



IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

(Coram: Nyarangi, Gachuhi & Kwach, JJA)

CRIMINAL APPEAL NO 98 OF 1989

MULAAAPPELLANT

VERSUS

REPUBLIC.....DEFENDANT

JUDGMENT

October 27, 1989, Nyarangi, Gachuhi & Kwach, JJA, delivered the following judgment.

The appellant was convicted by a senior resident magistrate, Nairobi of forgery contrary to section 349 of the Penal Code, of uttering a false document contrary to section 353 of the Penal Code and of obtaining by false pretences contrary to section 313 of the Penal Code.

His appeal against conviction and sentence to the High Court (Porter, J) was successful only with regard to the conviction on the first count. The appeal in respect of the other counts was dismissed.

Before this court the submissions on behalf of the appellant were that the lower courts erred in not considering that the appellant was given an imprest in the sum of Kshs 3,795 for the purchase of another radio in replacement, that the appellant's explanation as to what happened to the radio was plausible and lastly, that the evidence adduced did not prove any of the charges.

In this case, as regards all the courts, there is evidence that the appellant was permitted to purchase a radio cassette for the GK vehicle. The appellant was subsequently reimbursed of Kshs 3,795.

There were claims made by a number of prosecution witnesses, for example PW3 and PW5, that the payment of the Kshs 3,795 should have been made in Kiambu, where the appellant was stationed, and not in Nairobi, that the expenditure should have been changed to expenditure equipment and not to transport expenses and that the appellant had no authority to buy the equipment. None of those matters, even if true, constitute forgery or uttering or obtaining by false pretences.

On the evidence on record, it is unnecessary to do more than say that there was not a scintilla of evidence of forgery or uttering or obtaining by false pretences. The convictions under the second, third and fourth counts are squashed.

Now, there is no doubt that there was evidence that the appellant stated that he placed the radio cassette in a GK vehicle. Upon being asked to surrender the radio cassette, the appellant's explanation was that, inside his house, he placed the radio cassette on top of a lamp stand but the following morning when a house employee was sweeping and wiping and "pushing things here and there ...," the radio cassette fell

and broke. The appellant did not produce as an exhibit the broken radio cassette.

The trial magistrate very properly rejected the accused's explanation. It was bogus and a calculated lie.

The appellant fraudulently converted to his own use the radio cassettes. He was neither the special nor the general owner of the property. He stole it. That is the offence for which he should have been convicted by the High Court.

This court by virtue of sub-section 2 of section 3 of the Appellate Jurisdiction Act, cap 9, has

“the power, authority and jurisdiction vested in the High Court”.

We invoke that power, authority and jurisdiction and pursuant to section (2) of the Criminal procedure Code we convict the appellant of the minor offence of stealing contrary to section 275 of the penal code. The appellant shall serve a sentence of 2 years imprisonment from January 26, 1988.

Dated and delivered at Nairobi this 27th day of October , 1989

J.O NYARANGI

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR