



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Nyarangi, Gicheru & Kwach JJ A)

CRIMINAL APPEAL NO 62 OF 1989

BETWEEN

MWANIKI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from the judgment of the High Court at Kisumu, Omolo J, dated 4th May 1989 in High Court Criminal Appeal No 8 of 1989)

August 14, 1989, the following Judgment of the Court was delivered.

This appeal is from a judgement of the High Court, Kisumu, (Omolo J) dismissing an appeal from the decision of the Principal Magistrate whereby he convicted the appellant and another of the charges preferred against them. The issue of law of this second appeal is whether there was evidence to prove the several charges.

Mr Muhia for the appellant takes the point that the learned Judge erred in law in relying on a statement made to a Police Officer as to the destination of the wheat when such a statement, even if it was made, had not been made in compliance with the law.

The facts found by the trial Court were, *inter alia*, that when the appellant was arrested, he gave various inconsistent statements to a Police Officer as to where he had delivered the material wheat. In the same vein, the Judge held that the appellant must have made a statement to Police Officers as a result of which the house of 'Mama Scrap' was searched. Upon those concurrent findings of the lower courts, Mr Muhia's argument is that Sergeant Baraza (PW8), to whom the appellant made statements during which time the appellant is said to have kept changing his versions as to what happened to the three consignments of wheat, was not,

“a Police Officer of or above the rank of / or a rank equivalent to, Sub-Inspector”.

Further, Mr Muhia submits that the statement made by the appellant to the Police Sergeant amounted to a confession. The appellant was in the custody of the Police Sergeant when he made the statement. Mr Muhia thereafter referred us to Section 25 and Section 28(b) of the Evidence Act and urges us to uphold his contention that the appellant's confession could not, in law, be proved against him.

On this point, learned Principal State Counsel Mr Bwonwonga expressed the view that as the appellant was in police custody at the material time, his statement should have been recorded under caution. Mr Bwonwonga argued that the statements were not confessions. All the same, Mr Bwonwonga thought it was a misdirection for the lower courts to have admitted the statements.

One cannot get away from the fact, we think, that the statements made by the appellant, taken together with other evidence, reasonably lead to an inference that the appellant had committed the offence. Clearly, the statements amounted to a confession. That being the case, in the present case, on the basis of Section 28(b) of the Evidence Act, the material statements ought to have been excluded in the consideration whether or not the prosecution had proved the case against the appellant beyond reasonable doubt. The Judge, who is normally not to be faulted on matters of this kind, unfortunately relied unnecessarily heavily on the views of the trial court.

Mr Muhia's contention is in law correct and we uphold it.

There remains the second point taken by learned Principal State Counsel. It was submitted that there is other evidence to support the convictions in that ultimately the wheat which the appellant received at Nakuru was not received. The point was made that there is evidence of false documentation.

Evidence was given by Kimani (PW1) that on 21st December, 1987 he allowed vehicle registration mark KWR 463 to enter the silos at Nakuru. The appellant was driving the lorry. Later that day, the same lorry returned to the weighbridge loaded with wheat in bags. PW1 weighed the wheat and gave to the appellant a document known as the tabling clerk's issue for the appellant to hand over to Swan Millers, Kisumu. The appellant did produce a second copy of the tabling Clerk's issue bearing the stamp of Swam Millers and the signature of the Clerk of the Millers.

On the two days 5th and 12th January, 1988, PW2 allowed the appellant's lorry into their premises. On both occasions, the appellant loaded his lorry with wheat and was subsequently issued with tally clerk issues. A copy of the tally clerk issue was later returned to PW2 who verified the stamp and signature and gave the duplicates to the appellant for use by his employers in claiming transport charges.

PW3 the owner of vehicle registration mark KWR 463 and employer of the appellant testified that on the three occasions, he detailed the appellant to take his lorry to the KGGCU Ltd for transporting wheat. After each trip, the appellant returned the tally clerk issues bearing the stamp of Swan Millers, Kisumu, the signature of their representative and the signature of the appellant. The entries related to the wheat consignment were made employees of Swan Millers.

Now, the evidence which we have outlined does not establish that the appellant forged any of the documents he handed to the three witnesses PW1, PW2 and PW3. On the contrary, there is nothing which would contradict the appellant's testimony that he obtained the documents in the course of his employment in connection with the three wheat consignments. Of course the rubber stamp on all the three documents was later found not to have been genuine company rubber stamp. However,

as affecting the appellant, the plain fact is that there was not a shred of evidence to connect him with the forging or falsification of the rubber stamp.

Accordingly, as it seems to us, it is quite evident that there was no other evidence in support of the conviction of the appellant.

We have said enough to show that the appeal must be and is allowed, the conviction quashed, sentences set aside and it is ordered that the appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Kisumu this 14th day of August , 1989

J.O NYARANGI

.....

JUDGE OF APPEAL

J.E GICHERU

.....

JUDGE OF APPEAL

R.O KWACH

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR