



**REPUBLIC OF KENYA**

**Mwaniki v Republic**

**High Court, at Nairobi August 16, 1985**

**Schofield J**

**Criminal Appeal No 1618 of 1984**

**(Appeal from the Resident Magistrate's Court at Nairobi,; M A Angawa, Miss)**

**Advocates**

Appellant absent unrepresented and not wishing to be present

Miss W Ngugi for Respondent

**August 16, 1985, Schofield J delivered the following Judgment.**

Philip Ndirangu Mwaniki appeals against his conviction by an acting resident magistrate, Nairobi, on three charges of forgery contrary to section 349 of the Penal Code and four charges of obtaining by false pretences, contrary to section 313 of the penal Code.

Briefly summarized the prosecution case is that the appellant worked as a free-lance salesman for News Publishers Limited. This company publishes magazines and the appellant's duty was to sell advertising space to companies wishing to advertise their products in new Publishers Magazines. The prosecution alleges that the appellant set up his own company called Viewpoint Publishers and by purporting to four of New Publishers' customers that News Publishers Ltd had changed its name to View Point Publishers Ltd, obtained money from the four customers on invoices issued by News Publishers Ltd and for work done by them in advertising the customers' products.

The first three counts, two of forgery and one of obtaining by false pretences, relate to News Publishers' dealings with a company called Kenya Components Ltd. and allege that the appellant forged two invoices, No 6027 and 5349 for Kshs 1,600.00 and Kshs 5,100.00 respectively and received Kshs 5,000.00 by falsely pretending that News Publishers Ltd. had changed its name to Viewpoint Publishers Ltd. The amount in count III of Kshs 5,100.00 is wrong because the invoice alleged to have been forged is for Kshs 3,500.00. Be that as it may there was insufficient evidence to support the convictions.

The only witness who testified from Kenya Components Ltd. was PW 3, Grace Njogu who is the secretary to the General Manager. She related how the appellant was paid Kshs 5,100.00 by cheque and how the appellant told her that News Publishers had changed its name. She told how the appellant altered the heading of a News publishers Ltd. Document, but not an invoice, or the two invoices alleged to have been forged, but a statement G 2 about which no charge was laid. There is no evidence that the appellant altered the two invoices referred to in the charges of forgery. There was nothing to link the payment made

of Kshs 5,100.00 with advertisements in News Publishers' Ltd. Magazines. No order was produced, no advertisement, and no evidence of News Publishers' employer that payment of Kshs 5,100.00 should have been made to them instead of Viewpoint Publishers Ltd. There was insufficient evidence to support a conviction on the first three counts.

Count VI alleges obtaining by false pretences. By the same false pretence as alleged in the case of Kenya Component Ltd, the appellant is alleged to have obtained Kshs 4,500.00 from a Mrs Denz of Kenya Bag Exchange Ltd. PW 5. No invoice was produced in this case. Reference was made to an order placed through the appellant with News Publisher Ltd. but the witness did not expressly state that she paid to the appellant the sum of Kshs 4,500.00 which was due to News Publishers Ltd, on his assertion that the company had changed its name. Too much was left to inference in the evidence and, again, the conviction is unsafe.

The same applies to count VI which relates to a similar allegation relating to a company called VW Davie Stores. There is no link in the evidence between an invoice for work done by News Publishers Ltd. and a payment made to the appellant for Kshs 4,500.00. Nowhere is it stated in evidence that he was paid in the name of Viewpoint Publishers on an invoice used by News Publishers Ltd.

That leaves us with count IV of forgery and count V of obtaining by false pretences. The alleged forged document is an invoice No 5335, produced as exhibit 1, issued to Data Equipment for Kshs 4,375.00. PW 2 Moses Ekrapa testified that he is an accounts Clerk with Data Equipment. In May, 1984 the appellant approached him for payment on the invoice exhibit 1. He asked for the cheque to be prepared in the name of Viewpoint Publishers Ltd. The witness told the appellant an invoice in the new company's name whereupon the appellant changed the heading at the top of the invoice to "Viewpoint Publishers Ltd." A cheque for Kshs 4,375 was given to the appellant made out to Viewpoint Publishers Ltd.

PW 6 Feder Spel who works for Data Equipment in charge of advertising testified that his company placed an order with News Publishers Ltd. for an advertisement in the magazine "Autonews" in March, 1984. The invoice exhibit 1 refers to that advertisement.

PW 4 Shamalla Mugambi is the Marketing Director for News Publishers Ltd. He outlined the appellant's work and said that News Publishers Ltd had not changed its name to Viewpoint Publishers Ltd. He testified to several complaints made by companies when they received reminders of outstanding accounts which led to a report to the police. He said attempts were made by the appellant, his friends and relatives to settle the matter.

Briefly the appellant's evidence was that he was making such good progress with News Publishers Ltd. That jealousy crept in and became frustrated. He resigned from the company and set up his own company Viewpoint Publishers Ltd. He received work from his former News Publisher's clients and that company falsely alleged he received their money. He was owed money by News Publishers Ltd. He issued his own invoices for orders received. He denied the offences.

An analysis of the evidence relating to counts IV and V shows that it was adequately proved that the appellant went to Data Equipment, purported that News Publishers Ltd. had changed its name, altered News Publishers' invoice to read "Viewpoint Publishers Ltd." and received Kshs 4,375.00 by cheque made out to Viewpoint. The cheque was proved to be for payment for an advertisement placed in a News Publishers magazine. The appellant's explanation is incredible. It would be more likely if he were claiming that only News Publishers employees were involved in the allegations against him, but there is the clear evidence of the accounts clerk from Data Equipment Ltd, that the appellant told him that Viewpoint Publishers was the new name of the company. That is undoubtedly false. There is no doubt that the appellant received the cheque for Kshs 4,375.00 from Data Equipment on the false pretence that News Publishers had changed its name to Viewpoint Publishers. But did the alteration to the invoice sent to Data Equipment amount to forgery? Forgery is making of a false document with intent to defraud or deceive. Section 345, Penal Code reads:

***"347. Any person makes a false document who***

***(b) alters a document without authority in such a manner that if the alteration been authorized it would have altered the effect of the document;”***

The invoice was altered without authority. If the alteration had been authorised it would have altered the effect of the document in that payment would have been shown to be owed to a different company. I consider that the appellant was proved to have forged the invoice exhibit 1.

The upshot is that I allow the appeal in respect of counts I, II, III, IV and VII, quash the convictions and set aside the sentences passed thereon.

I dismiss the appeal against conviction in counts IV and V.

The sentence imposed in each case was three years imprisonment expressed to run concurrently. This is the maximum sentence on each offence, but of course the learned magistrate must have imposed the maximum because of the number of offences involved. With the reduction in the number of convictions recorded I consider I must regulate the sentence, particularly as they relate to one incident. Accordingly, I reduce the sentence on each of counts IV and V to 15 months imprisonment to run concurrently.