



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CRIMINAL APPEAL NO. 43 OF 2019**

**DENNIS KAMAU KARIUKI.....1<sup>ST</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 39 OF 2019**

**DAVID MBURU MBIRO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**AND**

**CRIMINAL APPEAL NO. 44 OF 2019**

**RUFUS NDUNG’U NDUATI.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from Original Conviction and Sentence of Hon E Kimilu, PM delivered on 6<sup>th</sup> November, 2019 in Naivasha CMCR No 1037 of 2016)*

**JUDGMENT**

1. The three appellants herein were charged jointly with others not before the court with offences as follows:

Count 1 Forgery contrary to **Section 349** of the **Penal Code** in that on 11<sup>th</sup> March, 2010, at an unknown place and with intent to defraud, they forged land title deed Kijabe/Kijabe Block 1/2621 under the name Scholastica Gakururu Karomo purporting it to be the genuine title deed for the said parcel Kijabe/Kijabe Block 1/2621.

Count 2 Making a document without authority contrary to **Section 357(a)** of the **Penal Code** in that on the said 11<sup>th</sup> March, 2020, they made a land title deed number Kijabe/Kijabe Block 1/2621 under the name Scholastica Gakururu Karomo purporting it to be the genuine title deed for the said piece of land.

Count 3 Obtaining money by false pretenses contrary to **Section 313** of the **Penal Code** in that on diverse dates between December 2014 and January 2016 at Naivasha, with intent to defraud, obtained from Dorcas Waithera Kimani and Isaac Kabutha Kimani a sum of Kshs 2,430,500/= by false and pretending to sell them Land Parcel No. Kijabe/Kijabe Block 1/2621 a fact they knew to be false.

2. The 1<sup>st</sup> Appellant, Dennis Kamau Kariuki, was also charged as follows:

Count 4 False assumption of authority contrary to **Section 104(c)** as read with **Section 36** of the **Penal Code** in that on 9<sup>th</sup> January, 2016, at Naivasha Township, he represented himself to be an Advocate authorized by law to sign a land-division agreement knowing that he was not so authorized.

3. In the trial court, the 1<sup>st</sup> Accused was David Mburu Mbiru (2<sup>nd</sup> Appellant herein); the 2<sup>nd</sup> Accused was Rufus Ndungu Nduati (3<sup>rd</sup> Appellant herein) and the 3<sup>rd</sup> Accused was Dennis Kamau Karuki (the 1<sup>st</sup> Appellant herein).

4. After hearing eleven (11) witnesses and the unsworn defences of Accused 1 and 2 (2<sup>nd</sup> and 3<sup>rd</sup> Appellants respectively) and the sworn evidence of 3<sup>rd</sup> Accused (1<sup>st</sup> Appellant) with one witness, the trial magistrate found all the Accused persons guilty of all counts of the charges filed against them. The trial court passed the following sentences:

“Count 1 : Two years imprisonment.

Count 2 : Two years imprisonment.

Count 3 : Two years imprisonment.”

In respect of the 3<sup>rd</sup> Accused (1<sup>st</sup> Appellant) in Count 4:

“Count 4 : Six (6) months imprisonment.”

5. Dissatisfied, each of the appellants filed separate appeals which have been consolidated herein. Mr. F. I. Mburu is counsel for the 1<sup>st</sup> Appellant Dennis Kamau Kariuki; Mr. Gichuki is counsel for David Mburu Mbiru, the 2<sup>nd</sup> Appellant; and the 3<sup>rd</sup> Appellant acts in person.

6. The grounds of appeal in all the three appeals, considered together may be summarized as follows. That the trial court:

i) Erred in convicting the appellants on contradictory, incredible and insufficient evidence that required corroboration;

ii) Erred in making its findings of guilt based on a photocopy of the title deed for Kijabe/Kijabe Block 1/2621 and not the original title deed;

iii) Erred by allowing the charges against the appellants under Section 349 of the Penal Code which does not created any offence;

iv) Erred in convicting the appellant whilst the purported owner of the land in Counts I and II does not tally with owners real name as disclosed in the evidence;

v) Erred in failing to require the prosecution to call crucial witnesses;

vi) Erred in meting sentences that were harsh and excessive.

7. As the first Appellate court with jurisdiction of questions of fact and law pursuant to **Section 347 (2)** of the **Criminal Procedure Code** and in accordance with the principles in **Okeno v Republic [1972] EA 32** this court's duty is to analyse, re-examine and re-evaluate the evidence upon which the appellants were convicted and arrive at our own independent conclusion, bearing in mind that this court did not see and hear the witnesses testify and thus give allowance for that fact.

### **The Facts of the Case**

8. In 2014, Dorcas Kimaru (PW1) and her husband Samuel Kimani Kibutha (PW8) were looking for land to buy. Since Samuel was working in Mombasa, he had authorized his wife Dorcas to look around for some land. In October 2014, whilst at home with his wife and son Isaac Kimani (PW3), three people came to their home in Maai Mahiu. Samuel knew Baba Ciku and the lady Wanjiru. They were accompanied by Rufus Ndungu (3<sup>rd</sup> Appellant) who is a land broker. The 3<sup>rd</sup> Appellant said there was some 5 acres of land for sale in Maai Mahiu. Samuel left his wife to negotiate the potential purchase after Rufus told them he had a photocopy of the title. The going price was Kshs 3,200,000/=.

9. According to Dorcas (PW1) Rufus Ndungu told her that the land belonged to his step-mother, Scholastica (PW2) who he said had died. He told her he was the administrator of Scholastica's estate and that he had two brothers, namely, David Mburu Mbiru (2<sup>nd</sup> Appellant) the elder brother, and another person. It was agreed on insistence of Rufus that she should pay the brokers Kshs 300,000/=.

10. On 8<sup>th</sup> December 2014, Dorcas came to Naivasha with David Mburu Mbiru (3<sup>rd</sup> Appellant) and a search was conducted on the title earlier presented by Rufus to them. The title was in the name of Scholastica Gakururu for parcel number Kijabe/Kijabe Block 1/2621. In court a copy of the title presented to her by Rufus to Dorcas and marked in court as MFI 1. She paid David Mburu (2<sup>nd</sup> Appellant) Kshs 500,000/= on that day in the presence of Isaac, the Assistant Chief Maai Mahiu, Ndungu Kang'ethe, and a land surveyor.

11. Thereafter, they went to Advocate Gachiengo Gitau's (PW9) Naivasha office. There, they had a sale agreement drawn indicating a sale price of Kshs 3,200,000/=, which they signed. According to Isaac, he and his mother were with David Mburu (1<sup>st</sup> Appellant) and the broker Wanjiru who had accompanied David Mburu. Isaac confirmed the payment of Shs 500,000/=.

12. Dorcas also had a land caution claiming a beneficiary's interest drawn by Advocate Gachiengo, which she and David Mburu went and placed or lodged against the title they were purchasing. In court the sale agreement and caution were marked MFI 3 and MFI 2, and were produced as P. Exhibit 2 and 3, respectively, by Advocate Gachiengo.

13. The parties to the sale agreement were David Mburu (2<sup>nd</sup> Appellant) as vendor and Dorcas Kimani and Isaac Kabutha (PW3) as purchasers. The sale price was Kshs 3,200,000/=. Payment of Kshs 500,000/= was acknowledged in the agreement. The purchase price balance of KShs 2,700,000/= was to be paid upon submission by the vendor of a confirmed grant, upon which transfer would be effected.

14. Later, David Mburu told Dorcas he had a debt with Dennis Kariuki (1<sup>st</sup> Appellant) with whom he had placed the title as security and was allegedly a lawyer in Kiambu. Dorcas went to Limuru and met Dennis Kariuki, also said he also had a law firm in Nairobi. He showed her the original title deed for the land and told her he could not release it until the land was paid for. She asked for a copy of the title and gave Dennis Kariuki Kshs 300,000/= for the copy of title and also to clear the 1<sup>st</sup> Appellant's alleged debt. Her son was with her on these occasions.

15. According to Dorcas, she paid David Mburu (2<sup>nd</sup> Appellant), in the presence of Dennis Kariuki (1<sup>st</sup> Appellant), the following amounts for the land:

1<sup>st</sup> Installment of Kshs 500,000/=

2<sup>nd</sup> Installment of Kshs 300,000/=

3<sup>rd</sup> Installment of Kshs 50,000/=

4<sup>th</sup> Installment of Kshs 480,000/=

In addition she gave him Kshs 300,000/= to clear his debt, and Kshs 480,000/= on 16<sup>th</sup> December, 2014 acknowledged in MFI 4 (P. Exhibit 4). She was also shown the parcel of land under sale.

16. At some stage in 2015 Dorcas found someone cultivating the land and the 1<sup>st</sup> Appellant told her since she had not finished paying for it, they had leased it out and she could take over after the harvest. At harvest time, she went to the land and found PW2 Scholastica Gakururu who said she owned the land. Scholastica showed Dorcas her title deed for the land, and so Dorcas reported the matter to the CID.

17. In the meantime, she said Rufus (3<sup>rd</sup> Appellant) became unreachable through the phone number she had. Nevertheless, the 1<sup>st</sup> and 2<sup>nd</sup> Appellant assured her the land was theirs but that a member of their family may have claimed it. Later, they also switched off their phones. The 2<sup>nd</sup> Appellant, David Mburu, at some stage came to her and sought money to help her resolve the issue. She notified the police and 2<sup>nd</sup> Appellant was arrested with two others.

18. Isaac Kimani's (PW3) evidence was corroborative of the evidence of PW1 but far more detailed. He testified, inter alia, that: Rufus 3<sup>rd</sup> Appellant, asked him to pay Kshs 120,000/= as legal fees to his lawyer, Dennis Kariuki (1<sup>st</sup> Appellant); that he did not make the payment; that he went to Nairobi with his father PW8 Samuel Kimani, where they were shown a gazette notice indicating that Scholastica Gakururu was deceased; that the 1<sup>st</sup> Appellant as lawyer for David Mburu (2<sup>nd</sup> Appellant) was the one who gave them the copy of the title deed which he produced as P. Exhibit 1. The gazette notice was not produced.

19. PW3 noted that the title, P. Exhibit 1, was issued in Naivasha and signed on 11<sup>th</sup> March, 2010 by Land Registrar Nyangweso (PW10). According to the lawyer Kariuki (1<sup>st</sup> Appellant), Scholastica Gakururu inherited the land, had no children but was the 2<sup>nd</sup> Appellant's step-mother.

20. In January, 2016 Dennis Kariuki (1<sup>st</sup> Appellant) visited with a lady he introduced as 3<sup>rd</sup> Appellant's wife and said the grant of succession was ready, and only a certified copy could be availed. He told them they could prepare for sub-division of the original title. He left behind a sub-division agreement.

21. Around mid-January, 2016 PW3's father Samuel (PW8), told him that a lady had brought in title for the same land Kijabe/Kijabe Block 1/2621 in the name of Scholastica Gakururu Karomu issued on 11<sup>th</sup> June 1985 at Nairobi Land Registry. He marked this document as MFI5. Shortly thereafter his father was summoned at Maai Mahiu Police Station.

22. Co-ordinating with his mother and the police, they arranged for David Mburu 1<sup>st</sup> Appellant, to be arrested, but on his being released on cash bail, he disappeared. PW3 also managed to trace Dennis Kariuki (3<sup>rd</sup> Accused) who had told him he practiced as an advocate in the name of KKG & Co. Advocates. He was also arrested by police and charged.

23. In cross-examination by David Mburu 2<sup>nd</sup> Appellant/1<sup>st</sup> Accused, PW3 confirmed they paid Shs 500,000/= to the 2<sup>nd</sup> Appellant while at Advocate Gachiengo's (PW9) office.

24. PW3 confirmed that they met him as 2<sup>nd</sup> Appellant's lawyer at Limuru where he said he was coming for a case; The 1<sup>st</sup> Appellant showed them the original title deed and availed a photocopy; That at the 1<sup>st</sup> Appellant's office in Nairobi they were told he was in court; that he assured them he was handling the succession cause and they were satisfied by his assurances.

25. The trial court's record of proceedings of 15<sup>th</sup> February, 2017 shows that PW3, Isaac Kimani was stood down as he had mentioned some documents relevant to the case. There is no record that PW3 was recalled to conclude his evidence.

26. PW2 Scholastica Gakuru Karomo and her son David Kori Gakuru (PW7), testified. PW2 said she bought the land titled Kijabe/Kijabe Block 1/2621 measuring 5 acres, in 1969. She first bought 2 acres then five acres. The title (photocopy) was produced as Exhibit 5. She, and also her neighbour, cultivate the land. In 2015, she was called by her neighbour and told that some strangers had gone round the land as if they were selling it. He, the neighbour, therefore erected a 'Not for Sale' sign which was later removed. Subsequently, she met a lady who said she had purchased the land and that a death certificate had been processed. They reported the matter to the police.

27. David Gakuru, PW7, confirmed that the land in question belonged to his mother, Scholastica, and that he went there with her in 2013; that she had told him of the land since he was young in the 1990's; and that she left it in the watch of someone who cultivates it.

28. PW4 Assistant S.O. Police Michira Ndege is a police document examiner. Without objection he produced a Forensic Laboratory Report dated 25<sup>th</sup> July 2017 (Exhibit 14) prepared by Inspector Kerubo Ruth who had been under his supervision but had since left the force. In summary, the documents examined and questioned handwritings were:

- A1-5 -Subdivision agreement and sale agreement (PMFI 9) (A1 - A4 were produced as Exhibit 3, 6, 8 and 9).
- B1-B4 - Specimen handwriting and signatures of Dennis Kamau Kariuki (PMFI 10).
- B5-B6 - Specimen signatures of David Mburu Mbiro PMFI 11.
- B7-B8 - Specimen signatures of George Nyangweso former Land Registrar, Naivasha PMFI 2 (Produced as Exhibit 12).
- C1 - Identification report containing the known signature of David Mburu Mbiro PMFI 13 (Produced as Exhibit 13).
- B1-B6 were produced as Exhibit 11; B7-B8 produced as Exhibit 12.
- Specimen signature of Land Registrar George Nyangweso

Also examined were the specimen signature of the Land Registrar George Nyangweso Exhibit 12 against the copy of title Exhibit 1.

29. After due examination and comparison by the examiner using video spectral –comparator and considering the movement of the pen, pen lift, pressure of pen, pen speed, ink distribution, character design and formation of characters and general resemblance, the examiner reached the following conclusions. That the questioned handwritings and signatures on documents A1-A4 (Exb 3,6,8,9) was similar to specimen handwritings and signatures of 2<sup>nd</sup> appellant and 1<sup>st</sup> appellant, respectively, where they are named in those documents. That the Land Registrar's specimen signature Exhibit 12 and that on the title AI are different, a fact confirmed by the said Registrar PW10

30. PW5, Veronica Nzilani, the Registrar of Persons, testified that she received a request to provide identification reports for David Mburu 2<sup>nd</sup> appellant, Dennis Kariuki 1<sup>st</sup> appellant and Rufus Ndungu 3<sup>rd</sup> appellant. She did this and the same were produced as Exhibit 15, Exb 17 and Exb 18 respectively for the appellants. The ID Numbers and occupations of the appellants as listed by the Registrar of Persons are as follows:

Dennis Kamau Kariuki's (1<sup>st</sup> appellant's) ID No is [...] - Carpenter;

David Mburu Mbiro (2<sup>nd</sup> appellant's) ID No is[...] – Self employed;

Rufus Ndyungu Nduati (3<sup>rd</sup> appellant's) ID No is [...] –Surveyor;

She also gave particulars of Scholastica Gakuru Karomo whose ID is No [...]. The appellants and Scholastica Karomo all hail from Kiambu.

31. PW6 John Muiru Mwaura, the Land Registrar Naivasha, produced the Green Card for Kijabe/Kijabe Block 1/2621 which he confirmed is registered in the name of Scholastica Gakuru Karomo ID No [...]. It has only three entries the 1<sup>st</sup> being the issuance of Land Certificate on 11<sup>th</sup> June 1985, which tallies with the evidence of Scholastica.

32. PW10 George Orwaru Nyangweso, currently Land Registrar Kisumu, testified as PW10. At the material time he was the Land Registrar Naivasha. He was shown a photocopy of title for Kijabe/Kijabe Block1/2621(PMF1). He denied signing it. He stated it was a forgery. He had given the document examiner his signature (Exhibit 12) and a report (Exhibit 13) prepared.

33. PW12 PC Japheth Ariga was the Investigating Officer (there was no witness identified as PW11). He testified that the complainants Dorcas Kimani, Isaac Kabutha and Samuel Kabutha Kimani made a report of their purchase of the land; that it was sold to them by the appellants who had shown the title deed that was allegedly held by their lawyer, the 1<sup>st</sup> appellant; they alleged the owner, Scholastica, had died; and that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were her sons. They settled on Kshs 3,200,000/- as the purchase price; made several payments after drawing a sale agreement with Advocate Gachiengo Gitau. In due time the purchasers discovered that Scholastica Karomo was not dead and had never sold her land.

34. In investigating the matter, he got the identification numbers of the appellants and had them verified by the Registrar of Persons. He found out that the vendors were not related to the Scholastica Karomo; he also got a letter from the Law Society of Kenya confirming that the 1<sup>st</sup> appellant was not a lawyer. He got sample handwriting and signatures of the appellants and the former Land Registrar who denied the signature on the photocopy of the title, and concluded that the appellants had forged the title and defrauded the complainants. The Registrar of lands also confirmed from the Green Card of the land that the owner was still Scholastica Karomo who held a title issued in 1985. After investigations, the three suspects were arrested and arraigned in court.

35. The defendants all denied the charges and gave evidence denying receiving any money or being involved in the fraudulent scam. I have taken their evidence carefully into account and it appears to me incapable of withstanding scrutiny as against the prosecution evidence. The 1<sup>st</sup> appellant availed his father, David Kariuki, as a witness, and he confirmed to the court that his son used to take the 2<sup>nd</sup> appellant to Dorcas Kimani's house.

#### **Issues for determination**

36. Having considered the grounds of appeal, the evidence and documentation, and submissions of the parties, the issues which arise for determination are as follows:

1. *Whether the Charge Sheet was defective by naming the complainant as Scholastica Gakururu Karomo whilst she was in fact Scholastica Gakuru Karomo.*
2. *Whether the charge under Section 349 of the Criminal Procedure Code creates an offence whether it could be the basis of a conviction.*
3. *Whether the evidence adduced on each count was credible, sufficient and of such probative value as was required by law to support a conviction:*
  - *Contradictory evidence as to amounts paid.*
  - *Failure to call crucial witnesses, or avail crucial documents.*
4. *Whether the trial court was entitled to make a finding based on a photocopy of the title rather than on the original title.*
5. *Whether the sentence meted was unlawful as being too harsh and excessive.*

#### **Analysis and Determination**

##### **Whether the Charge Sheet was defective by naming the complainant as Scholastica Gakururu Karomo when she was in fact Scholastica Gakuru Karomo**

37. This issue was raised by the 2<sup>nd</sup> Appellant who argues that Counts 1 and II on forgery and making a document without authority mis-name PW2 the complainant. In her testimony, PW2 gave her middle name as Gakuru which is what is contained in the titles for the subject land that were exhibited. Thus that the error in the charge sheet is fatally defective.

38. It is trite that some errors in a charge sheet are curable if they result in no prejudice to the accused. **Section 382** of the **Criminal Procedure Code** provides:

*“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*

*Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”*

39. In determining whether the error occasioned a failure of justice, the court must consider whether the objection could and should have been raised at an earlier stage in the proceedings. In this case both the accused and the prosecutor were entitled to raise issue with the name used in the charge sheet and rectify the same. The appellants have not indicated what prejudice they would or did suffer as a result of the misspelling of the complainant's middle name.

40. The cases of **Yosefa v Uganda [1967] EA 326** a decision of the Court of Appeal of Eastern Africa and **Sigilani v Republic [2004] 2KLR** give permanent pointers on what errors would constitute a fatally defective charge sheet. Both cases hold that a fatal defect subsists when a charge sheet does not allege an essential ingredient of the offence, since the law is that an accused should be charged with an offence known in law.

41. A close perusal of the charge sheet in this case shows that the essential ingredients of the offences are stated therein, the only error being the misspelling of the complainant's name. That is a curable defect, and accordingly this ground fails.

##### **Whether the Charge in Count I under Section 349 of the Penal Code could found the basis of a conviction**

42. This issue was also raised by the 2<sup>nd</sup> appellant who submitted that no offence is created by **Section 349** of the **Penal Code**, thus no conviction can be sustained. This issue covers all appellants, who were each charged and convicted under Count I in the trial court.

43. **Section 349** of the **Penal Code** 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.”***

44. Clearly, this Section provides for the punishment for forgery. The offence is created by **Section 345** of the **Penal Code** which defines forgery and identifies the ingredients of the offence as follows:-

***“Forgery is the making of a false document with intent to defraud or to deceive.”***

The offence of forging consist of making a false document; the ingredients include the intent to defraud or deceive.

45. On this issue, we start with first principles, which is that our law provides that a charge or information must contain the offence or offences with which an accused person is charged. This is provided for in **Section 134** of the **Criminal Procedure Code** which provides:

***“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”*** (Emphasis added)

46. This is a mandatory statutory provisions. It obliges the prosecution to identify the offence not only the punishment. However **Section 134** of the **Criminal Procedure Code** is also clear that the charge as sufficient of a statement of the specific offence with particulars as may be necessary *“for giving reasonable information as to the nature of the offence charged”*. The focus of the section is that the accused person must not be prejudiced or impeded in understanding the case he or she must face so they can defend themselves.

47. The argument suggest that the Charge Sheet should have contained the offence in **“Section 345 as read with Section 349”** which is the common way for this charge to be made.

48. The point has been dealt with by the decisional law of our courts in such serious cases as those of robbery with violence where the outcome is capital punishment. The Court of Appeal in **Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR** and **Joseph Onyango Owuor & Cliff Ochieng Oduor v Republic [2010] eKLR** has provided the principles that **Section 137** of the **Criminal Procedure Code** on form and content of a charge will be complied with if:

- the charge is under a section creating the offence, and
- that charge discloses or explains the ingredients for that offence which the accused needs to know so as to appreciate the offence he is facing and prepare his case in defence.

49. I have perused the charge in Count I. It contains a charge of forgery. Whilst it does not incorporate the essential description of the offence which is the making of a false document in terms of **Section 345** of the **Penal Code**. It does clearly set out that the accused persons *“with intent to defraud [they] ...forged”* the specified land title deed *“purporting it to be the genuine title deed for the said parcel”*.

50. Taken as a whole, I think that the objects of **Section 137** of the **Criminal Procedure Code** were met in the framing of the charge. The charge was therefore not fatally defective nor is it shown that the appellants were prejudiced or did not knew they were defending themselves against charges of forgery of the title. This ground of appeal therefore fails.

**Whether the evidence adduced on each count was credible, sufficient and of such probative value as was required by law to support a conviction:**

#### **Count 1 – Forgery of land title deed for Kijabe/Kijabe Block 1/2621**

51. It was argued that the allegation that the appellants either forged or made the title for Kijabe/Kijabe Block 1/2621 without authority cannot stand since there was no evidence that they made the alleged documents. All that was produced in evidence was a photocopy and not the title deed itself.

52. The appellants relied on the case of **Elizabeth Achieng Nyanya v Republic HCCRA No. 123 of 2017** (Siaya) where it was stated:

***“34. The operative word here is forgery, as the word suggests the name forgery means fake i.e. not real. The Black’s Law Dictionary, 9<sup>th</sup> edition defines it as the act of fraudulently making a false document or altering a real one to be used as a genuine.***

***35. The High Court of India in the case of Sukanti Choudhury vs State of Orisa held that the following ingredients are necessary for an offence of this nature to be proved:-***

- i. The document must be forged.***
- ii. Accused used the document as genuine.***
- iii. Accused knew or had reason to believe that it was a forged document, and***

*iv. Accused used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document.*

**36. Thus forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud.**

**37. In the Nigerian case of *Alake vs The State* the court listed the following as the ingredients of the offence of forgery:-**

*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 intends the forged document to be acted upon to the prejudice of the victim in the belief that it is genuine.”*

53. On their part, the respondent relied on the cases of **Patrick Njuguna Richu v R [2018] eKLR** and **Joseph Wanyonyi Wafukho v R [2014] eKLR**. Both cases cite the definition of forgery set out in **R-v- Dodge and Harris (1971) 2 ALL E.R. 1523** where it was stated:

**“A document is false must tell a lie about itself and not about the maker. We think the position is better put, by stating that, the false document is forged if it is made to be used as genuine. To defraud is, by deceit, to induce a course of action: OMAR BIN SALEM V R (1950) 17 EACA 158, and to defraud is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, see SAMUEL –V- REPUBLIC.”**

54. The argument that the accused persons were not identified as the persons who forged the title is not an insignificant one. There must be proof beyond reasonable doubt that the actus reus, the act of forgery, or an omission resulting in the forgery, was effected specifically by the appellants or any of them.

55. From the evidence, there can be no doubt that, as affirmed by the Land Registrar PW10 George Nyangweso, the signature on the photocopy of the title deed (Exb 1) shown to him was not his. This was confirmed by the forensic examination. Thus the document satisfies the criteria for forged document. However, it is not clear from the evidence who forged the document. The charge alleges that the appellants, in their plurality, forged the document. This cannot be for fault must be proved to lie somewhere specific, even if the fault is shared between persons who may have acted jointly.

56. Forgery is the making of a false document (Sec 345 PC). The making of a false document is clearly described under section 347 (a) to (g) of the Penal Code which highlights the actus reus – the actions that constitute making a false document. They include: a. Making a document; b. altering a document; c. introducing matter into a document; d. signing a document; e. fraudulently making or transmitting an electronic record; affixing a digital signature; making any mark denoting the authenticity of a digital signature; f. fraudulently cancelling or altering an electronic document; g. fraudulently causing a person to sign, seal or execute or alter a document. None of these actions were demonstrated by the evidence availed by the prosecution.

57. Accordingly, the charge of forgery or making a false document was not proved to the required standard. This ground of appeal succeeds.

#### **Count 2 – Making a document without authority, namely, land title deed for Kijabe/Kijabe Block 1/2621**

58. The charge under Section 357(a) of the Penal Code fails for the same reasons as the previous charge discussed above. **Section 357(a)** 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;”** (Emphasis supplied).

59. The elements of the offence require that there is proof that the accused person(s) made, signed or executed the title for the bland for or in the name of or on account of another person. As already noted, the evidence of the act is not availed.

60. But of equal, if not greater significance, and as argued by the 2<sup>nd</sup> appellant, is the fact that the document that was alleged to have been made, a title, was never produced in evidence. Instead there was a photocopied document with the forged signature of a purported Land Registrar. Does the photocopied document amount to a Land title for Kijabe/Kijabe Block 1/2621? I think that the

61. In **Dennis Binyenya v Republic [2018] eKLR** Ngenye, J was satisfied that the offence under Section 357(a) had been proved in a case where the appellant had presented a KSCE certificate that had been forged. The learned Judge set out the ingredients of the offence 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 was with the intention to defraud or deceive.

She then explained her reasoning:

**“28. It was clear that the Appellant was a candidate during the 2003 KCSE examinations and he was therefore not authorized or was in a position to issue his own certificate. From the particulars of the offence [it] was not disclosed where the certificate was made and with whom the Appellant had produced the certificate. But it is doubtless that the certificate was received from the Appellant and submitted for purposes of his recruitment to join the disciplined forces. The same was thereafter forwarded to the Kenya National Examinations Council for verification. At the Council the document was found to differ with the information produced by the Council leading to the conclusion that the grades in the individual subjects as well as the mean grade were altered. Undoubtedly then, the certificate held false information regarding the grades attained by the Appellant as can be clearly seen from comparing them with the grades apparent in exhibit 3. This alteration of the results meant that the certificate was not a genuine document. This leads to the inference that the Appellant he was either involved in the alterations or he procured the making of the alterations.**

62. In the present case, the document was a photocopy of a document that appeared largely like the title of the land in question. Although it was stated by the complainants that they were shown the original forged title, none was availed.

63. I have also carefully perused the prosecution’s submissions. I note that the prosecution focused their entire submissions on the charge concerning obtaining by false pretenses by making false representations, and none on the other charges.

64. In my view the evidence availed on this ground was insufficient and the ground succeeds.

### **Count 3 - Obtaining money by false pretenses from the complainant**

65. The crucial question here is whether the complainant, Dorcas Kimani, paid any money to any of the appellants, and if so who, or was induced to part with something capable of being stolen in terms of **Section 313** of the **Penal Code**. That section provides:

**“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.”**

66. There are three ingredients in the offence of obtaining by false pretenses, from reading of the section. These are:-

i) That the accused person by false pretense and with intent to defraud “obtains” something.

ii) That the accused person by

a. False pretense and

b. With intent to defraud “induces” any other person to deliver to any person something.

iii) That there is something capable of being stolen.

67. **Section 312** of the **Penal Code** defines “false pretence” as follows:

**“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.”**

In essence, therefore, to constitute a false pretence the following conditions must exist:

a) There must be a representation of fact by word writing or conduct.

b) the representation is either past or present

c) the representation must be false, and

d) the person made the representation knowing it to be false or did not believe it to be true.

68. Under **Section 313** of the **Penal Code**, the offence clearly includes to “obtain” and to “induce” any other person to deliver to any person anything capable of being stolen. Whereas to obtain supply means to receive, what does to induce mean?

The **Oxford English Dictionary** defines “*induce*” as follows:

- “1. *succeed in persuading or leading someone to do something.*
2. *bring about or give rise to (eg an electric charge or current or a magnetic state) by induction.....”*

**Black’s Law Dictionary 10<sup>th</sup> Edition** defines “*inducement*” as follows:

“*the act or process of enticing or persuading another person to take a certain course of action.*”

69. In light of these definitions read within the context of **Section 313** of the **Penal Code**, it is abundantly clear that the offence of obtaining involves both obtaining and inducement. Thus an accused person who has not obtained or received a thing capable of being stolen is nevertheless liable if he has with intent to defraud induced, enticed or succeeded in persuading another person to deliver to any person something capable of being stolen.

70. In analyzing the evidence, therefore, both the questions as to whether there was obtaining and whether there was inducement must be taken into consideration. In the present case the evidence established the following.

71. With respect to 1<sup>st</sup> Appellant Dennis Kamau Kariuki, he represented himself to be a lawyer for the 2<sup>nd</sup> Appellant; that he was the person who showed the complainants the false title deed for Kijabe/Kijabe Block 1/2621 of 11<sup>th</sup> March 2010 (Exhibit 1) whose authenticity was denied by the Land Registrar G.Nyangweso; that he subsequently signed and stamped a sub-division agreement (Exhibit 6) as advocate, that his handwriting and signature on being taken for forensic examination - as reported by document examiner PW4 - it was established that he, the 1<sup>st</sup> Appellant, signed Exhibit 6; that the 2<sup>nd</sup> appellant represented to the complainants that the 1<sup>st</sup> appellant was the lawyer pursuing succession issues of the owner of the land, Scholastica Karomo – whilst not in fact acting as such, and she not having in fact died.

72. Further, the 1<sup>st</sup> Appellant admitted in his evidence that he had visited Dorcas Kimani’s house thrice with the 2<sup>nd</sup> Appellant, although he denies the purpose of the visits. Although he also denied being or purporting to be an advocate, the unrefuted forensic evidence pins the sub-division of the subject land and signature thereof on him.

73. It cannot be doubted that 1<sup>st</sup> Appellant was part of the scheme to defraud the complainant. His words and actions misrepresented the true position and smoothed the transaction of the fraudulent sale of the land. The sub-division agreement and the forensic examination of his handwriting and signature establish that he was complicit in that scheme.

74. It is true, as argued by his counsel, that there was no documentary evidence to show that the 1<sup>st</sup> appellant directly obtained or received money. However, his actions recited above did induce the complainants to make actual payments to the 1<sup>st</sup> appellant’s accomplices – some of which were documented – including to the 2<sup>nd</sup> Appellant in terms of **Section 313** of the **Penal Code**. I so find.

75. With regard to the 2<sup>nd</sup> Appellant, David Mburu Mbiro what he did in relation to Section 313 of the Penal Code is self-evident. Most critically he represented himself as an owner of the land and entered into an agreement for sale as vendor, signed a caution as a beneficial owner, and received money as such from the complainants. I need not belabor the evidence, which clearly goes beyond making representations. He is no doubt guilty under this charge, and I so find.

76. Similarly, the 3<sup>rd</sup> appellant Rufus Ndungu represented himself as a broker. From the evidence on record, it was he who first persuaded the complainants that there was land available for sale; it was he who asserted that the title documents were available; it was he who lied that Scholastica Karomo was dead. It was he who told the complainants that his brother lived in Loitokitok, and introduced them to that their lawyer (Dennis Kariuki) 1<sup>st</sup> appellant, in respect to the succession of Scholastica’s property. All these were untruths, but they helped weave the perfect story for the fraud to succeed. As a result, money was paid to 2<sup>nd</sup> appellant by the complainants.

77. There is substantial evidence of his culpability in respect of the charge under this Count. I so find and hold.

#### **Count 4 - False assumption of authority by representation as an Advocate**

78. The charge against the 1<sup>st</sup> appellant under section 104(c) of the Penal Code is that he essentially pretended to be an advocate when not so authorized by signing the sub-division agreement.

79. The facts have already been set out above under the issue on false representation and need not all be repeated here. Section 104(c) provides:

“*Any person who—*

.....

*(c) represents himself to be a person authorized by law to sign a document testifying to the contents of any register or record kept by lawful authority, or testifying to any fact or event, and signs such document as being so authorized, when he is not, and knows that he is not, in fact, so authorized, is guilty of a misdemeanor”* (Emphasis supplied).

80. In the present case, the prosecution case is that the 1<sup>st</sup> appellant signed a sub-division agreement for the land in question as an advocate. As already seen, there is clear proof, based on the forensic evidence of his signature, that he did so. The defence argues that, even if he did sign the said document, it did not acquire any legal value as such signing was not in exercise of authority under the Advocates Act.

81. The Advocates Act defines a person who is authorized to be deemed as an advocate as a person qualified under the Act. A qualified person is one who is registered under the Advocates Act. The Act at section 31(1) provides that:

***“Subject to [section 83](#), no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.***

82. What the Act seeks to prevent is a situation where a person can in any way masquerade as an advocate. The Act itself makes this an offence with penal consequences. The Penal Code provision cited above appears to reinforce the protection against acting as an advocate by the broad prohibition against any unauthorized person signing, as an advocate, any document which testifies to any fact or event.

83. In my view the 3<sup>rd</sup> appellant’s act of signing of the sub-division agreement (Exhibit) 9 as an advocate; and the fact that there was evidence from the Law Society of Kenya availed by PW 12, Investigating officer Japheth Ariga, as Exhibit 18, confirming that he was not an advocate; is sufficient to show that the 1<sup>st</sup> appellant was in breach of the Advocates Act and the provision of section 104(c) of the Penal Code.

84. Statutory advocacy involves acting or pleading in support of something or someone as a person licensed in law to do so. In this case the signing of the Subdivision agreement – between the complainant as purchaser and the 2<sup>nd</sup> appellant as vendor – complete with the signature by the 1<sup>st</sup> appellant as witness with a rubber stamp purporting to be that of an advocate, was tantamount to the 1<sup>st</sup> appellant asserting that the document had the validity, veracity or legal force of such a document in law by a person licensed to make such a representation. He did this knowing he had no legal authority to do so. I so find and hold. Accordingly, the 1<sup>st</sup> appellant committed the offence as charged.

#### **Whether the sentence meted by the trial court was unlawful as being too harsh and excessive**

85. All the appellants complained that the sentences were harsh as they had been meted as consecutive sentences. I agree that although a sentence on each count may be independently apt, the consecutive nature of their application may not be appropriate.

86. I have perused the case of **Lilian Wairimu Ndungu v Republic [2011] eKLR** where Emukule J, and I agree with him, succinctly explained the problem that can arise with consecutive sentences as follows:

***“The third ground was that the sentence was harsh. The learned trial magistrate sentenced the appellant along with her co-accused to consecutive terms on all the five counts. I agree with learned counsel for the appellant on this ground. The maximum sentence under the five counts is 7 years for making a false document. To sentence the appellant to consecutive terms means that the appellant would serve an average of five years on the other counts where the maximum sentence is 3 years. This would be clearly contrary to those provisions.”***

87. In the present case however, as I have set aside the convictions on two of the counts, I need not now comment on the length of the sentences.

#### **Disposition**

88. In light of all the foregoing, each of the appeals succeeds in part. Accordingly, I determine and order as follows:

a) In respect of Count I on forgery of Title Deed Number Kijabe/Kijabe Block 1/2621 contrary to **Section 349** of the **Penal Code**, the convictions of each of the accused persons is hereby set aside, the sentences quashed and the accused persons acquitted.

b) In respect of Count II on making a document without authority, namely Title Deed Number Kijabe/Kijabe Block 1/2621 contrary to **Section 357(a)** of the **Penal Code** the convictions of each of the accused persons is hereby set aside, the sentences quashed and the accused persons acquitted.

c) In respect of Count III on Obtaining money by false pretences contrary to **Section 313** of the **Penal Code**, the convictions of each of the accused persons is hereby sustained and the sentences of two (2) years imprisonment for each accused are hereby affirmed.

d) In respect of Count IV on assumption of authority contrary to **Section 104 (c)** as read with **Section 36** of the **Penal Code**, the conviction and sentence of six (6) months imprisonment meted on Dennis Kamau Kariuki are hereby affirmed.

e) The sentences meted on Dennis Kamau Kariuki herein shall run consecutively.

#### **Administrative directions**

89. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties

and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

90. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

91. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 11<sup>th</sup> Day of February, 2021.**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Maingi for the DPP
2. Mr. D. K. Gichuki holding brief for Mr. F. I. Mburu for the 1<sup>st</sup> Appellant
3. Mr. D. K. Gichuki holding brief for the 2<sup>nd</sup> Appellant
4. Rufus Ndung'u Nduati - 3<sup>rd</sup> Appellant in person in Naivasha Prison
5. Court Assistant - Quinter Ogutu