REPUBLIC OF KENYA

HIGH COURT APPELLATE SIDE NAIROBI

CRIMINAL APPEAL NO 911 OF 1978

EUSTACE KIBERA KARIMI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction for forgery at the Resident Magistrate's Court, Nairobi, in Criminal Case No 1487of 1978)

JUDGMENT OF THE COURT

The appellant thought that he would start a business for his younger brother and sister. He told them about it, they agreed and they gave him authority to do whatever he thought right. He started the business, and for its better running, opened an account at a bank in their name, but himself provided their specimen signatures for it. He operated the account quite properly and honestly, but he was nonetheless prosecuted for forging the specimen signatures. It is immediately clear that if the appellant has infringed the law, the infringement was minimal, and the trial magistrate (believing that the appellant was guilty of forgery) obviously shared this view because, following conviction, he discharged the appellant absolutely.

When the prosecution case was closed, the defence submitted that there was no case for the appellant to answer, which submission was rejected in a detailed ruling, a practice which should not, at all events generally, be followed as Roskill L J pointed out in *R v Falconer-Atlee* (1974) 58 Cr App Rep 348, 356, in relation to a jury case:

> If he was going to leave the case to the jury, he should have left it saying no more than that there was evidence to go to the jury …

Roskill L J thought that in the circumstances of the case the trial judge had been unwise, as he put it, because in giving his reasons he expressed a view, albeit only a tentative view on the facts. The appeal was allowed. The topic was further discussed in relation to the law in England in *R v Barker* (1975) 65 Cr App Rep 287 and *R v Mansfield* (1977) 65 Cr App Rep 276, to which we simply draw attention because the question was discussed here by the Court of Appeal in *Murimi v The Republic* [1967] EA 542 in which the appeal was allowed because the trial magistrate in refusing to acquit an accused at the close of the prosecution case (as he should have done), occasioned a failure of justice on the facts of the case.

As we have said, the magistrate gave detailed reasons in the instant case. In it he said:

> The only element in the two offences that has given rise to some complexity is whether the [appellant] in making the two cards false documents, as I think he did, had an intent to deceive.

We stress the words "as I think he did". It is true that the case was being fought, mainly on the question of intent; but this was not for consideration until, on the whole of the evidence, it was proved that the appellant had made false documents. It is unfortunate that the decision of this Court (Trevelyan J) in *Mbande v The Republic* [1971] EA 553 was not drawn to the magistrate's attention because if it had been, the magistrate would almost certainly have acquitted the appellant on the ground that it had not been proved that he had made any false document. Whether a document is false or not depends, of course, on whether it falls, or does not fall, within the provisions of section 347 of the Penal Code; and in regard to what is before us only paragraph (a) or paragraph (d) of that section could have been for consideration. But the specimen signatures did no more than to describe how the signatures of the persons named in the

forms would appear, and the appellant did what he did in pursuance of authority given to him. But whatever course the magistrate might have adopted, and whether or not a *prima facie* case of forgery was made out, this appeal has to be allowed; nor does the State counsel seek to uphold the convictions which were entered, because of the finding at the end of the prosecution case which we have reproduced. It was a positive finding that the appellant had made false documents. As the *Mbande* case pointed out, "external facts are relevant to the question of falsity", and whilst the prosecution had called the appellant's brother and sister, so that the appellant might well have resolved to open and close his case without giving or calling any evidence, the magistrate's ruling at best shifted the burden of proof on to the appellant to establish that the document was not false and at worst precluded him from dealing with it at all.

We allow the appeal, quash the convictions and set the order (which should have been "orders") of an absolute discharge aside. The appellant is acquitted on both counts.

Appeal allowed.

Dated and delivered at Nairobi this 1st March 1979.

E. TREVELYAN

JUDGE.

J.H.S TODD

JUDGE.