



REPUBLIC OF KENYA



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**Maina v Republic (Criminal Appeal 48 of 2019)
[2023] KEHC 26006 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26006 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL 48 OF 2019
DAS MAJANJA, J
NOVEMBER 30, 2023**

BETWEEN

JOSEPH ARAP MAINA ALIAS SIMON MBUGUA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Original Conviction and Sentence of Hon. L. Kathure, CM dated 18th November 2019 in Criminal Case No. 617 of 2019 at the Magistrate's Court at Nanyuki)

JUDGMENT

Introduction and Background

1. Before the trial court, the Appellant and two other accused persons were charged with the following 11 counts:
 - i. Count I: Obtaining money by false pretences contrary to section 313 of the Penal Code (Chapter 63 of the Laws of Kenya). It was alleged that between 08.10.2012 and 29.11.2012 at an unknown place within the country, the Appellant jointly with others and with intent to defraud, obtained Kshs. 17,000,000.00 cash from David Kamande Muiruri by falsely pretending that he was in a position to sell him land registered as LR No. Nanyuki/Marura/Block 4/41(Kimuri) (“the suit property”) measuring approximately 40.6 hectares, a fact which was false
 - ii. Count II: Personation contrary to section 382 of the Penal Code. It was alleged that between 08.10.2012 and 29.11.2012 at an unknown place within the country, the Appellant represented himself to be Simon Mbugua Thungu (Director of M/s Eldoret Express Company Limited)



- iii. Count III: Forgery contrary to section 349 of the Penal Code. It was alleged that between 08.10.2012 and 29.11.2012 at an unknown place within the country, the Appellant jointly with others and with intent to defraud, forged a certain document namely National identification card number xxxx purporting to be the identification card of James Muigai Thungu (Director of M/s Eldoret Express Company Limited)
- iv. Count IV: Forgery contrary to section 349 of the Penal Code. It was alleged that between 08.10.2012 and 29.11.2012 at an unknown place within the country, the Appellant jointly with others and with intent to defraud, forged a certain document namely National identification card number xxxx purporting to be the identification card of Simon Mbugua Thungu (Director of M/s Eldoret Express Company Limited)
- v. Count V: Forgery contrary to section 349 of the Penal Code. It was alleged that between 08.10.2012 and 29.11.2012 at an unknown place within the country, the Appellant jointly with others and with intent to defraud, forged a certain document namely National identification card number xxxx purporting to be the identification card of Joseph Nganga Thungu (Director of M/s Eldoret Express Company Limited)
- vi. Count VI: Forgery contrary to section 349 of the Penal Code. It was alleged that between 08.10.2012 and 29.11.2012 at an unknown place within the country, the Appellant jointly with others and with intent to defraud, forged a certain document namely Certificate of Incorporation Number C61xxx purporting to of M/s Eldoret Express Company Limited
- vii. Count VII: Forgery contrary to section 349 of the Penal Code. It was alleged that between 08.10.2012 and 29.11.2012 at an unknown place within the country, the Appellant jointly with others and with intent to defraud, forged a certain signature purporting to be that of Simon Mbugua Thungu (Director of M/s Eldoret Express Company Limited)
- viii. Count VIII: Uttering a false document contrary to section 353 of the Penal Code. It was alleged that between 08.10.2012 and 29.11.2012 at an unknown place within the country, the Appellant jointly with others knowingly and fraudulently uttered a forged national identity card number xxxx to Albert Kuloba Commissioner of Oath of (A.S Kuloba and Wangila Company Advocates) purporting it to be the national identity card of James Muigai Thungu
- ix. Count IX: Uttering a false document contrary to section 353 of the Penal Code. It was alleged that between 08.10.2012 and 29.11.2012 at an unknown place within the country, the Appellant jointly with others knowingly and fraudulently uttered a forged national identity card number xxxx to Albert Kuloba Commissioner of Oath of (A.S Kuloba and Wangila Company Advocates) purporting it to be the national identity card of Simon Mbugua Thungu
- x. Count X: Uttering a false document contrary to section 353 of the Penal Code. It was alleged that between 08.10.2012 and 29.11.2012 at an unknown place within the country, the Appellant jointly with others knowingly and fraudulently uttered a forged national identity card number xxxx to Albert Kuloba Commissioner of Oath of (A.S Kuloba and Wangila Company Advocates) purporting it to be the national identity card of Joseph Nganga Thungu
- xi. Count XI: Uttering a false document contrary to section 353 of the Penal Code. It was alleged that between 08.10.2012 and 29.11.2012 at an unknown place within the country, the Appellant jointly with others knowingly and fraudulently uttered a forged certificate of incorporation number C61xxx to Albert Kuloba Commissioner of Oath of (A.S Kuloba and Wangila Company Advocates) purporting it to be of M/s Eldoret Express Company Limited



2. The matter was set down for hearing where the Prosecution lined up 17 witnesses to prove its case against the Appellant. In his defence, the Appellant testified on his own behalf. After considering the charges, evidence and submissions presented by the parties, the trial court, in a judgment dated 18.11.2019 found that the Respondent had proved its case beyond reasonable doubt against the Appellant in each of the 11 counts. He was convicted and sentenced to serve 3 years' imprisonment on each count. The sentences in Counts I, II, III, IV were to run concurrently, same as Counts V, VI and VII and; Counts VIII, IX, X, and XI meaning in total, the Appellant was to serve 9 years' imprisonment. The other accused were acquitted.
3. The Appellant is dissatisfied with this decision and now appeals against the convictions and sentences and seeks to have the same set aside by the court and that he be acquitted forthwith. His appeal is set out in the Petition of Appeal dated 02.12.2019 and is supported by his written submissions. The Respondent has also filed written submissions in its opposition to the appeal.

Analysis and Determination

4. In determining this appeal, I am mindful that I am required to review all the evidence and come to my own conclusions as to whether to uphold the convictions and sentences bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see *Okeno v Republic* [1972] EA 32, *Kiilu and Another v Republic* [2005] 1 KLR 174). In order to proceed with this task, it is necessary to reprise the evidence emerging before the trial court.
5. As stated, the Respondent presented 17 witnesses. Joseph Nganga Thungu, a director of Eldoret Express Limited ("the Company") (PW 1) stated that the suit property was purchased by his brother and director of the Company, James Muigai Thungu (PW 2) in 1996 on behalf of the Company and a title deed issued to that effect. When PW 2 informed him in 2013 that someone had fenced the suit property, he reported the matter to the Nanyuki CID office where he recorded his statement and was informed that the suit property had been sold and transferred someone else. When shown a letter in the name of the Company and photographs of its alleged directors, he denied that the letter was from the Company or that the photographs represented the actual directors. He also denied signing a sale agreement and transfer which indicated the directors as PW 1, PW 2 and Simon Mbugua (PW 3) and a resolution by the Company to sell the suit property. He stated that a photocopy of the identity card in his name shown to him was not his.
6. PW 1 denied meeting the person who purchased the suit property and further denied knowing the Appellant. PW 1 stated that the loss of the title deed of the suit property was reported to the Police. He denied that PW 2 sold the suit property or that he appeared before an advocate in the firm of A.S Kuloba & Wangila Advocates to sign the sale agreement as indicated in the said agreement. PW 1 denied knowing an entity by the name Eldoret Company Limited or Eldoret Transporters Enterprise or the documents associated with them.
7. PW 2 confirmed that he purchased the suit property on behalf of the Company and when he visited it in 2013, he found that it was fenced whereupon he reported to the Police. He also confirmed that he had reported the loss of the title deed to the suit property but by the time he found it at Nanyuki Police Station, it had been cancelled and another one issued in the name of a person called 'Kamande'. PW 2 denied signing the transfer forms for the sale of the suit property and further denied knowing the Appellant.
8. PW 2 stated that when he bought the suit property, he was the one who signed the transfer form on behalf of the Company. PW 2 denied that he was the one who sold the suit property and reported the loss of the title deed to cover up the sale. He denied knowing who sold the suit property and stated that



he did not know the person whose photograph appeared on the signed transfer form. PW 2 stated that the Company does not hold board meetings and thus the impugned board resolution that resolved to sell the suit property was forged. He denied the stamp impressed therein and stated that the same was forged and that the said resolution did not have the Company's letterhead. PW 2 stated that he had lost his identity card and that he had reported the same to the police after the suit property had been sold. PW 2 stated that the Company is called Eldoret Express Limited and not Eldoret Express Company Limited and also stated that he did not know Eldoret Transporters Enterprises and the documents associated with it. PW 2 stated that the Identity card and PIN numbers indicated on the transfer were his but that the photo therein was not.

9. PW 3 recalled that the Company bought the suit property and that PW 2 informed him in 2013 that the suit property had been fenced off. PW 3 also identified the suit property green card and official search which indicated that the title deed had been cancelled and the suit property was transferred to David Kamande Muriuri in 2012. He denied that the Company sold the suit property. He also denied signing the sale agreement that sold the suit property, attending any Land Control Board meeting or ever meeting the Appellant. When shown the identity card used in the transactions, PW 3 stated that the photo resembled the Appellant. He also denied knowing of any subsidiaries of the Company or Eldoret Transporters Enterprise. He stated that he had never been to the office of the firm of A.S Kuloba. PW 3 denied that the PIN certificate No. A006xxxxxK was his.
10. PW 3 also testified that Eldoret Express Limited and Eldoret Express Company Limited were one and same thing. He confirmed that PW 2 informed him that he reported the loss of the title deed to the suit property. He stated that PW 2 did not sell the suit property without the authority of PW 1 and PW 3 and denied signing any transfer form or participating in any sale of the suit property. PW 3 told the court that the Simon Mbugua indicated in the sale documents is fake and that the signatures appearing therein do not belong to PW 1, PW 2 or PW 3.
11. Jacob Oduor (PW 4), a Forensic Document Examiner stated that he received the impugned sale agreement, transfer, two certificates of incorporation of the Company and specimen and known signatures of PW 1, PW 2 and PW 3 for examination and analysis. He concluded in his report dated 23.07.2013 that the signatures in the sale agreement and transfer as compared to the specimen and known signatures of PW 1, PW 2 and PW 3 were different and that the font and style of the two certificates of the Company and that of Eldoret Express Company Limited were different and were not accurately dated as there were omissions on the dates. However, PW 4 stated that he could not tell whether the Appellant signed the documents as PW 1. He reiterated that the signatures in the sale agreement and transfer forms were not genuine and that they were forged. PW 4 confirmed that he did not receive the Appellant's specimen signature for analysis.
12. Michael Njagi Macharia (PW 5), an Assistant Manager in charge of security and investigations in respect of this case at Postal Corporation of Kenya recalled he was requested to investigate Postal Box xxxx and code 00100 which he stated could not be traced at the General Post Office (GPO) Nairobi. Teresia Wanjiku Mugure (PW 6) stated that she was the Assistant County Commissioner, Laikipia Central Ward, Laikipia East Sub County whose duties included representing the Deputy County Commissioner as Chairman of the Land Control Board. She recalled that a meeting of the Board was held on 31.10.2012 in relation to an application for consent from the Company to David Kamande and the Appellant appeared as a director of the Company and claimed he was PW 3. According to PW 6., the identity card presented by the Appellant appeared genuine and she had no reason to doubt its authenticity. PW 6 testified that the Appellant was asked why the other directors of the Company were not present and he informed them that one of them was seriously sick while the other had sent his daughter.



13. The Secretary to the Land Control Board at Nanyuki, Paul Gihaa Mbogo (PW 7) confirmed that at the meeting chaired by PW 6, the Appellant appeared and identified himself as PW 3, produced an ID card that had PW 3's name and presented other documents of the Company and other directors of the Company. That the Board considered the documents as genuine.
14. David Kamande Muriuki (PW 8) recalled that he was introduced by one of the accused to people who claimed to be directors of the Company as he was interested in purchasing the suit property. They informed him that the price of the suit property was Kshs. 170,000.00 per acre hence Kshs. 17,000,000.00 for the 100 acres. Since he was interested in the suit property, he contacted his advocate to contact the vendor's advocate, A. S Kuloba who drafted the sale agreement which he executed on 19.10.2012. Thereafter he wired a deposit of Kshs.6.8 million to his advocate for onward transmission to the vendor's advocate. He also stated he executed the transfer documents.
15. PW 8 further stated that he was represented by his advocate at the Land Control Board after which he sent the balance of the purchase price, Kshs. 10.2 million to his advocate who in turn sent it to the vendor's advocates. PW 8 confirmed that he obtained the Title deed of the suit property in his name on 07.12.2012. That he took up possession soon after in January 2013 where he began developing the same. He later learnt that there had been inquiries and complaints in regard to the suit property at the Lands office and the CID office in Nanyuki and a restriction placed on the title. PW 8 recorded a statement and gave evidence on the transaction.
16. The advocate, Albert Simiyu Kuloba (PW 9), recalled that in October 2012, two gentlemen, one who stated that he was Simon Mbugua, and a lady walked into his office and introduced themselves as directors of the Company. After confirming that they had a property in Nanyuki for sale, they gave him documents relating the suit property including a copy of the Company's certificate of incorporation, copies of ID cards of PW1, PW2 and PW 3, the Company's Board resolution confirming that the directors had sat and agreed to sell the suit property, a copy of the Company's PIN and the original title of the suit property to enable him prepare the sale agreement. PW 9 stated that he prepared the sale agreement which was executed by the directors of the Company, Joseph Nganga and Simon Mbugua who appeared before him. He confirmed that he received the Kshs. 6.8 million deposit from PW 8's advocate. He was also instructed to remit Kshs. 1 million to the agent who procured the buyer, Kshs. 2 million to an account in the name of Eldoret Transporters Enterprise and he retained Kshs. 400,000.00 as part of his legal fees.
17. PW 9 further confirmed that he received the balance of the purchase price, Kshs. 10.2 million after he prepared the transfer documents. He remitted part of the sum to the account of Eldoret Transporters Enterprises and to Joseph Nganga Thungu and Simon Mbugua in the presence of the lady, Mercy Mungai. PW 9 also clarified that the transfer forms were not signed by the Company's directors in his office.
18. Wachira Muriuki (PW 10), a surveyor by profession testified that he showed PW 8 the boundaries of the suit property by identifying its beacons and certified that it measured 100 acres. Amos Janai Chweya (PW 11), the advocate who acted for PW 8, confirmed much of PW 8's testimony about conducting due diligence of the suit property, executing the sale agreement and transfer, paying the purchase price and receiving the requisite completion documents for the suit property. PW 11 confirmed that he was present at the Land Control Board meeting and that the person who appeared as Simon Mbugua kept changing names. He further stated that Simon Mbugua appeared with a lady called Mercy who introduced herself as a daughter of one of the directors. PW 11 stated that he only witnessed the execution of the documents by PW 8 and that in the entire transaction he only dealt with his colleague, PW 9.



19. Yusuf Sikudhani (PW 12), a Relations Manager working with Gulf African Bank confirmed that Eldoret Transporters Enterprises opened a partnership account with the Bank on 03.11.2012 with the following partners; Robert Muthuri, Joseph Arap Maina, James Mungai Thungu, Joseph Nganga Thungu and Simon Mbugua. PW 12 stated that the parties availed all documents sought to open the account including ID details, KRA Pins, passport size photographs, a Board resolution, certificate of registration and an introduction note. PW 12 confirmed that one of the passport size photographs availed belonged to the Appellant. He further stated that only two deposits were made to the account after it was opened; an initial Kshs. 10,000.00 deposit and payments by PW 9.
20. Cpl. Jacob Kathurima (PW 13) testified that on 03.09.2013, he arrested the Appellant in Nairobi, booked him at Pangani police station from where Nanyuki police picked him up. Oson Otieno Owino (PW 14), a Records Officer at the Attorney General's office, testified that the two certificates of incorporation before the trial court were different and that the one indicated as Eldoret Express Company Limited did not originate and was not signed from their office and that the same document did not bear the name of the registrar and was thus invalid.
21. Beatrice Wairimu Mwai (PW 15), a Lands Registrar testified that she received the transfer documents lodged by PW 11 which indicated that Eldoret Express Company Limited was transferring the suit property to PW 8 and a title deed was issued to him. PW 15 states that she signed the title deed herself after being satisfied that all documents availed were in order. She also confirmed the entry of the restriction against the title on 06.11.2012 which indicated that there could have been a problem with the land. PW 15 stated that she did not know who the transferors were and that she never detected anything unusual with the transaction until the CIDs came with a request for the restriction. PW 15 stated that she could not recall receiving a document from Eldoret Express Limited but Eldoret Express Company Limited and that to her, they were valid documents and thus the transfer was done.
22. Francis Mburu (PW 16), a Registration Officer in Laikipia Sub County between 2017 and 2018 testified that on 26.02.2014 he received a request from the DCIO over fingerprints concerning the Appellant. In a response dated 06.03.2014, it was established that ID No. 3424033 belonged to the Appellant and that of Simon Mbugua was 6432482. He stated that Simon Mbugua was not the same person as the Appellant.
23. The Investigating Officer, Inspector Josiah Chelangat Maritim (PW 17), recalled that on 27.06.2013, PW 2 complained that the suit property had been transferred to a new owner without the Company's authority whereupon he commenced investigation after recording statements from PW 1, PW 2 and PW 3. That PW 2 reported the loss of his ID and the title deed of the suit property. That on 27.06.2023, the Registrar at the Laikipia Lands Registry forwarded to him various documents lodged at the time of the transfer of the suit property. He established that PW 1, PW 2 and PW 3 were the Company's directors and gathered from PW 14 that Eldoret Express Company Limited did not exist hence the registration was forged and documents supporting the registration were not genuine.
24. PW 17 also found that from the transfer document, the names and ID numbers of PW 1 and PW 2 were indicated but the passport photos therein were not theirs. From the information obtained from PW 16, PW 1, PW 2 and PW 3, the three persons who executed the transfer documents on behalf of the Company were not the same as the three known directors of the Company. From the evidence of PW 4, he confirmed that the signatures were made by different persons and that the persons listed as vendors in the transfer documents were not the directors of the Company. PW 17 also investigated the Appellant's ID Number through elimination of his fingerprints which they sent to the National Registration Bureau and found that his ID Number was given as 3424033 belonged to the Appellant and not Simon Mbugua the one purported to have conducted the sale. PW 17 also found that the Board



resolution of the Company was forged and that the account of Eldoret Transporters Enterprises at Gulf Bank was opened by the Appellant and another person. PW 17 also testified that it is the Appellant who signed the application of the consent from the Land Control Board and that he received Kshs. 1 million purporting to be a director, Simon Mbugua. PW 17 summed that his investigations revealed that the entire transaction was mired in forgery occasioned by the Appellant who also committed offences of obtaining money by false pretences, impersonation and uttering false documents.

25. After considering the evidence tendered by the Respondent, the trial magistrate ruled that a prima facie case had been made out against the Appellant that required him to put up a defence. The Appellant testified and denied the allegations against him. He denied any knowledge of the suit property or the Company. He asserted that he is a member of Eldoret Transporters Enterprises together with PW 1, PW 2, PW 3 and others and that the said entity opened an account with Gulf Bank and that PW 1 was in the office when the said bank official came into the office. He also stated that he had minutes showing that the said persons authorized him and one Robert Muthuri to open the account. The Appellant averred that money from the Company found its way into Eldoret Transporters Enterprises as the account with Gulf Bank was operational and that one of the members, Robert Muthuri had no problem with the same. The Appellant denied withdrawing any money from the Company and further denied receiving any money from the said Robert from the Gulf Bank account as proceeds of the sale of the suit property. He further denied forging any document or impersonating PW 3, stating that he knew him as a member of Eldoret Transporters Enterprises. The Appellant further denied delivering documents to the firm of PW 9.
26. The Appellant claimed that he was only arrested because the said Robert Muthuri could not be traced by the police and that he was asked for cash bail of Kshs. 200,000.00 and informed that the police would pursue Robert Muthuri. Thus, the Appellant stated that if Robert was traced he would not be arraigned and charged in court. The Appellant denied signing the impugned sale agreement or signing any document on behalf of PW 3. He stated that Eldoret Express Company Limited is unknown to him and that PW 16's evidence did not tally with the information in the transfer documents. That PW 15 misled the trial court when she testified that it is him who delivered the application for consent to the Land Control Board. The Appellant stated that he did not steal any money from PW 8 and that PW 1, PW 2 and PW 3 are known to him even though they denied him in open court. He further denied delivering their details and ID Copies to the firm of PW 9 or signing the transfer forms of the suit property. He also stated that the photographs on the transfer forms were strange to him.
27. As stated, the trial court found the Appellant guilty of all counts against him and the duty of this court is thus to review all the evidence and come to its own conclusions as to whether to uphold the convictions and sentences imposed. The Appellant was charged, convicted and sentenced on the counts of obtaining money by false pretences contrary to section 313 of the Penal Code, personation contrary to section 382 of the Penal Code, forgery contrary to section 349 of the Penal Code and uttering a false document contrary to section 353 of the Penal Code.
28. For the offence of obtaining money by false pretences, section 313 of the Penal Code provides as follows:

Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.



29. The trial court relied on the court’s decision in *Joseph Wanyonyi Wafukho v Republic BGM HCCRA* No. 200 of 2012 [2014] eKLR which discerned that from the aforementioned provision, the essential elements of the offence of obtaining through false pretences are that the person:
- a. Obtained something capable of being stolen;
 - b. Obtained it through a false pretence; and
 - c. With the intention to defraud.
30. The trial court also relied on section 312 of the Penal Code which defines. “ ‘false pretence’ as ‘Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.’”
31. Juxtaposing the facts and evidence I have outlined above, I find that there was evidence from PW 9 that was confirmed by PW 17 that the Appellant directly received at least Kshs. 1 million from the subject transaction. There was also undisputable evidence that the Appellant indirectly received well over Kshs. 10 million through his entity Eldoret Transporters Enterprises from this transaction. Thus, there can be no doubt that the Appellant received some money, directly or indirectly from this transaction. Money is something that it capable of being stolen and therefore, the first ingredient of the offence was proved. Next, is whether the Appellant obtained this money through false pretences, that is, did he, by words, conduct or in writing represent himself as a director of the Company and owner of the suit property thus capable of selling the property, when he knew this to be false?
32. The prosecution was able to demonstrate that the suit property was owned by the Company and that its directors were PW 1, PW 2 and PW 3 who did not authorise the sale of the suit property. The Appellant was neither a director nor an agent of the Company and by his own testimony had, “nothing to do with Eldoret Express Ltd”. Despite this denial, there was evidence by PW 4, PW 6, PW 7, PW 8, PW 9 and PW 17 that the Appellant held himself out as a director of the Company, through documents he presented and that he represented to others that he was in a position to sell the suit property on behalf of the Company and as its director. This was false representation as the Appellant was not a director of the Company and had no capacity to bind the Company to sell the suit property. The Appellant knew that his holding out as a director of the Company and his capacity to bind the Company to sell the suit property was false but he still went about representing himself to people as such. I have thus little doubt in finding, just like the trial court, that the Appellant obtained the money he received from the proceeds of the sale of the suit property by false pretence and he definitely had an intention of defrauding everyone involved. All the ingredients for the offence of obtaining money by false pretences were thus proved and for these reasons, I find that the trial court rightly convicted the Appellant on those counts.
33. On the counts of personation, section 382(1) of the Penal Code provides as follows:
1. Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanour.
34. There was evidence by PW 4, PW 6, PW 7, PW 8, PW 9 and PW 17 that the Appellant represented himself as PW 3 and PW 3 confirmed that this representation was false as he was never in the Land Control Board meeting and in the presence of PW 9 to sign the impugned sale agreement. All these was being done by the Appellant and I find that he indeed falsely represented himself as PW 3 and the trial court was right to find and convict him as such.



35. The Appellant was also charged, convicted and sentenced with various counts of forgery contrary to section 349 of the Penal Code which provides as follows:

Any person who forges any document is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.

Section 345 of the Penal Code defines forgery ‘...the making of a false document with intent to defraud or to deceive.’ The Appellant was accused of forging the ID documents of PW 1, PW 2 and PW 3, the signature of PW 3 and certificate of incorporation of Eldoret Express Company Limited. This charge was supported by the testimony and evidence of PW 16 that the Appellant’s ID Number was 3424033. The evidence of PW 6, PW 7 and PW 9 was that the Appellant and his accomplices presented ID cards bearing the names of PW 1, PW 2 and PW 3. The Appellant also presented a certificate of incorporation of Eldoret Express Company Limited which certificate PW 4 stated was not genuine and a forgery, testimony that was corroborated by PW 14. PW 4 also stated that the signatures in the sale agreement and transfer documents did not match with the specimen and known signatures of PW 3, who the Appellant was impersonating in the subject transaction. The Appellant offered no explanation as to how these documents and PW 3’s signature came about in the impugned sale agreement and transfer and yet he was actively involved in the entire transaction. It is clear that the above evidence directly ties the Appellant to those forged documents and the inescapable conclusion from the totality of the evidence is that the Appellant forged those documents. I therefore come to the same conclusion the trial court rightly found that the Respondent proved the offence of forgery against the Appellant on all counts.

36. On the counts of uttering a false document, section 353 of the Penal Code provides that ‘Any 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.’ The Court of Appeal, in *Kepha Moses Mogoi v Republic NRB CA CRA No.99 of 2013 [2014] eKLR* stated that this offence is proved if a person knowingly and fraudulently utters a false document. In law, a document is classified false when it purports to be made by a person who did not make or authorise its making or if its contents be altered materially, or if the whole or part of it is shown to have been made by or on behalf of a person who is fictitious or deceased or where it is indeed shown to have been made by a living real person or by his authority the intention is to pass it as having been made by another not being the maker. Put differently, a document is false when, among other things, it purports to be what it is not; when altered without authority so as to affect its effect and alter the purport thereof or when signed without authority in the name of the person as the author or where the person shown as the author is fictitious or dead (See *Peter Thurania v Republic MRU HCCRA No. E038 of 2021 [2022] eKLR*).
37. The Appellant was accused of uttering ID cards he claimed belonged to PW 1, PW 2 and PW 3 and the certificate of incorporation of Eldoret Express Company Limited to PW 9. As stated, PW 9 testified that these forged documents were presented to him by the Appellant and his accomplices. The Appellant knew that these documents were forged but he presented them to PW 9 with an intent to defraud PW 8. These counts were therefore proved to the required standard against the Appellant.
38. From the foregoing and having analysed the evidence independently I have come to the same conclusion as the trial magistrate and I am satisfied that the prosecution proved its case beyond reasonable doubt. I affirm the convictions on each and every count.
39. Turning to the issue of sentence, the principles upon which an appellate court may interfere with the sentence imposed by a trial court are well known. It has been held that a sentence must in the end depend upon the facts of its own particular case and the appellate court shall not interfere with the



discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factor, acted on a wrong principle or his sentence is manifestly excessive in the circumstances of the case (see *Ogulo s/o Owuora v Regina* [1954] 21 EACA 270, *Wanjema v Republic* [1971] EA 599 and *Griffin v Republic* [1981] KLR 121).

40. As stated in the introductory part, the trial magistrate sentenced the Appellant as follows:
- a. Counts I, II, III and IV – 3 years imprisonment to run concurrently
 - b. Counts V, VI and VII – 3 years imprisonment to run concurrently
 - c. Counts VIII, IX, X and XI – 3 years imprisonment to run concurrently
41. The offence of forgery attracts a maximum sentence of 3 years' imprisonment under section 349 of the Penal Code. The Appellant was sentenced to this maximum penalty and in considering the same, the trial magistrate took into account the fact that the Appellant was a first offender, that offences he had committed were serious and that the seriousness of this offence calls for a deterrent punishment. However, it is a general principle that the maximum penalty should not be imposed on a first offender and if it is indeed imposed, it should be for the worst offenders (see *Josephine Arissol v R* [1957] EA 447 and *Samuel Kinyua Kirimania v Republic KBU HCCRA No. 26 of 2017* [2018] eKLR). I therefore quash the sentences imposed on the counts of forgery and substitute them with a sentence of 1(one) year each.
42. Obtaining money by false pretence also attracts a maximum sentence of 3 years under section 313 of the Penal Code and this is what was meted out on the Appellant. For the same reasons I have set out above, I set aside the maximum penalty and reduce the sentence to 1 (one) year imprisonment.
43. For the offence of personation under section 382(1) of the Penal Code, a person who is found guilty of this offence is guilty of a misdemeanor. Under section 36 of the Penal Code, the general punishment for a misdemeanor is a maximum term of 2 years' imprisonment with a fine or both. Under section 382(2), 'If the representation is that the offender is a person entitled by will or operation of law to any specific property and he commits the offence to obtain such property or possession thereof, he is liable to imprisonment for seven years.' The facts of impersonation in this case did not fall under section 382(2) hence the trial magistrate erred in imposing a 3 years' imprisonment on this count when the maximum sentence was 2 years' imprisonment (see *Samuel Kinyua Kirimania v Republic* (Supra)). Thus, the sentence of 2 years was illegal. I therefore quash it and substitute with a fine of Kshs. 500,000.00 or in default, the Appellant to serve imprisonment for 6 months.
44. In respect of the offence of uttering a false document, section 353 of the Penal Code provides that the person, '...is liable to the same punishment as if he had forged the thing in question.' The trial court found that the Appellant had forged the documents in question and thus, he is liable to the same punishment under section 353 as though it was section 349 for forgery. In the circumstances, I substitute the sentence therein with one-year imprisonment.
45. As to whether aforementioned sentences should run concurrently or consecutively, the Court of Appeal in *Peter Mbugua Kabui v Republic NRB CA CRA No. 66 of 2015* [2016] eKLR held as follows:

As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though



the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

46. Counts 1 and 2 are separate and distinct offences committed in different places and against different persons hence they run consecutively. Counts 3, 4, 5, 6 and 7 and Counts 8, 9, 10 and 11 relate to the same offences committed in the same transaction and against the same people. They ought to run concurrently. The total aggregate terms of imprisonment should therefore be 3 years and 6 months or a Kshs. 500,000.00 fine.

Disposition

47. In sum and in conclusion, I find that the learned trial magistrate's decision on the Appellant's conviction on all counts was sound and judicious. I dismiss the appeal on the conviction.
48. I allow the appeal on sentence. The sentences are quashed and substituted with the following sentences:
1. Count 1 – 1 year imprisonment
 2. Count 2 – A fine of Kshs. 500,000.00 or in default, 6 months' imprisonment
 3. Count 3 – 1 year imprisonment
 4. Count 4 – 1 year imprisonment
 5. Count 5 – 1 year imprisonment
 6. Count 6 – 1 year imprisonment
 7. Count 7 – 1 year imprisonment
 8. Count 8 – 1 year imprisonment
 9. Count 9 – 1 year imprisonment
 10. Count 10 – 1 year imprisonment
 11. Count 11 – 1 year imprisonment
49. Counts 1 and 2 shall run consecutively. Counts 3, 4, 5, 6, 7, 8, 9, 10 and 11 shall run concurrently and from the date of sentence in the Subordinate Court. The Appellant shall be given credit for any time served in pre-trial custody.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT NANYUKI THIS 30TH DAY OF NOVEMBER 2023.

A.K. NDUNG'U

JUDGE

