



REPUBLIC OF KENYA



**Muriuki v Republic (Criminal Appeal 33 of 2018)
[2023] KEHC 332 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 332 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 33 OF 2018
RM MWONGO, J
JANUARY 27, 2023**

BETWEEN

JOSEPHAT GAKUYA MURIUKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment delivered on 20th April, 2018
in Wanguru PMs Criminal No 561 of 2015 by Hon. PM Kiama, SPM)*

JUDGMENT

1. The Appellant was charged with two counts of making a False Document without Authority Contrary to Section 357A of the *Penal Code*, two counts of Forgery contrary to section 349 of the Penal Code, and one count of Stealing contrary to section 268(1) as read with section 275 of the Penal Code. All the offence were allegedly committed within Kirinyaga East District in Kirinyaga County.
2. The particulars in Counts I and II are that jointly with others not before the court, with intent to defraud or deceive, without lawful authority or excuse made certain documents namely Nairobi Securities Exchange Sale Transfer Forms serial numbers xxxx and xxxx each respectively for 5,330 shares the property of Tabitha Wanjiru Kihoi purportedly issued by Nairobi Securities Exchange a fact he knew to be false.
3. The particulars in Counts III and IV are that on diverse dates between September 19, 2012 and May 7, 2013 at an unknown place jointly with others not before the court, with intent to defraud or deceive, forged certain documents namely Nairobi Securities Sale Transfer Form for serial number xxxx and xxxx each respectively for 5,330 shares the property of Tabitha Wanjiru Kihoi.
4. The particulars in Count V are that on diverse dates between May 6, 2013 and May 7, 2013 at Equity Bank Embu Branch in Kirinyaga East District, Kirinyaga County jointly with others not before the



- court he stole Kshs 213,127/- being the proceeds of sale of 5,330 shares of Kenya Commercial Bank, the property of Tabitha Wanjiru Kihoi.
5. The state adduced evidence through ten witnesses and the accused testified but did not call witnesses. At the close of the trial he was convicted and sentence to imprisonment for four (4) years in Count I, four (4) years in Count Two, three (3) years in Count III and three (3) years in Count IV. The sentences were to run concurrently.
 6. Dissatisfied, the Appellant has appealed the trial court's decision on thirteen grounds summarised as follows:
 1. That the trial Court erred in convicting the accused whilst relying on the complainant's evidence.
 2. That the trial Court erred in convicting the accused while relying on evidence that inconsistent and contradictory.
 3. That the trial Court erred in acquitting the 1st accused whilst convicting the accused.
 4. That the trial Court erred in relying on the evidence of PW-8 to convict him, when PW8 went on a frolic of his own to examine documents that had not been complained about.
 5. That the trial Court failed to take into account the defence and exonerating evidence of DW1.
 7. This being a first appeal this Court is obliged reconsider and re-evaluate all the evidence adduced at the trial and reach its own conclusions, taking into due consideration the findings and conclusions of the trial court, and noting that this court did not itself have the benefit of hearing and seeing the witnesses (See *Okeno v R* (1972) EA 32).
 8. The evidence adduced at the trial in the lower court was as follows.
 9. PW1 Tabitha Wanjiru Kihoi testified that she was married to the deceased Ezekiel Kihoi, who had left many properties including some shares of which she was a beneficiary. She testified that on or about September 19, 2012 and May 7, 2013, she was approached by the Appellant and his co-accused Mathew Njiraini Murage, purporting to be officials from the Nairobi Stock Exchange. That she was persuaded to surrender the share certificate belonging to her late husband and as such, she stood to benefit from the profit every month.
 10. It was her evidence that she was then given Kshs 3000/- after surrendering her husband's death certificate, and identity Card. The people promised her that she will be supplied with a new death certificate She was able to identify the death certificate as MFI-1, the share certificate MFI-3 (a), (b), and (c). However, she did not know the people in the dock.
 11. PW2 Simon Ngure testified that he was a son to the deceased who left behind properties that included 3500 shares at Kenya Commercial Bank. That after having obtained the Grant to the deceased estate, he visited KCB to inquire the status of the shares but got shocked to learn they had been transferred and reported the matter to Capital Markets Authority. He did not understand how the same could be transferred without the letter of administration.
 12. PW 3 David Muriithi Gikunju, the assistant chief, Nguka sub-location, confirmed that the family of the late Ezekiel Kihoi paid him a visit at his office for the letter to petition the Court for a grant.
 13. PW 4, Joseph Maina Thiongo the Senior Clerical Officer at the Civil Registration Kerugoya testified as PW4. He said he was approached by officers from Capital Markets to verify some documents and confirm if the handwriting and signature were his. He stated that after perusing the documents, it



was clear that neither the handwriting nor the signature was his. He noted that there was a stamp of the District Clerk. He noted that from the look of the handwriting, the Appellant, Josephat Muriuki Gakuya, was the person who signed the transfer. He confirmed that he was authorised to sign if the appellant was absent.

14. PW5 Stephen Makori is the former District Commissioner Kirinyaga East from 2005 to 2012. He testified that he did not execute the document that purported to emanate from his office but confirmed that the handwriting did not appear to be that not of PW4.
15. PW6 Gill Hussein stated that he was worked at KCB Nairobi in the shares department. He acknowledged that the transfer of shares was submitted by one Mathew Njiraini Murage through KCB Kerugoya branch. The shares belonged to the late Ezekiel Kihoi. That a copy of the death certificate, ID card of the deceased and that of Mathew Njiraini Murage and the probate and administration documents given by the District Commissioner were presented. The documents were then forwarded to Faida Securities for verification. Later it was discovered they were forged.
16. PW 7 Bernard Savalla stated that he was working at Faida Investment Bank. He acknowledged that their company counterchecked the sale transfer form signed by the District Commissioner and approved the transfer of shares to Mathew Njiraini Murage.
17. PW 8 Chief Inspector Geoffrey Chania, a forensic Document examiner, testified that he was presented with a share transfer form, purchase transfer form and letter of indemnity. He examined the handwriting of the Appellant and a specimen signature of the former District Commissioner and the rubber stamp of the clerk. He formed the opinion that the handwriting was by the Appellant. He produced the exhibits.
18. PW -9 CPL John Kivuva He works at the Capital Market Authority Investigation Unit. He testified that after receiving the complaint from PW2, he was able to confirm that indeed shares had been transferred
19. PW 10 CPL James Mutua, the investigating officer, testified that this was reported as a case of forgery and handed over to him by an officer that was on transfer. He was able to ascertain that the documents had been made at the District Commissioner's office Kinyaqa and some 5,330 shares of Ezekiel Kihoi (deceased) had been transferred.
20. He further stated that there was purchase transfer form, sale transfer form from Nairobi Security Exchange and that the author was the Appellant who purported to sign as the District Commissioner. That upon subjecting them to forensic examination, the Appellant was found to have been the author and was arrested.
21. The 1st Accused Ephantus Mwai Njiraini testified as DW1. He stated that he was a shares trader. He said that he bought shares from Tabitha Wanjiru Kihoi on March 25, 2010 and they signed a share transfer agreement. Tabitha's daughter, Pauline Wanja, appended her signature to the agreement. He further testified that one Ephantus Mwai borrowed Kshs 200,000 from him and offered to repay him with shares. There was a written agreement for the loan since they are brothers. He reiterated that he bought the shares from Tabitha Wanjiru Kihoi.
22. The appellant Josephat Muriuki Gakuya, testified as DW2. He said he is a civil servant attached to Mwea West. He testified that the documents were familiar to him. They were share transfer form, letters of indemnity and an affidavit in case of loss of shares. He stated that when these type of documents come to the office they are scrutinised by the Senior Clerk Josaph Maina Thiongo who is also the custodian of the Clerk's stamp. The other stamp is kept by the Secretary. Both are kept under lock and key.



He doesn't see the parties himself, and didn't know the co-accused. He testified that he did not sign anywhere and was not part of the transaction. He also said he never received any proceeds from them.

23. In cross examination, he stated that the District Clerk interrogated the beneficiaries and he, the appellant, was instructed to fill in the forms by Joseph Thiongo.

Parties' submissions

24. The Appellant submitted that the issue was whether the Appellant is guilty for the offence of forgery and making of a false document. He stated that forgery has been defined under Section 345 of the Penal Code (CAP 63) of Kenya as the making of a false document with intent to defraud or to deceive.

25. He also submitted that the Court of Appeal while making its determination in the case of [*Joseph Mukubu Kimani v Republic Criminal Appeal No, 76 of 1983 \(1984\) eKLR*](#) held that for the offence of forgery, the prosecution has to prove that:

- a. The document was false, in the sense that, it was forged.
- b. The accused knew it was forged.
- c. The utterer intended to defraud

In this case the ingredients of forgery were not met.

26. The Appellant further submitted on the authority of [*John Mauri Wandithi v Republic Nyeri High Court Criminal Case No 404 of 2002*](#) where Okwengu J (as she then was) held that even where there is evidence that documents are forged; the prosecution further has to prove that the forgery was done by the accused person.

27. In addition, the appellant relied on the case of [*Caroline Wanjiku Ngugi v Republic \[2015\] eKLR*](#) where Mativo J held that: Forgery is the false making or material alteration where the writing has the apparent ability to defraud. Thus, the elements of forgery are:

- i. False making - The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. Writing includes anything handwritten, type written, computer generated, printed or engraved.
- ii. Material alteration - The person must have taken a genuine document and changed it in some significant way; It is intended to cover situations involving false signatures or improperly filling in blanks on a form or altering the genuine content of a document.
- iii. Ability to defraud - The document or writing has to look genuine enough to qualify as having ability to mislead others to think genuine.
- iv. Legal efficacy - The document or writing has to have some legal significance.
- v. Intent to defraud - this intent must be shown.

28. The Appellant also submitted that the definition of forgery was set out in [*Republic v Doge and Harris \(1971\) 2 AII ER 1523*](#) as follows:-

' A document is false if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it or authorize its making or if, though made by or on behalf of or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, is falsely stated therein; and in particular a document is false:- (a) if any material alteration, whether



by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein; (b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; (c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorized it.'

29. Finally, the appellant submitted that the Respondent did not prove beyond reasonable doubt its case that it was the Appellant who made documents without authority and committed the forgery.
30. The state submitted on three issues:
 - Whether the Appellant was convicted on the complainant's evidence
 - Whether the evidence was inconsistent and contradictory
 - Whether the evidence was uncorroborated and circumstantial
31. As to whether the Appellant was convicted on the complainant's evidence: the state argued that the complainant PW-1 (Tabitha Wanjiru Kihoi) did testify that she was married to one Ezekiel Kihoi (deceased) from whom she had benefited from some shares. Further, that on or about September 19, 2012 and May 7, 2013, she was approached by the Appellant and his co-accused Mathew Njiraini Murage purporting to be officials from the Nairobi Stock Exchange. That she was persuaded to surrender the share certificate belonging to her late husband on the promise that she stood to benefit from the profit every month.
32. It was her evidence that she was then given Kshs 3000/- after surrendering her husband's death certificate, identity Card and they promised her that she will be supplied with a new death certificate She was able to identify the death certificate as MFI-1, the share certificate MFI-3 (a), (b), and (c).
33. As to whether the evidence was inconsistent and contradictory: The respondent submitted that the evidence of PW1 to PW10 was consistent and that there were shares that were taken fraudulently and the exhibits were produced.
34. As to whether the evidence was uncorroborated and circumstantial: The respondent submitted that the evidence adduced in Court was clear and well corroborated. It pointed a finger at the Appellant as being the maker of the documents that were used to transfer the deceased's shares from the Kenya Commercial Bank.
35. Further, that the Appellant made a false document with all the elements of alteration that had the ability to defraud, and the document had apparent legal efficacy that was intended to defraud, hence forgery. The state relied on *Alake v The State* a Nigerian Case, where the Court listed the ingredients of the offence of forgery as:
 - i. That there is a document or writing;
 - ii. That the document or writing is forged;
 - iii. That the forgery is by the accused person;
 - iv. That the accused person knows that the document or writing is false
 - v. That he intended the forged document to be acted upon to the prejudice of the victim in the belief that it is genuine.
36. The state argued that all the above ingredients were proved by all the prosecution witnesses and confirmed by PW8 the Forensic Documents Examiner.



Analysis and determination

Issues

37. Three issues arise in this case are as follows:
- a. Whether there was a document in writing and whether it is forged
 - b. Whether the forgery is by the accused
 - c. Whether the accused knew the document was false/forged
 - d. Whether the document was intended to be acted upon to the prejudice of the victim

Whether there was a document in writing and whether it is forged

38. The offence of forgery is defined under Section 345 of the Penal Code (CAP 63) of Kenya as the making of a false document with intent to defraud or to deceive. Further, Section 357 of the Penal Code on making documents without authority provides:

' Any person who, with intent to defraud or to deceive -

- a. Without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or
 - (b) Knowingly utters any document or electronic record or writing so made, signed or executed by another person, is guilty of a felony and is liable to imprisonment for seven years'
39. It cannot be denied that the Share transfer transactions forms were forged. They included the Nairobi Securities Sale and Purchase Transfer Forms, respectively, serial numbers xxxx and xxxx for 5,330 shares. The shares were the property of the deceased's beneficiary, Tabitha Wanjiru Kihoi. This was contained in the evidence of PW1, the complainant. She was approached by two persons who essentially tricked her into handing over to them the share certificates, deceased's ID and signed transfers, in exchange for 3,000/-. However, she was not able to identify the accused in the dock.

Whether the forgery is by the accused

40. The DC who testified as PW5, stated that the stamp and the documents for use in transfers were under the custody of the Clerk, Joseph Maina PW 4. On his part, PW4 testified that the handwriting in the transfer forms for sale and purchase was not his nor were the signatures; that the District Clerk, the Appellant, was:

' The person who was to sign the transfer. I was working at human resource office my work was to oversee the happenings of the clerical officers as the most senior there Josphat Gakuya was assigned the duties of Estates. He was to receive documents and then transfer the information to the relevant office.

I can say the document was signed by Joseph Muriuki Gakuya'

41. In cross examination PW4 stated that although his name is on the form, he could see the signature of the appellant where his, PW4s name is written. He gave samples of his handwriting to the IO.



42. PW5, stated that the signature under his name on the forms was not his and the rubber stamp affixed was not the one they use. The name of Joseph Thiongo, the Senior Clerk was on the forms, but he did not recognise the handwriting as Thiongo's; that he did not sign the documents as DC.
43. PW8 Geoffrey Chania was the forensic document examiner. He examined the Nairobi Stock Exchange Transfer form A1 (PMFI 4(a) and B1(PMFI 18) and B2 (PMFI 19) being documents containing the known handwriting of the appellant; and specimen handwriting of the appellant (PMFI 1(a)). He also got the specimen signature of the DC (PMFI 11)
44. He concluded that the handwriting in the transferor section and transferee section outlined in a pink pen on both sale and purchase form (PExb 4a and 4b) was made by Joseph Maina Gakuya, the appellant. He also concluded that the signature of the DC on the two forms was not appended by the DC Kirinyaga East. The signatures were made by different authors, but the DCs stamp impression was the regular stamp used by the DC; the stamp shown highlighted in green ink was the stamp used by the stamp of the District Clerk
45. It was not conclusive who witnessed the signature of the transferor, but the witness signature on the transferee form purporting to be that of the DC was, as already stated, discounted by the document examiner
46. The common thread of the evidence therefore is that the critical sale and transfer forms were essentially completed by the appellant and the DC did not sign either the sale or purchase form. Who signed on behalf of or forged the signature of the DC is not indicated from the forensic evidence.
47. On the completion and execution of these critical forms, the evidence in chief of the appellant was that:
- ' I did not sign anywhere but I did what I was instructed. I don't know the accused and never met them before'
48. However, in cross examination he admitted with regard to PExb 4(a) and (b):
- ' In this case the district clerk interrogated the beneficiaries. I was instructed to fill the forms by Joseph Thiongo. He was present then (PExb 4(a)& (b). I am the one who signed the form. The district clerk is supposed to sign the form. I only filled in the figures of shares and name of the company and the transfer. I did the same for the purchase/ transfer forms. In this case the 1st accused was to be present but I don't know if he opposed. I knew the shares belonged to the late Kihoi. There should be an agreement, the ID card of the beneficiary, the death certificate, original share certificates.' (ROA pg 89 Lines 10-24
- This admission tallies with the finding of the documents examiner that the forms were not signed by the DC.
49. I have perused PExb 4(a) and 4(b), the Nairobi Stock Exchange Sale (4(a)) and Transfer (4(b)) Forms S/No xxxx and xxxx respectively. The appellant admitted in cross examination that he signed them. He stated in evidence in chief that he did not see the parties himself, that the documents that he was given by PW 4 the Clerk were the sale transfer form, letters of indemnity, and affidavit in case of loss of shares.
50. On Forms PExb 4(a), the only space for a signature is that of the transferor and the witness. In Form PExb 4(b) the only space assigned for signature is that the transferee and the witness. It has been shown that the DC did not sign. It has been admitted by the appellant that he signed, yet there was no assigned place for him to sign except those spaces assigned for transferor and witnesses.



51. I am constrained to find that the appellant by signing these forms, according to his admission, he essentially forged them. Discussing the components of the offence of making a false document, the court in *Joseph Muerithi Kanyita vs R [2017] eKLR* stated:

' That offence is committed by the making, signing or executing a document, electronic record or writing, for or in the name of another person. In addition, the making, signing or execution must be without lawful authority or excuse, and with the intent to defraud or deceive.'

In the present case, the trial court convicted the appellant for forging the signature of the District Commissioner, PW 5 and his clerk, PW4.

Whether the accused knew the document was false/forged

52. The Appellant submitted that in *John Mauri Wandithi v Republic Nyeri High Court Criminal Case No 404 of 2002* where Okwengu J (as she then was) held that even where there is evidence that documents are forged the prosecution has to further prove that the forgery was done by the accused person. It is a forgery if the signing is done for or in the name of another.

53. As already stated, the appellant was aware as to who the signatories of the Forms PExb 4(a) and (b) were supposed to have been. This is clear from his statement that:

' I am the one who signed the form. The district clerk is supposed to sign the form.

Having signed the form in a space that was not intended for him to so sign, the appellant knew that the document thereby became a forgery.

Whether the document was intended to be acted upon to the prejudice of the victim.

54. It is not in dispute that where a document is stated to be forged, the guilty party must be shown to have intended it to be acted upon to the victim's prejudice.

55. The trial magistrate convicted the appellant on counts 1,2,3 and 4. The trial magistrate found that there was proof that the appellant acted with intent to defraud or deceive, without lawful authority or excuse made or forged Nairobi Securities Exchange Sale and Purchase Transfer Forms serial numbers xxxx and xxxx, respectively. The trial court found that the appellant (2nd Accused) took advantage of his position as an insider in the DCs office to forge the signatures of the then DC and of Joseph Thiongo the Clerk

56. The trial court also found that there was no evidence led to show any connection between the 1st accused and the 2nd accused. The question that arises then, is whether there was any prejudice intended against the victim by the appellant.

57. I am of the considered view that the appellant, by signing a document in a place where he is not authorised to sign, and is so doing forging the signatures of the persons authorised to sign, must be deemed to intend prejudice to the victim unless it is demonstrated that the appellant acted innocently, under duress, coercion or similar circumstances.

58. The appellant testified that he had worked in the DCs office for one year; that he did not see the parties to the sale himself; that he was aware that he was aware of various documents used in such transactions including sale transfer form, letter of indemnity and affidavit in case of loss of shares; that such documents are availed by beneficiaries; that stamps are kept under lock and key.

59. With that knowledge, the appellant exercised himself to fill in the sale forms, signed them, and stamped or procured their stamping. There was no evidence of innocence, coercion or duress on his part. It is



clear that the signed forms were intended to be acted upon to fulfil the transaction which was a sale and transfer by the beneficiary of the estate.

60. To this end, I find no basis for interfering in the trial court's determination, and no merit in the appeal. It is hereby dismissed. The conviction and sentence are upheld.

61. Orders accordingly.

DATED AND DELIVERED THIS 27TH DAY OF JANUARY, 2023.

R. MWONGO

JUDGE

In the presence of:

1. Mr. Ndegwa for the Appellant

2. Mr. Mamba for the State

3. Mr. Joram, Court Assistant

