



REPUBLIC OF KENYA



**Wambui & another v Republic (Criminal Appeal 10 & 11 of 2020)
[2022] KEHC 10603 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL 10 & 11 OF 2020**

RB NGETICH, J

MAY 31, 2022

BETWEEN

GEORGE NGATIA WAMBUI 1ST APPELLANT

PETER NJOROGE KIHURIA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon . M. Ochieng PM dated 10th February 2020 in Githunguri Principal Magistrate's court, Criminal Case No. 1529 of 2014)

JUDGMENT

1. The appellants was charged in the subordinate court with the following offences:

Count I

Making a Document Without Authority Contrary to Section 357(a) of The Penal Code

Particulars

George Ngatia Wambui and Peter Njoroge Kihuria on unknown dates, time and place within the Republic of Kenya, jointly with others not before the court, with intent to defraud and without lawful authority or excuse made a certain document namely an application for late registration of birth purporting it to be a genuine application birth certificate form for late registration of birth signed and stamped by the chief of Githunguri location and his assistant chief Githunguri sub- location.



Count II

Making a Document without Authority Contrary to Section 357(a) of the Penal Code

Particulars

George Ngatia Wambui on the 16th day of May 2017 at Githunguri sub- location county within Kiambu county, jointly with others not before the court, with intent to defraud and without lawful authority or excuse made a certain document namely an introduction letter addressed to the manager Gititu coffee Factory purporting it to be a genuine letter issued, signed and stamped by the assistant chief of Githunguri sub- location.

Count III

Uttering a Document with Intent to Defraud Contrary to Section 357 (b) of the Penal Code

Particulars

George Ngatia Wambui on 16th May 2017 at Githunguri town, in Githunguri sub-location within Kiambu county, jointly with others not before the court, with intent to defraud knowingly uttered a certain forged document namely an introduction letter addressed to the Manager Gititu coffee Factory purporting it to be a genuine letter issued, signed and stamped by the assistant chief of Githunguri sub- location.

Count IV

Cheating Contrary to Section 315 of the Penal Code

Particulars

George Ngatia Wambui on 16th May 2017 at Githunguri town in Githunguri sub-location within Kiambu County, jointly with others not before this court, by means of fraudulent trick obtained Kshs 1,000/= from Grace Wanjiku.

2. During the trial court, the Prosecution availed 9 witnesses to prove its case. The appellants were jointly convicted on Count I. Accused I was acquitted of Count III and convicted on Count II and IV. For Count I both were sentenced to one (1) year imprisonment, for Count II Accused I was sentenced to 1 year imprisonment and Count IV, 6 months imprisonment.
3. The appellants were aggrieved by the decision and each appellant filed an appeal, being Kiambu Appeals No 10 and 11 of 2020. Citing the following grounds of appeal.
 - a. The learned trial Magistrate erred in law and fact by failing to find that not only was the mode of arrest unjustified by evidence but also that admitting the testimony of PW9 which was hearsay and ought not to be admissible in law
 - b. The learned trial Magistrate erred in law and in fact in matters of law and fact by not resolving the explicit contradictions in the prosecution case.
 - c. The trial Magistrate erred in law and in fact in failing to consider that the Prosecution failed to avail key and essential witnesses to testify in court.



- d. The trial Magistrate erred in matters of law and fact by rejecting the appellants' defence which was plausibly underpinned by the doubtful circumstances circumventing the mode of arrest in violation of natural justice.
 - e. The learned trial Magistrate erred in points of law and fact by conducting the trial in a manner that violated the appellant's rights to a fair trial under Article 50(2), (e) and (k) of *the Constitution* of Kenya 2010.
4. The two appeals HCRA Nos.10 and 11 both of 2020 were consolidated on 2nd September 2020 with HCCRA No. 10 of 2020 being the lead file.
 5. The Prosecution partly conceded with the appeal.
 6. Directions on the hearing of the appeal were issued on 24th January 2022. Counsels for the parties agreed to canvass the appeal by way of written submissions. The appellants filed their submissions on 21st September 2021, while the prosecution filed on 26th November 2021.

Appellants' Submission

7. Counsel for the appellants submitted that the trial court disregarded the appellant's defence and urged this court to find the learned trial Magistrate did not consider objectively and dispassionately their defence and her reasoning was not well deliberated nor resolutely expressed and Cited the case of the High Court of Bloemfontein, *South Africa of SA vs Singh* (1975) (1) SA 227 (N) AT 228 where the court laid down legal principles for determining whether a court has given due regard to evidence in its decisions as follows:

“the best indication that a court has applied its mind in the proper manner ...is to be found in its reason for judgment including its reason for acceptance and the rejection of the respective witnesses.”

8. Counsel for the appellants further submitted that the 2nd appellant in his defence states he was only a recommender of Martin Nderitu and did not participate in any other task and added that the prosecution failed to call the crucial witness who was the applicant of the late birth certificate.
9. Counsel for the appellants further submitted that the trial court failed to give reasoning for her finding, and urged the court to assume that the evidence was either disregarded or not properly weighed at the time of delivering the judgment.
10. The appellant's cited the case of *MKK vs Republic* (2019) eKLR where Mativo J. held as follows

“the facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment of the trial court if there was evidence led during the trial, but such evidence is not referred to in the judgment, it is safe for the court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment.”

“This court must determine, what the evidence of the state witnesses was, as understood within the totality of the evidence, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court about that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decisions/ findings or judgment.”



11. Counsel for the appellants further submitted that the learned trial Magistrate disregarded the prosecution's evidence that favoured the appellants and quoted the evidence of PW5 where in her statement on pages 36 to 38 of the record of appeal she stated as follows:-

“I(he) could not tell who filed the document and the appellants did not submit the document at her offices... the role of the recommender in the application is to state whether he knows the person.”

12. Counsel for the appellants further submitted that the evidence of PW2 favoured the 2nd Appellant who stated he had no issue with Peter recommending for Martin and the prosecution failed to challenge the issue of the 2nd appellant being a recommender of Exhibit 3; that the crucial evidence was not properly evaluated.

13. The third issue counsel for the appellants contends the trial court failed to call adverse and crucial witnesses in regards to exhibit 3, and only called crucial witnesses in regards to exhibit 1. Counsel contends the prosecution ought to have called Peris Wairimu and Livingstone the applicants of the late birth certificate application to shed light on exhibit 3 whether it was authored at the chief's office.

14. The appellants further submitted that the trial court failed to call the supervisor of the appellants who would have established if the appellants were assigned duties at the chief's office and urged this court to find that PW9, the investigating officer failed in his job to properly investigate the matter before deciding to prosecute.

15. The appellants further submitted that the trial court relied on assumptions and stated that it was assumed that the appellants were the originator of exhibit 3 yet the prosecution failed to prove where the exhibit emanated from; that the prosecution failed to establish whether exhibit 3 was filed at the chief's office and prosecution failed to prove the 2nd appellant was not a relative of the applicant of exhibit 3.

16. The appellants submitted that the prosecution failed to prove that the appellants jointly authored the birth application form and PW2 assumed that since the 2nd appellant was a witness in the document, then the document originated from the chief's office and the trial court proceeded to rely on the said assumptions in writing the judgment.

17. The appellants further submitted that there was no circumstantial evidence against the appellants and the trial court shifted the burden of proof to the appellants yet in criminal cases, the legal burden does not shift to the accused person and pointed out the evidence of PW9 who indicated he had spoken to accused 2 who indicated the applicants were his relatives but he failed to produce them cited the case of *Peter Kubai Mbugua vs Republic* (2007) eKLR where the court stated as follows:-

“ the burden of proof is always on the prosecution. it can never shift. It was not for the accused to prove his innocence but for the prosecution to prove his guilt.”

18. The appellants urged this court to find that the prosecution failed to prove the case beyond reasonable doubt against the appellants by failing to prove the making, signing or execution of exhibit 3 as to whether it was done by the appellants and further prosecution failed to prove that the making, signing or execution was without lawful authority or excuse and stated that the 2nd appellant acted as a recommender to exhibit 3 and he acted lawfully with authority; that the 2nd appellant come at the second stage of filling the application for birth and thus could not be faulted for the actions of the chief or other persons.



19. The appellants further submitted that the prosecution failed to prove the making signing and execution was with the intent to defraud or deceive; that no witness was called by the prosecution to prove the recommender acted with intention to defraud.
20. In conclusion, the appellants urged this court to find that the prosecution failed to prove the case against the appellant beyond reasonable doubt; that the burden of proof was wrongly shifted and a lot of assumptions were relied upon and urged this court to allow the appeal, quash the conviction and set aside the sentence meted by the trial court.

Prosecution Submissions

21. In response, Mr. Kasyoka for the state partially conceded to the appeal by the 2nd appellant Peter Njoroge Kihuria on ground that his conviction was based on assumptions and/or suspicion and cited the case of *Sawe vs Republic* (2003) KLR 364 the court of appeal stated as follows:-

“suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond a reasonable doubt.”
22. The state counsel opposed appeal by the 1st appellant and submitted that the prosecution discharged its legal mandate in establishing the requisite elements of the offence of Making a document Without Authority Contrary to Section 357 (a) of the *Penal Code*.
23. The state counsel further submitted that the prosecution in the trial court established the element of counts 1 and 2 during the trial and urged this court to uphold the conviction of the 1st appellant on counts I, II and IV.

Analysis and Determination

24. This being the first appellate court, I am required to re-evaluate the evidence adduced before the trial court and arrive at my own determination. I do this bearing in mind the fact the unlike the trial court, I never got the benefit of observing demeanor of witnesses and for that I give due allowance. This position was stated in the case of *Okeno vs. Republic* 1972 EA 32 where the Court of Appeal set out the duties of the first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala vs. R. (1957) EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
25. From the foregoing, I have perused the lower court proceedings, memorandum of appeal and the submissions by counsels for the appellants and the Respondent and what I wish to consider is whether the charges against the the 2nd appellant were proved beyond reasonable doubt
26. PW1 testified that he was on terminal leave when the letter alleged to have been authored by him was authored. He confirmed that his clerk at the time was George Ngatia the first appellant herein. He denied the signature in the document and stated that he suspected the 1st appellant as the author of the



- document. He further stated Peter Njoroge the 2nd appellant herein was a Clerk at DC's office and he is indicated as a witness in the document.
27. PW1 who was the chief Githunguri location at the time of the incident informed court that the said letter should have come from Assistant chief Kiaria sub-location and the person who should have done it was Kiaria Assisant chief called Esther. He said the letter was purportedly signed by himself being chief Githunguri Location and Assistant chief yet they did not sign;and neither was his stamp in the document.
 28. Evidence adduced show that A1 was a Clerk at chief's office Githunguri and A2 was Clerk at DCC's office.From PW3's evidence, she knew A1 as Assistant chief. They were arrested following complaint raised by a lady by the name Rachael Wangui from Jamaica Kiaria sub-location that the chief had written a letter to the people of Gititu coffee growers in respect to her late husband's estate.
 29. PW4 Esther Wanja Thuo who was Assistant chief Kiaria sub-location testified the complainant's co-wife Grace Gachamba had gone to her asking her to do a letter for change of names in Gititu Coffe Factoactory. He asked her to go to her office for the letter with her co-wife but they never saw them again until when she heard of the complaint from the DO II Ezekiel Kiplangat. She testified that the letter had chief's stamp which the chief does not know nor PW2 the area chief. She confirmed that PW1 Stephen M.Mwangi is the retired chief.
 30. PW5 a registration Clerk testified that when document herein/application form(MFI3) was presented to her,she realized the signature is not same as specimen signature she had in her office. She referred her back to chief Githunguri. She confirmed that recommenders name is Peter Njoroge Kihuria and that the role of recommender is to state that he knows the applicant. She however said the application was not taken to her by the second appellant and there was no problem with him being recommender.
 31. PW6 Grace Gachambi testified that she wanted the introductory letter to take to Gatitu Coffee and when the chief asked for her co-wife, she left the chief's office and while leaving, A1 approached her and told her he would get the letter from the chief. She confirmed that he took the letter to her and she did not see him afterwards. She said A1 asked for kshs 1000 inorder to get the letter for her which she gave him. She said she used the letter to get money from Gititu factory.
 32. PW7 who is PW6's son confirmed taking his mother for introductory letter from the chief. He stated after being asked to go with her stepmother,A1run following them offering to assist them get the letter. He confirmed that they gave A1 kshs1000 after he gave them the letter.
 33. The letter was submitted for forensic examination and from report of PW8, it returned finding that the handwritings matched that of the specimen handwriting of the 1st appellant and the 2nd Appellant.
 34. The appellants'argument is that the conviction on counts I, II and IV are unsafe and urge the court to quash the same. The prosecution on the other hand conceded to appeal against the conviction of the 2nd Appellant but urged this court to uphold the conviction against the 1st appellant on the counts I, II and IV.
 35. The prosecution rightly conceded on appeal against 2nd appellant's conviction as record show that he was the witness or the recommender of the applicant Martin Nderitu. He stated in his defence that he had known him for close to 12 years and he was a relative
 36. The issue that remain for determination is whether the prosecution proved that the 1st appellant made doucument marked EXHIBIT 3 the introductory letter.



37. Section 357(a) provide as follows:-

“ 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;”

38. In finding the accused persons were guilty of count 1, the learned trial Magistrate stated as follows:-

“ this court is satisfied that, the application for late registration of birth Exhibit 3 was not signed and stamped by either the chief or the Assistant chief. The evidence adduced indicates that exhibit 3 was filled by 1st accused and the recommender in the document was accused Accused 2. ...It is unfortunate that accused 1 and 2 used their position as Clerks to dupe the member of the public. In my view accused 1 and 2 must have acted in concert.”

39. In *Dennis Binyenya v Republic* [2018] eKLR the learned Judge set out the ingredients of the offence under section 357 (a) as follows:

“ 27. From the definition, the offence constitutes the following ingredients;

- i. proof of the making, signing or execution of a document and that the same was done by the accused,
- ii. proof that the making, signing or execution was without lawful authority or excuse and
- iii. proof that the making, signing and execution were with the intention to defraud or deceive.

40. The prosecution were s required to prove elements of the offence being the accused made, signed or executed the document in the name or on account of another person without authority and with intend to deceive or defraud.

41. In this case, the document submitted was signed on behalf of the chief by the 1st appellant and affixed the chief's stamp that was not the original chief's stamped while the 2nd accused acted as a recommender of the applicant.

42. Evidence adduced show participation of the 1st accused in making the document.

43. On argument that crucial witnesses were not called to ascertain whether 1st appellant was authorized to sign the document, there is no doubt that the 1st appellant did not have the capacity to sign neither was he authorized to make a document which was to be signed by a chief nor affix the chief stamp.

44. I have looked at the evidence adduced in the trial court and I do note that the Investigating Officer laid more emphasis and embarked on conducting intensive investigations on the introduction letter written to Gititu coffee farmers that incriminates the 1st accused person. From the evidence adduced it is clear the 1st accused person was linked and found having forged the letter addressed to Gititu farmers. According to PW8 the known handwriting and signature of the 1st accused person matched the writings and signature in the said letter.

45. In my opinion, therefore, I find the learned trial Magistrate erred in convicting the 2nd accused on the assumption that he acted in concert with the 1st accused and consequentially quash the conviction of



the 2nd accused person. I am satisfied the charges against the 1st accused person were proved beyond a reasonable doubt. I have no reason to interfere with the decision of the trial court in respect to the 1st appellant George Ngatia Wambui.

46. Final Orders

1. The appeal by the 2nd Appellant Peter Njoroge Kihuria is hereby allowed. Conviction and sentence against A2 in Count I is hereby quashed.
2. The appeal by the 1st appellant George Ngatia Wambui on both conviction and sentence in all the 3 counts (Count I, II & IV) is hereby dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 31ST DAY OF MAY, 2022

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RACHEL NGETICH

JUDGE

In the presence of:

Ms. Mwangi for 2nd Appellant

1st Appellant – Present

2nd Appellant – Present

