not realising that he was concerned with handwriting of three different people. From his evidence I do not see how I can associate those characters with any of the appellants to the exclusion of the rest.

Also bearing in mind that the document examiner had many documents, it is doubtful whether the few characters he referred to were sufficient.

One other problem I encounter in this appeal is that the document examiner appears to have talked of more documents than the documents the investigating officer, PW6, said he gave the document examiner. The figures he gave do not appear to agree with the figures given by the investigating officer. The document examiner is by mistake referred to in the lower courts’ record as PW6. He should have been PW7. I cannot establish how the learned trial magistrate managed to see the consistency with regard to the mentioned sets of documents. He had the advantage of seeing the documents and witnesses at the time he was hearing the witnesses. But he should have used that advantage to put the record clear in order to serve the ends of justice in the event of an appeal. In the case of Hassan Salum v Republic [1964] EA 126 the appellant was charged with forgery, uttering a forged document and stealing. The only evidence against him was of opportunity to commit the offences and of a handwriting expert who stated that he had compared the signature on the postal receipt with a letter written by the appellant and specimen of the handwriting of the appellant and two other messengers in the same employment as the appellant and he had come to the conclusion that the signature on the receipt and the letter were written by the same person, who was the appellant. On appeal from his conviction of the offences charged; it was held that the most an expert on handwriting can properly say, in an appropriate case, is that he does not believe a particular writing was by a particular person or, positively, that two writings are so similar as to be indistinguishable. It was emphasised that the handwriting expert should have pointed out the particular features of similarity or dissimilarity between the forged signature on the receipt and the specimens of handwriting. It was added that evidence showed that the appellant had the opportunity to commit the offences and that the forged signature might have been written by him, but this fell far short of proving beyond reasonable doubt that the appellant was in fact the forger. It was stated that handwriting is not like finger print where no two people can have same finger print.

This is because a person’s handwriting can change sometimes, for instance, when the person is tired. A person can also write two different types of writings depending on what he is writing. It is possible for one person to copy another person’s handwriting. How well he copies that handwriting will depend on the practice he has put in. The more one practices the better the copying will be.

I think it was with all that in mind that it was held in the case of Onyango v Republic [1969] EA 362 that a magistrate is entitled to accept or reject the opinion of a handwriting expert.

The learned trial magistrate in the instance case relied mainly on the evidence of the document examiner and he seems to have felt assured in that from the evidence of PW2, PW3 and particularly PW4 who claimed they were familiar with the handwriting and initials of the second appellant.

He claimed to be familiar with the handwriting and initials of all the appellants. What does not appear to have been borne in mind is that PW2, PW3 and PW4 were not handwriting experts. The most each could say was that the handwriting he was looking at resembled the handwriting of a certain appellant. None of those witnesses could swear that the questioned writings attributed to a particular appellant were written by that appellant.

PW2, PW3 and PW4 could not say if there was some interference. They could not know. Moreover was it not possible for one person to write a receipt and another person to receive the money being receipted?

Looking at the evidence further there was none to show that on the particular dates each appellant is alleged to have committed the offence, he was the one collecting money from members of the public. This is despite the evidence that the second appellant was a cashier and that sometimes the first or third appellant could be asked to stand in for the second appellant. There was no evidence that only the first and third appellants would stand in and that no other officer in that office would do the work.

The second appellant must have been entitled to annual leave and could also be away for one reason or another. There had to be evidence proving that on 12th August, 1989, 9th August, 1988, 31st May 1989 and 14th February, 1989 it was the second appellant who had the exclusive possession of the receipts in question and he was the one collecting revenue. Similarly it had to be proved that on 11th November, 1988 it was the third accused who had the exclusive possession of the receipt in question and collected the revenue. It had also to be proved that on 17th November, 1988 it was the first appellant who was in exclusive possession of the receipt in question and collected the revenue there was no such evidence.

To prove positively that the money appearing on original receipts was paid, the people who paid the money should have given evidence. If the original receipts issued to them were recovered and produced as exhibits, these people were available and could have given evidence. Otherwise how can the Court assume payment from a mere entry in a receipt which is capable of being made by anybody in any name and with any amount of money even if the person named therein as the prayer never paid any money.

There was no evidence of accounting for the money by the appellants to show that they had received any money. For instance a cash book by which the appellants were accounting for the money to the District Treasurer, should have been in the evidence. The officers who were receiving such money at the District Treasurer could haven given evidence to show that the appellants actually handled money and surrendered it or paid it to the District Treasurer as reflected on the triplicate receipts.

Instead what we have are mere entries in the receipts in question, mere figures appearing in those documents without evidence that the actual cash or any part thereof was received by the appellants. Apparently, the provisions of section 37 of the Evidence Act were not borne in mind. It states:

“Entries in books of account regularly kept in the course of business are admissible wherever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.”

On the question of the prescribed fees payable, while I may not go to the extent of stating that the relevant subsidiary legislation should have been made part of the charge as demanded by learned counsels for the appellants.

I am of the opinion that there should have been clear evidence as to what specific application each appellant handled or processed at any one time and what was the prescribed fees for that particular application in relation to what the appellant collected from the applicant and what the appellant subsequently accounted for. What Mr Maseno, PW1, told the Court with regard to the fees payable in respect of a new alien certificate shs 200/= and a renewal shs 100/= was not only insufficient but it also became doubtful in the light of subsequent prosecution evidence.

This was a case which was easy for the prosecution to prove had there been good investigation coupled with a keen handling. Since that was not done, the circumstantial evidence which was adduced before the Court and upon which the prosecution’s case depended, did not in my opinion, irresistibly point at the guilty of the appellants or any of them. That evidence, in my view, is inadequate not only on the counts of fraudulent false accounting but also on the counts of stealing by a person employed in the public service. That evidence therefore sustains no conviction. At best it was unsafe to convict on such evidence.

In the circumstances these appeals are all allowed. The conviction of each appellant on each count against him quashed and the sentences thereof set aside.

Each appellant be set at liberty forthwith unless otherwise lawfully detained.