

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATES COURT AT NAIROBI
CRIMINAL CASE NO. 691 OF 2015

REPUBLIC.....PROSECUTOR

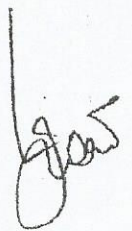
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GOEFFREY NYADIDA ODONGO.....1ST ACCUSED

ERIC OBEIRO NYADIDA.....2ND ACCUSED

JUDGMENT

On 17th day of April, 2017, Geoffrey Nyadida Odongo and Eric Obiero Nyadida herein referred to as 1st and 2nd accused were arraigned before this court and with the offence Forgery contrary to Section 345 of the penal code as read with Section 349 of the Penal Code (11) particulars of the offence were, on or before 29th September, 2014 at unknown place within the Republic of Kenya, the two accused persons with the intent to defraud, jointly allegedly forged a letter buying of Copy rights dated 15th October, 2014 purporting to be genuine and letter signed, and issued by Edward Muchai the Senior Communications Equity Bank Limited. The 1st accused Geoffrey also faced a second count of false document contrary to Section 353 of the Penal code. Particulars of the were, on the 29th day of September at Equity Bank Headquarters in Nairobi Nairobi County, with the intent to defraud knowingly and frequently uttered a false document namely an Equity Bank Limited Letter title Buying of Copyrights dated 15th September, 2014 to Lydia Kiburu, a General Manager Department at the said Equity Bank Head office.

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The accused entered plea of “not guilty “to charges which they faced and their trial commenced before this court. In support of their case, the prosecution called a total of 5 witnesses.

PW1 Edward Muchai the Senior Communications Manager at Equity Bank Testified that he accused persons went to his office with a compact Disk CD containing a song he had composed and made a proposal to sell the rights to his song to Equity Bank Limited. He was then referred by PW1 to Equity Group Foundation where he would then receive a response of the proposal since the “wings to fly” program which the song was about was overseen by the Equity Group Foundation.

PW2 Philomen Kiburu a Senior Program Manager of the “wings to fly” program confirmed that indeed in the year 2013, the 2nd accused went to his office at Equity Group Foundation and offered to sell them a song which he had composed and which he felt could be used to market the “wings to Fly” program. They spoke at length with the 2nd accused and even asked him to call his producer to come see him. PW2 also admitted having repeated email communication with the 2nd accused whereas, the supposed email communication between PW2 and the 2nd accused were not produced in court. The emails had not been printed from Mr. Kibiru computer or directly from his email but that he had forwarded the emails to Mr. Joachim Ireri, (PW3)

PW4, Joachim Ireri, a Security Officer at Equity Bank charged with performing internal investigations related to the suspected crimes committed against he stated that, the 1st accused had come to the bank severally claiming that he 2nd had been engaged by the bank in relation to sale copyrights to his song but the had subsequently reneged on its commitment. He also stated that the accused come with printouts of PEXH.1 which he stated had been received by the 2nd through email. He however did not investigate the email accounts of either PW1

PW2 and that fact the email produced in court as exchanged between PW2 not printed directly from Mr. Kibiru's email account. He further agreed that he of an email cannot in all fairness be expected to have the original of a scanned document since the sender retains the original.

PW5 Ivy Akinyi a document examiner attached to the Director of Criminal investigations testified that as at time she was examining the document PEXH1 and drawing PEXH8 she had only been preparing a forensic document examination reports for only one year. She continued to state that she had compared the specimen signature occurring in the PEXH1 and had a finding that the signatures were by different authors. She however confirmed that she had not compared the signature in PEXH1 with the specimen handwriting of the accused persons to establish whether the signature in PEXH1 was actually by the accused persons.

PW5, Corporal Knocker Nyasinga a police officer attached to the Banking Fraud and also the investigating officer in this matter testified that he was assigned in April, 2014 and at the course of this work he contacted PW4 who received him Equity Bank where he was able to meet and record the statement of PW1. He stated that he met the accused who revealed to him that he had received PEXH6 by email from the bank and that he had merely printed them and them to the bank for verification. PW5 testified that he had collected specimen signatures from PW1 only and presented them to the document examiner. He stated that he took email communication printed by PW2 and arrested the persons at Equity Centre. In cross examination he admitted that he did not take specimen handwriting from the accused persons to compare with the PEXH1 and as such, it was impossible to tell if the handwriting in PEXH1 was of the accused persons. He further admitted that he did not investigate the address of PW1 even after the 2nd accused had told him that he received PEXH1

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through email. There was numerous email communication between PW2 and accused however PW5 did not investigate PW2's email account and that the emails produced in court were those PW2 had forwarded to PW3. He conceded in the absence of actual emails produced from PW2's email account it is tell if the email forwarded to PW3 were al emails.

After the close of the prosecution case the court ruled that both the accused persons had a case to answer and were put to their defence where they opted to give in sworn evidence to their defence and also called a further witness Emily Grace Akinyi Obingo.

DEFENCE CASE

Accused on their defence, Erick Obiero Nyadida told the court that in June 2013, he was aged 16 years. And in High School. He was at the time still a musician and had a manager by the name John Kennedy, who had been appointed by his mother Grace Akinyi since Accused was still a minor.

During the 2nd term, his manager informed him that he had gotten a deal with Equity Bank, wings to Fly, the accused 1 proceeded to Home Boyz studio and recorded a song. He then proceeded to Equity Centre in company of John Kennedy accused 2. Since it was John Kennedy who knew the contact person. It was accused 1 who went into Edward Muchai's office, and upon a short discussion Mr. Muchai took the CD and listened to it. Mr. Muchai then gave accused 1 a document indicating that he was buying copyrights, which accused 1 refused, he did not give accused 1 a copy. Accused 1 prepared and produced which he duly signed and took it to Mr. Muchai. A letter was given by Mr. Muchai which accused 1 and John Kennedy took to the CEO's office on 7th floor. The letter was received by the Secretary.

During the August holiday, John Kennedy called and told accused 1 that Equity bank had promised to pay him during the next financial year after the song was verified.

John Kennedy left the court and accused 1 decided to follow up the matter. He was to later meet Mr. Muchai and Philenon Kibiru who promised to pay him Kshs. 1.5 Million for his song.

There was consequent communication between accused 1 and Mr. Kibiru as well as his mother. On 16th April, 2015 when accused 1 went to Equity centre to follow up the matter, he was subsequently arrested.

Geoffrey Odongo, Accused 2 placed on his defence corroborated accused evidence. It was his evidence that when he worked at the documents that his younger brother had in his possession allegedly from Equity bank, they had a lot of irregularities. When he escorted his brother to equity centre to follow up, that is when he was arrested.

Emily Akinyi DW3 confirmed that Accused 1 is her son, and produced an affidavit appointing John Kennedy as his manager.

I have carefully considered the submission by both the defence and the prosecution and the following grounds fall for determination. I will address each ground separately.

1. Whether the alleged forgery was by the accused

Section 345 of the Penal Code defines forgery as "the making of a false document with intent to defraud or deceive". In the case of Caroline Wanjiku vs. Republic (Criminal Appeal No. 11 of 2013) the learned judge while quoting the Nigerian case of Aleke vs. the state the court listed the following ingredients for forgery;

- i. There is a document in writing.
- ii. The document or writing is forged

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- iii. The accused knows that the document or writing is false.
- iv. The forgery is by the accused person.
- v. The accused intends the forged document to be acted upon to the victim in the belief that it is genuine.

A charge of forgery cannot stand unless it is shown that the alleged forgery was by the accused person. From the witness statement of PW5, the investigating officer testified that, during investigations, the 2nd accused told him that he had received PEXH1 and PEXH6 by email from Equity Bank Limited. He also established that there had been numerous email communications between Philomen Kiburu PW2 and the 2nd accused but dispute the lead offered by the 2nd accused PW5 did not investigate the email conversation between PW2 and the 2nd accused. PW5 did not investigate the email accounts of PW1 & PW2 to rule out the possibility that they were originators of PEXH1 & PEXH6.

PW2 admitted that there had been repeated email communication between him and the 2nd accused but his emails were not produced before this court. Both PW2 and PW5 stated that they had found it unnecessary to print the emails directly from PW2's email account. Was there anything that was occurring in the actual email between PW2 and 2nd accused that the prosecution was trying to hide from the eyes of the court? Had the prosecution produced the original email?

Conversation between PW2 and it could have shed some light as to know who were actually the originators of the emails in question. The prosecution would not have suffered any prejudice if the court saw all the emails as printed from PW2 and the 2nd accused, in their defence both the accused persons testified that they were not the makers of PEXH1 and PEXH6 and further that, they did not sign the documents, evidence that was not rebutted by the prosecution by way of contrary evidence.

PW Ivy Adanyi who was the document examiner did not take the specimen handwriting of the accused persons for comparison with the signature occurring in PEXH1 and PEXH6 to establish whether the signatures were by the accused persons. As a result he did not present to court any findings by a document examiner to the effect that the signatures occurring in PEXH1 and PEXH6 were signed by the accused persons.

Also throughout the prosecution case no evidence was led to show that the accused persons knew that PEXH1 and PEXH6 were false documents. SW1 on his testimony noted that having received the documents through his email from the complainant bank he had no reason to believe that the documents were false. Indeed the day the accused persons were first handed over by PW5 at Equity bank limited they had gone to pursue what they believed was genuine offer from equity bank limited.

I find that the evidence produced by the prosecution in this regard is not manifestly clear and convincing that the accused persons forged the document in question and that it had the ability to defraud.

2. Whether the accused persons uttered a false document contrary to section 353 of the Penal Code

Under Section 353 of the Penal code any person who knowingly frequently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.

I find it useful guidance in Nigerian case of Nelson Moore vs. Federal Republic of Nigeria where it was held that in the offence of this nature the prosecution prove the following ingredients namely; the accused person knowingly and uttered a forged document or writing a counterfeit. Thus the elements of false documents are:

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1. Uttering and publishing a forged document knowingly the instrument to be false altered, forged or counterfeit and,
2. Intending to injure or defraud.

In order to prove an offence of uttering a false document the prosecution had to prove that the accused persons presented forged documents to PW2 knowing that they were false with intent to defraud. Through the prosecution no evidence was led to show the court that the accused knew that the documents were false. They say that the accused persons were handed over to PW3 at Equity bank limited they had gone to pursue what they honestly believed that was a genuine offer from Equity bank limited. PW5 when asked the basis of his opinion that the 2nd accused had prepared PEXH1 and PEXH6 and presented them to equity bank limited after making photocopies, PW5 stated that it was just his opinion and could not state the concrete basis for it. He conceded that the documents could be printouts from the 2nd accused email just as the 2nd accused had stated that he had received PEXH1 and PEXH6.

Considering the facts of this case and the evidence adduced by the prosecution I find that the accused persons, knowingly uttered a false document to PW2. This is because the Investigating Officer did not investigate the role played by John Kennedy, the alleged manager.

3. Whether the case against the persons has been proved to the requisite standard?

The main issue that the court seeks to answer is whether or not the prosecution proved the particulars to the offences and whether the accused person offered other explanation that could exonerate them from circumstances which could or weaken the inference of guilty which is a necessary test before arriving at a conviction of the tendered evidence. The evidence produced by the prosecution

should not be rationale inference that could be drawn from evidence if there is reasonable possibility consistent with innocence; it is the duty of the court to accused not guilty. The variance of the prosecution evidence did not support the prosecution charges. In the upshot I find that he prosecution case has not been proved to the required statements as required. I hereby grant Accused 1 and 2 the benefit of doubt acquits on all charge under Section 215 Criminal Code for lack of sufficient evidence.

I therefore find that the prosecution failed to prove the case in all the two counts beyond reasonable doubt and to the required standard.

MILIMANI LAW COURTS
PAID
 SENIOR PRINCIPAL MAGISTRATE
 24 JAN 2018
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MILIMANI LAW COURTS
 SENIOR PRINCIPAL MAGISTRATE
 15 JAN 2018
 PASSED FOR PAYMENT
HT

Order: Cash to be refunded to the depositor

M. M. MUTUKU

SENIOR PRINCIPAL MAGISTRATE

*Judgement done & delivered
 open court before Mr. Mutuku
 No Fines or other
 CC No records.*

*Mts 1 / Pursuit
 2 / Pursuit*

Mv Onew is not pursued

Order: cash to be returned to depositor

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2/10/2017

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