



**Titus alias Ndegwa Titus v Republic (Criminal Appeal E009 of 2022)
[2024] KEHC 16732 (KLR) (Crim) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16732 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E009 OF 2022
CJ KENDAGOR, J
DECEMBER 20, 2024**

BETWEEN

N TITUS ALIAS NDEGWA TITUS APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against conviction and sentence in Milimani Chief Magistrates' Courts Criminal Case No. E3400 of 2020 delivered on 17th December, 2021 by Hon. E. Kimilu (Ms.), Senior Principal Magistrate.)

JUDGMENT

1. N. Titus alias Ndegwa Titus the Appellant was charged with five (5) counts, being Count I and Count II; on the offence of Forgery of Judicial documents contrary to Section 351 of the [Penal Code](#), Count III and Count IV; on the offence of Uttering False Documents contrary to Section 353 as read with Section 349 of the [Penal Code](#), and Count V; on the offence of Attempted Stealing contrary to Section 268 (1) as read with Section 389 of the [Penal Code](#).
2. The particulars of the offences are that, under Count I; on the 18th day of July, 2013 at an unknown place within the Republic of Kenya, jointly with others not before the Court Forged Grant Letters of Administration in respect of Civil Appeal No. 43 of 2012, formerly Siakago SPM's Succession Cause No. 58 of 2010 in the estate of the late Justus Nthimi Kirimi purporting to be a genuine Grant Letters of Administration issued by Deputy Registrar High Court of Kenya, Embu.
3. Under Count II; that on the 15th day of April, 2019 at an unknown place within the Republic of Kenya, jointly with others not before the court Forged Grant Letters of Administration in respect of Civil Appeal No. 43 of 2012, formerly Siakago SPM's Succession Cause No. 58 of 2010 in the estate



- of the late Justus Nthimi Kirimi purporting to be a genuine Grant Letters of Administration issued by Deputy Registrar High Court of Kenya, Embu.
4. Under Count III and Count IV, that on the 24th day of April, 2019 at Custody and Registrar's Ltd offices in Nairobi, within Nairobi County, knowingly and fraudulently uttered a forged Grant Letters of Administration and a certificate of Confirmation of Grant in respect of Civil Appeal No. 43 of 2012, formerly Siakago SPM's Succession Cause No. 58 of 2010 in the estate of the late Justus Nthimi Kirimi purporting to be a genuine Grant Letters of Administration and a Certificate of Confirmation of Grant issued by Deputy Registrar High Court of Kenya, Embu.
 5. Under Count V; that, on the diverse dates between 18th day of July, 2013 and 15th day April, 2019 at Custody & Registrars Ltd Offices in Nairobi within Nairobi City County attempted to steal (28400) Barclays Bank of Kenya Limited shares valued at Kshs.379,600/= the property of Custody & Registrars Services Ltd.
 6. The Appellant was after full trial found guilty and convicted on all counts, and thereby sentenced to pay a Court fine of Kshs.50,000/- and in default to serve one (1) year imprisonment on Count I, II, III, and IV each, and a further Kshs.80,000/- and in default 18 months' imprisonment on Count V.
 7. Being aggrieved by the conviction and sentence, he preferred the present appeal. He filed grounds of appeal as per his Memorandum of Appeal spelt out as follows;
 - I. That the judgment of the law court was not satisfactory as most of the aspects were not considered.
 - II. That the court erred in law by failing to observe that the case for the prosecution was not proven beyond reasonable doubt as required by law.
 - III. That the learned trial magistrate erred in law and in fact by failing to consider the charge sheet was irreparably defective for want of disclosure of the complainant in the case.
 - IV. That it is unprocedural and against the provision of criminal procedure code Cap 75 to charge him without stating who is the complainant and also it is unconstitutional.
 - V. That the case before the court is alleged to have been committed in the year 2019 and yet he was charged in 2020 after languishing at Kilimani Police Station for 54 days. He was brought to court after his matter was taken over by Human Rights Groups and media.
 - VI. That there was no positive identification or confirmation of possible recognition by the witnesses.
 - VII. That the trial court used unreliable inconsistency evidence to convict him (sic)
 8. The appeal was canvassed by way of written submissions. The Appellant submitted that the prosecution violated his rights to fair trial by not giving him a chance to submit written submissions as provided under Article 50 (2) (c) and (j) of the COK. He claimed that he appeared in court for a plea on 12th October, 2020, but was then illegally detained at Kilimani Police Station. He was subsequently brought back to court on 30th November, 2020, where the charges were read to him again. He submitted that, as a result, he spent an unjustified 54 days at Kilimani Police Station.
 9. He submitted further that the charge sheet was defective by failing to disclose where the offence took place or who the complainant was. He relied on the authority in Pius Arap Maina vs Republic (2013)eKLR.



10. As at the time of making this determination, the Respondents were yet to file any written submissions on record. They made oral submissions and urged the Court to uphold the conviction and sentence in Counts III, IV and V. The Respondent conceded to Counts I and II.

Evidence at the Trial Court

11. I have considered the entirety of the evidence as proffered in the trial Court and the salient testimonies thereto, which I summarize as follows;
12. Lilian Nyaera Mokaya, who works with Custody and Registrar Services Ltd, testified that in 2016, the Appellant visited their offices to inquire about shares held in Barclays (now ABSA) under account number 1799 in the name of Justus Njiru Kothimi. It was alleged that Justus had passed away, and the Appellant was advised on all the necessary procedures accordingly. On 24th April, 2019, the Appellant visited them with a Court order (High Court of Kenya at Embu Civil Appeal No. 431 of 2012, formerly Siakago Law Court's Succession Cause No. 58 of 2010) regarding the estate of the late Justus Nthimi Kirimi. In this visit, the Appellant requested that they process the dividends and pay the Appellant, who would hold these funds in trust for Ciaweru Njiru and Cyrus Ileri.
13. She testified that the company received the order and sent it, along with a letter, to the Embu Law Courts for verification. The Court responded, revealing that the order did not originate from them and was therefore not genuine. Consequently, the company reported the matter to the Capital Markets Fraud Investigation Unit, attaching both the disputed order and CCTV photos of the Appellant.
14. PW2; Cyrus Ileri Njiiru, the deceased's son, in his testimony, revealed that he knew the Appellant to be a lawyer and had requested him to follow up on shares of his deceased father. He testified that he was later surprised to learn that the Appellant had presented documents wherein he (Appellant) was listed as a beneficiary of their late father's estate as he was neither a family member nor known by the deceased. He also denied that the Appellant was given a power of attorney.
15. PW3; Ciaweru Njiru; the deceased's widow, confirmed that she had never authorized any third-party to conduct issues pertaining to her deceased husband's estate.
16. PW4; Immaculate Mutheu; a land registrar, testified that she received a letter from the Capital Market Fraud Investigation Unit, dated 3rd November, 2020, requesting for details in an alleged power of attorney and certified copies of the power of attorney registered in parcel Mbeere Mutitu/4040, and copies of the registration forms any other relevant documents. She testified that she wrote back to the Investigation Unit, noting that as per their records the application was rejected, by dint that the donors thereto who were donating the power to the appellant were not the registered owners of the plot.
17. PW5; Njeru Ithicia, an Advocate of the High Court, testified that he received one Cyrus Njiru in his Office with a power of attorney which he desired attested, whereby he signed it before him and counsel affixed his signature.
18. PW6; Joseph Michugu, Court Administrator, Embu Law courts, appeared and confirmed that the alleged court documents, forwarded to them by a letter from DCI dated 10th June, 2019, were not genuine documents issued from the respective Court, and presented the authentic copies as per the court file, at the trial Court.
19. PW7; No. 73135, Sgt. Winrose Bise, attached to capital Market Fraud Investigation Unit. She testified that a complaint was received from C & R Services Ltd, with regard to purported Letters of Grant and Confirmation of Grant, which investigations through High Court Embu, revealed that the said grants did not originate from them, thus not genuine.



20. She produced photo images extracted from CCTV Footage, taken in 2016 and 2019 depicting the appellant as the perpetrator submitting documents at C& R offices. That, the appellant was arrested as he visited the C & R offices, on the pretext of following up on the status of the dividends in the shares. That, they further obtained Power of Attorney from the appellant in relation to the transfer of lands no. Mbeere/Mutitu/440 and Mbeere/Mutitu/1449, which were confirmed by the Registrar of Lands Mbeere, to have been rejected. On cross examination she confirmed that CCTV Footage placed the Appellant at the C& R Service Ltd offices submitting documents.
21. Further, she clarified that the Appellant was remanded at Kilimani Police Station after plea taking following the outbreak of Covid 19.
22. At the close of the prosecution's case, the trial Court established that the prosecution had made out a prima facie case, and as such the Appellant was put in his defence. The trial Court explained to the Appellant Section 211 of the Criminal Procedure Code.
23. DW1: Ndegwa Titus gave an unsworn testimony decried that the charge sheet is defective. He testified that after plea taking, he was remanded at Kilimani Police Station instead of being taken to the Industrial Area Remand for 54 days. He argued that, as stated by PW2, he was simply an agent and he had paid him Kshs.15,000/= out of the agreed kshs.50,000 for his services. The Appellant argued that PW7 only produced a printout of an image and not a genuine photo of himself.
24. He stated in his testimony that no complainant appeared in Court; instead, witnesses were brought in to falsely accuse him, even though he was innocent.

Determination

25. This being a first appeal, this Court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR* where the Court of Appeal held that: -
 - a. "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".
26. It is the duty of the first Appellate Court to carefully examine and analyze afresh the evidence presented from the trial Court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. (See *Pandya vs. Republic (1957) EA 336*).
27. Due consideration has been given to the grounds of appeal, the evidence on record and the written submissions filed by both parties as well as the authorities cited by the respondent.
28. Having done so, I find that the key issues arising for my determination are threefold namely:
 - i. Whether the evidence presented before the trial court proved the guilt of the appellant as charged beyond any reasonable doubt?
 - ii. Whether the appellant's right to fair trial was infringed?
 - iii. Whether the sentence imposed on the appellant was harsh and excessive?
29. This Court will sequentially dispense with the pertinent issues raised as below.



Whether the evidence presented before the trial court proved the guilt of the appellant as charged beyond any reasonable doubt?

30. As regards Count I and Count II, the offence of forgery of an official document is created under Section 351 of the *Penal Code*, which provides that;
- a. "Any person who forges any judicial or official document is liable to imprisonment for seven years."
31. Section 345 of the *Penal Code* defines forgery as follows:
- a. 'Forgery is the making of a false document with intent to defraud or to deceive.'
32. In the case of *Alexander Muteti Mutinda & Another v. Republic* (2015) eKLR the Court of Appeal held that:
- a. "As regards the evidence of the document examiner, this court holds that that evidence did indeed establish the two (2) documents were forgeries... It was not necessary for the prosecution to establish who actually made the documents if it managed to establish that the Appellants presented the said documents. The Appellants were beneficiaries of the said forgeries".
33. In the instant, it was established with absolute certainty, that the impugned order on letters of Grant and Confirmation of Grant presented to C & R Services Ltd by the Appellant, were forgeries. This was corroborated through the testimonies of PW1, PW3, PW6 and PW7. Further, it was evidenced that the said orders were drafted directing C & R Services Ltd, to transfer dividend funds held at the then Barclays Bank, in an account held in the name of Justus Nthimi Kirimi (deceased), to the Appellant, purportedly in trust for PW1 and PW3. A clear indication that the Appellant was a beneficiary of the forgeries.
34. In the circumstances, I find no reason to depart from the trial Court's holding that the prosecution had proved its case. The same is thus upheld.
35. As a ripple effect, Count III and IV, on uttering forged documents Section 353 of the *Penal Code* provides:
- a. 'A person who knowingly and fraudulently 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.'
36. Uttering, as previously stated, refers to the use of a false document. When a person uses a document while knowing it is false, that person is guilty of the offence of uttering. Uttering is the act of knowingly passing on a false document or using it. See persuasive case of *R vs Dunlop* (1857) 15 UCQ 118.
37. The evidence proffered in establishing the Appellant's forgery above undoubtedly crystallizes as unchallenged and undoubted proof, that the appellant uttered forged documents to C & R Services Ltd. He was at the company and he presented the forged documents and created an impression that they were genuine grant of letters of administration issued by the Court. PW2 stated that the Appellant had told him that he would help him process his late father's dues. I find the charge was proven beyond reasonable doubt.
38. Sequentially, on Count V on Attempted Stealing, Section 268 of the *Penal Code* defines stealing as follows;



1. A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
39. Further, an attempt to commit a felony/misdemeanour is provided under Section 389 of the [Penal Code](#) which reads as follows-
 - a. Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment, he shall not be liable to imprisonment for a term exceeding seven years.
40. As stated before, the prosecution proved on required standard that the documents presented by the appellant to the C & R Services Ltd were forgeries. The Appellant attempted to obtain dividends from an account belonging to the deceased, Justus Nthimi Kirimi, by submitting fraudulent documents. These dividends, held at Barclays Bank of Kenya Limited (now ABSA), were valued at Kshs. 379,600. I therefore uphold the trial court's conviction on this count as well.

Whether the Appellant's right to fair trial was infringed by dint that the charge sheet was defective?

41. The Appellant argued that the charge sheet was defective as it failed to detail who was the complainant in the case.
42. In determining whether a charge sheet is defective or not, the Court of Appeal in Sigilani –v- Republic (2004) 2 KLR, 480 held as follows: -
 - a. “The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.
43. It is trite that an accused person is entitled to not only be charged with an offence recognized under the law but also to be furnished with all the necessary details of the offence, to enable him appreciate the nature of the charge(s) against him and to enable him to prepare an appropriate defence. It follows, therefore, that a charge sheet that was deficient in substance would prejudice an accused person's right to a fair trial as provided for in Article 50 (2) (b) of [the Constitution](#).
44. I have reviewed the contested charge sheet, and after examining the record and the evidence as a whole, it is evident that the Appellant understood the nature of the charges against him. This is clearly demonstrated by the questions he asked during the cross-examination of the prosecution witnesses, indicating he was aware of the charges he faced.
45. A careful reading of the information, as drawn clearly, shows that first, the Appellant was charged with Forgery of Judicial documents, uttering false documents and attempted stealing. Second, the particulars indicate the period within which the offences were allegedly committed. Third, the particulars indicate the victim/complainant of the alleged offences by name or by reference. Just because the charge sheet did not distinctly signify the complainant, on the designated section, the same does not inherently render the charge sheet defective. The claimants were detailed with specificity on the particulars of each count the Appellant was charged on and he was not prejudiced in any way. Evidence indicated that the documents did not originate from the Court and were presented to the Custody & Registrars Services Limited in an attempt to steal the shares and dividends.



46. Similarly, regarding the alleged detention of the appellant at Kilimani Police Station after the plea was taken, rather than being remanded at Industrial Area, the justification provided by PW1 is considered sufficient and warranted. This action was in accordance with the containment measures implemented following the onset of COVID-19. I will leave it at that.

Whether the sentence imposed on the appellant was harsh and excessive?

47. It is now established law, following several authorities, that sentencing is a matter resting within the discretion of the trial court, and that the sentence must be based on the facts of each case.

48. As an appellate Court, I am enjoined not to interfere with a sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. See *Bernard Kimani Gacheru vs Republic (2002) eKLR*.

49. I have reviewed the trial Court's sentencing in relation to the grounds of appeal presented by the appellant. Contrary to the Appellant's claims, it is clear that he was given the option to either pay a fine or serve a custodial sentence. Therefore, the Appellant had the freedom to choose, and he ultimately opted to serve the custodial sentence.

50. I have noted that the trial Court was silent on whether the distinct custodial sentences would run concurrently or consecutively.

51. Section 14 of the *Criminal Procedure Code* provides for circumstances in which a Court can direct sentences to run concurrently or consecutively, whereby when a person is convicted on trial of two or more distinct offences, the Court may sentence him for those offences, to the several punishments prescribed thereof which the court is competent to impose unless the Court directs that the punishments shall run concurrently. Thus, it is deducible that silence by the trial court on how the sentence would run would imply that the same would run consecutively.

52. Further, in the case of *Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97*, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan, stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences.

53. In this particular case, it is important to note that although the offences involved may suggest a common purpose and intent, they were actually committed on different days and involved distinct transactions. This separation in time and circumstances indicates that the actions should be viewed as unrelated events rather than part of a single ongoing crime. Given this context, it is entirely reasonable for the Court to consider the imposition of consecutive sentences for each offense. As a result, this court sees no reason to overturn or modify the sentence originally issued by the trial Court. Therefore, I uphold the trial Court's decision.

54. For the foregoing reasons, I uphold the conviction and sentence by the trial court. The Appeal is hereby dismissed.

55. Under Section 332 of the *Criminal Procedure Code*, the Prison Authorities shall consider the period spent in custody from 12th October, 2020 until the date sentence was passed on 17th December, 2021 when computing the sentences.

56. It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON THIS 20TH DAY OF DECEMBER, 2024.**

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant - Titus Ndegwa

Mr. Mongare ODPP for the Respondent

