REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CRIMINAL APPEAL 103 OF 2006

FRANCIS BWIRE OMADA ……..…….APPELLANT

AND

REPUBLIC ……..……RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Busia (Sergon, J.) dated 5th November, 2004

in

H.C.CR.A. NO. 90 OF 2003)

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JUDGMENT OF THE COURT

The appellant, ***Francis Bwire Omada***, has come to us, on second appeal, challenging his conviction and sentence, by the Senior Resident Magistrate's Court at Busia, for the offences of forgery contrary to ***section 349*** and stealing by clerk contrary to ***section 281*** of the ***Penal Code*** respectively. There were three forgery and three stealing counts making a total of six counts.

On first appeal to the superior court, the appellant's conviction on the second forgery count was quashed and the sentence imposed on him on that count was set aside.

The appellant was sentenced to 2 years imprisonment on each of the forgery counts and 5 years imprisonment on each of the stealing counts, but these sentences were ordered to run concurrently. So the setting aside of the imprisonment term did not have any practical beneficial effect on the appellant as the appellant was for all practical purposes ordered to serve a period of 5 years imprisonment.

This being a second appeal, by dint of the provisions of ***section 361*** of the ***Criminal Procedure Code***, only issues of law may be canvassed. The memorandum of appeal has four grounds, but Mr. Balongo for the appellant abandoned the first ground, which read as follows:

"1. The learned Honourable Judge erred in law in holding that evidence of PW1 and PW3 was sufficient to establish theft of the money in respect of the receipts the students were not called to testify."

The request to withdraw that ground was proper as in any case it related to a finding of fact which is excluded by ***section 361*** above, and therefore was improperly included as a ground of appeal to this Court.

The remaining grounds are as follows:

"**(2) The learned Honourable Judge of the first appellate court failed in law to appreciate that in the circumstances of this case evidence of the handwriting expert was not conclusive.**

(3) The learned Honourable Judge erred in law in holding that the charges preferred against the appellant were not duplex.

(4) The learned Judge of the first appellate court did not re-evaluate evidence on records and hence arrived at wrong conclusion on issues of law."

Before we consider those grounds, we will first set out the background facts. The appellant was employed as an accounts clerk with Busiada Girls Secondary School in Butula Division, Busia District. His duties included receiving school fees from either the students or their parents and or guardians. In the whole of 1999, 2000 and 2001 the appellant was working in that capacity.

In September, 2001 some discrepancies were noticed between receipted amounts on the original as well as duplicate receipts which had been issued under the hand of the appellant. The discrepancies were discovered when some students were sent home for non-completion of fees payable. It transpired that they had receipts showing that indeed they had no fees outstanding. Among the students who were told they had not completed the payment of their fees were Jackline Aketch Onze, Serah Mwihaki, Jane Kimani, Lucy Oduori, Ann Adeya, Marion Muranga, Eunice Were, Caroline Ogutu, Molline Amollo, Catherine Adhiambo, Leah Munyasia, Caroline Oduor, Hellen Maloka, Lydia K. Odera, Caroline Anyango, Leah Mutoro, Beatrice Busuru, Margaret Nekesa, Linda B. Kafwa, Janet Opiyo, Christine Wandera, Faustine Adhiambo Odhiambo, Violet Nagubu, Godliver Achieng, Oduor Taylor Anyango, Nancy Nafula Senya, Susan Were, Alice Osieko and Jackline Odhiambo.

All these testified that they made payments to the appellant, were issued with receipts reflecting the various amounts they had paid, but later it was shown that the duplicate receipts which were in the custody of the appellant reflected amounts which were much less. ***CPI. Daniel Barasa*** who investigated the case checked all the original receipts from the above named people and discovered that the duplicates indeed reflected lesser sums than were shown on the originals.

Although the appellant admitted he had prepared both the original and duplicate copies of these receipts, he denied he had stolen any money. He contended that whatever monies he had collected from various students or their parents or guardians, were entered into the relevant books of account and no shortage or loss was reflected.

It should, however be recalled that the investigating officer checked all the available original receipts against the duplicates and in each of them there was a discrepancy. The appellant was not using the original receipts to prepare his accounts, because those were issued to the various payees and would not therefore be available for use in preparing the books of account. The appellant must have used the duplicate receipts, which if they had already been altered, there was no possibility of a discrepancy assuming the appellant only paid in the amount of money which was reflected on the duplicate receipts.

The original and duplicate receipts which were recovered were submitted to a document examiner who compared the writings on the original receipts and the duplicates and found them to have been by the same hand in all the 77 documents forwarded to him. The writings were compared with the known handwriting of the appellant and it was found to match. The document examiner's report was produced in court by the investigating officer under ***section 77(1)*** of the ***Evidence Act, Cap 80*** Laws of Kenya, and this was quite proper.

Thus the evidence showed the appellant had prepared the original and duplicate copies of the receipts, the individual witnesses who testified showed that they had paid the appellant the money which was reflected on the original receipts. Accordingly it is clear that the duplicate receipts told a lie about the amounts of money the appellant had received against those receipts and as a result they told a lie about themselves. The appellant used them to deceive his employer that the money reflected therein was the only money he had collected which was a lie.

The term forgery literally means making a false document with intent to defraud or deceive. A document is false if it tells a lie about itself. (See **Baigumamu v. Uganda [1973] EA 26**). In ***Words And Phrases Legally Defined, Vol.2 D-H page 273*** it is stated that a document is false, among other things,

"**(a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein."**

The copies of receipts in the appellant's possession had material alteration on the amount of money paid of which it was supposed to be evidence of.

Was there any theft? Mr. Balongo for the appellant submitted that while it is true that the alterations on the receipts were shown by evidence that they were made by the appellant, there was no evidence, he said, to show there was any theft. In his view evidence was necessary to show the appellant did more than altering documents namely that he stole some money. He said that documents of account were necessary to show a loss.

With due respect to counsel, why the alterations were made on the duplicate receipts was a matter within the particular knowledge of the appellant. We agree with Mr. Balongo, that in criminal cases the burden is throughout on the prosecution to prove a criminal charge beyond any reasonable doubt. However, in certain cases there are certain matters which are peculiarly within the knowledge of the accused which the law requires him to explain. ***Section 111(1)*** of the ***Evidence Act***, provides, in pertinent part, thus:

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."

The appellant was paid certain monies. He acknowledged receipt thereof by issuing the original receipts. The amount of money he received against each receipt was proved by both oral and documentary evidence. It is the appellant who indicated different figures in the copies of receipts which were meant to be used by his employer for its accounting purposes. The school acted on those receipts and it was obvious that the appellant had not accounted for the difference between the amounts on the original receipts and the duplicate copies of those receipts. What happened to that money was a matter peculiarly within the appellant's own knowledge. He owed the trial court an explanation thereof. Having not explained, a rebuttal presumption of fact was raised that he converted the money to his own use.

The trial magistrate, in his judgment found as a fact that eye- witnesses identified the appellant as the person they paid money to. After he issued them with receipts, more money was demanded from them later implying that the appellant did not hand over to his employer all the money he received, and that the document examiner's evidence corroborated their testimony.

The superior court (J.K. Sergon, J.) affirmed that decision on all but the third count. He examined evidence in support of each count and came to the conclusion that, in count 1 although eight receipts were shown in the particulars of the charge to have been forged, evidence of forgery was tendered in respect of only one of them. He nonetheless sustained the conviction of that count on the basis of that one receipt. We think the learned Judge was perfectly entitled to come to that conclusion.

The superior court was also right when it held that as no evidence had been adduced to show how the receipts enumerated in count three, the trial magistrate fell into error when he held that those receipts too, had been forged. It was incumbent upon the prosecution to call witnesses who had been issued with those receipts for them to confirm that they had paid the amounts shown on those receipts, but lesser sums were reflected on the duplicates thereof.

The learned Judge of the superior court was however not correct when he said "*In establishing the offence of theft it was not necessary that the prosecution should restrict its evidence to the receipts specified in the charge sheet."* The whole purpose of particulars of a charge is to inform an accused

person of the complaint against him. Calling evidence to prove particulars outside those introduces variance between the evidence and the particulars, and in an appropriate case, this not being one, it may lead to the conviction being quashed on account of uncertainty of the particulars of the charge against the accused.

Mr. Balongo for the appellant submitted before us that the forgery counts were duplex and as a result the appellant was adversely affected in the conduct of his case before the trial court. It was further his view that the superior court erred in holding that those counts were not duplex.

We have considered that submission and we agree that the forgery charges were omnibus in nature. We do not however, agree with Mr. Balongo that every case of duplicity should lead to the conviction on the relevant counts being quashed. The guiding principle upon which an appellate court should act is to consider whether the duplicity caused any prejudice to the appellant in the conduct of his defence before the trial court. ***Section 382*** of the ***Criminal Procedure Code***, ***Cap 75*** Laws of Kenya, provides:

"382. Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings under this Code, unless the error, omissions or irregularity has occasioned a failure of justice."

We have gone through the records of both courts below and it is clear to us that the appellant understood very well the charges he faced, the evidence in support thereof, he cross-examined witnesses and put to them relevant questions and he presented his first appeal reasonably well. We are satisfied he was not prejudiced in the prosecution of his case nor was there any failure of justice.

We also wish to comment on certain documentary exhibits which were tendered in evidence to support the theft counts, over and above the receipts on which the witnesses we mentioned above testified. In the absence of any appropriate counts in relation thereto, the evidence was gratuitous and of no material substance and did not, in our view, prejudice the appellant.

In the result, we are of the view that the appellant's conviction on the five counts was based on admissible, sound and sufficient evidence and we find no basis for interfering with the convictions. Accordingly, we dismiss the appellant's appeal. It is so ordered.

Dated and delivered at Kisumu this 16th day of June, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APLPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR