REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. E001 OF 2021

NJOROGE MWANGI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(*Appeal from original conviction and sentence dated 28th January 2021 (Hon. M. Kasera, PM), in Criminal Case No.2017 of 2015 at the Chief Magistrate's Court, Kajiado)**

JUDGMENT

1. The appellant was charged with three counts of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code; one count of malicious damage to property contrary to section 339(1) of the Penal Code; one count of forgery contrary to section 349 of the Code; one count of uttering a false document contrary to section 353 of the Penal Code and one count of making a document without authority contrary to section 357 (c) of the Penal Code.

2. Particulars on count 1 were that on the 8th day of November, 2015 at Noonkopir area of Kitengela in Isinya Sub-County within Kajiado County, jointly with others not before court, he robbed Patrick Kipkoech Sawe of mobile phone make Samsung Galaxy valued at Kshs. 10,000 and at the time of such robbery used actual violence to the said Patrick Kipkoech Sawe.

3. Particulars in count two were that on the same day at the same place, jointly with others not before court, he robbed Manashe Keter Kiplangat of mobile phone make Samsung Galaxy valued at Kshs. 10,000 and at the time of such robbery used actual violence to the said Manashe Keter Kiplang'at while particulars on count three were that on the same day at the same place, jointly with others not before court, robbed Francis Musangi Ngila of a mobile phone make Samsung Galaxy valued at Kshs. 10,000 and cash Kshs. 1,200 and at the time of such robbery, used actual violence to the said Francis Musangi Ngila.

4. Particulars with respect to count 4 were that on the same day at the same place, jointly with others not before court, he willfully and unlawfully damaged a stone perimeter fence for plot numbers 478 and 480 valued at Kshs. 1,200,000, the property of Hillary Kyengo.

5. Particulars on count 5 were that on unknown dates within the Republic of Kenya with intent to deceive, he forged a certain document namely, development plan for Noonkopir Trading Centre, purporting it to be development plan issued by Kajiado County Physical Planning office. On count six, particulars were that on the 17th day of November, 2015 at Kajiado DCI office in Kajiado Sub-County within Kajiado County, knowingly and fraudulently uttered a forged development plan for Noonkopir Trading Centre purporting it to be development plan issued by the Kajiado County physical planning office.

6. And particulars with regard to count seven being that on unknown date within the Republic of Kenya, with the intent to deceive, without lawful authority or excuse, made development plan for Noonkopir Trading Centre, purporting it to be a development plan issued by Kajiado County Physical Planning office.

7. The appellant denied all the seven charges and after a trial in which the prosecution called a total of 9 witnesses and produced several exhibits, and his sworn testimony and that of his witness, the appellant was convicted on counts one and two and sentenced to 14 years imprisonment on those counts. He was also convicted on counts four, five, six and seven. He was fined of Kshs. 30,000 or 6 months imprisonment on counts four and five and a fine of Kshs. 20,000/- or 3 months imprisonment on counts six and seven. He was acquitted on count three.

8. Aggrieved with both conviction and sentence, he lodged this appeal and raised grounds of appeal which can be summarized as follows, that:

a. The leaned trial magistrate erred in law and in fact by failing to appreciate the fact that the appellant and PW3 had a long history of litigation and other suits were pending before the lower court touching on their respective plots in dispute which could have led to the instigation of the case to implicate him in order to get rid of him.

b. The learned trial magistrate erred in law and in fact in failing to appreciate the fact that the appellant had been charged with the offence of malicious damage to property in Cr. 1871of 2015 and the present case was a clear pointer to an intention of incarcerating him for a long period of time.

c.The learned trial magistrate erred in law and in fact by failing to appreciate that the appellant and PW3 had other protracted legal matters before the lower court touching on the property he is alleged to have destroyed and was in error in dismissing his defence as mere denial.

d. The learned trial magistrate erred in law and in fact by convicting the appellant on the offence of robbery with violence despite there being no proof beyond reasonable doubt that he was positively identified as the offence committed at night and there was no sufficient light.

e. The learned trial magistrate erred in law and in fact by failing to find that the ingredients of the offence of robbery with violence were not proved beyond reasonable doubt.

f. The learned trial magistrate erred in law and in fact by failing to consider the glaring inconsistencies in the prosecution's case and therefore wrongly convicted the appellant.

9. The appellant filed supplementary grounds of appeal raising the following grounds:

a. The learned trial magistrate erred in fact and in law by finding that the prosecution had proved its case beyond reasonable doubt and convicting the appellant on that basis.

b. The learned trial magistrate erred in law by failing to ensure that the appellant was accorded his constitutional right to a fair trial.

c. The learned trial magistrate erred in law by finding the appellant guilty on a charge that is non- existent and not known in law.

d. The learned trial magistrate erred in law by convicting the appellant on the basis of a charge sheet which was fatally defective.

e. The learned trial magistrate erred in fact and law by considering extraneous evidence other than what was contained in the witness testimonies.

10. This appeal was disposed of through written submissions.

Appellant's submissions

11. The appellant filed written submissions dated 14th April 2021. He submitted relying on ***David Njuguna Wairimu v Republic*** (2010) eKLR and ***Joseph Njuguna Mwaura & 2 others v Republic*** [2013] eKLR on the duty of the first appellate court and urged this court to reevaluate and reanalyze the evidence a fresh, consider the circumstances of the offence and come to its own conclusion.

12. According to the appellant, this was a land ownership dispute between him and PW3 over Plot numbers 478 and 480 and 96A and 96B and there are disputes before the lower court on that issue. He also submitted that he did not commit the offence he was charged with. According to the appellant, by the time the offences were alleged to have been committed, there was already an order of injunction issued in Civil Suit No. 591 of 2015 in which the appellant had sued PW3. The order restrained PW3 from dealing with the disputed plots.

13. The appellant first took issue with counts 5, 6 and 7 relating to forgery, uttering and making a false document. He asserted that he got all the documents relating to his plot from PW5 who sold them to him and that both PW3 and PW5 admitted that Plot Nos. 96A and 96B had allotment letters which were obtained from PW5. Further, PW5 admitted that she had allotment letters to the said plots sold them to him at Kshs. 40,000 each and gave him all the original documents including the allotment letters and transferred to his name. He argued that PW5 was the right person to explain the origin of the documents forming those counts. The appellant argued that event though he had the documents, he did not forge or make them.

14. He also argued that a surveyor by the name Kasuku from the County government was not called and had failed to attend court in other cases dealing with the issue. Instead, the prosecution presented a different witness Wesley Sankaya Risachi (PW8). The appellant took issue with the prosecution's failure to call Mr. Kasuku who claimed to have issued the said documents. In his view, the trial court should have presumed that the testimony of that witness would have been adverse to the prosecution case.

15. Regarding the counts on robbery with violence, the appellant argued that the trial magistrate failed to address the issue of his identification by the complainants. According to the appellant, the finding that the complainants had been able to identify him was not supported by evidence. He argued that the light was insufficient for a positive identification since the trial court was not told how far the house from which light came was from the scene. It is his case that, PW2's torch was not properly identified, and the attackers being in a crowd of over 20 people, it would have been difficult to shine light on only one person and identify him out of the crowd, without facing

hostility from the rest of the gang. The appellant further argued that the voice could have been mistaken for that of another person.

16. The appellant submitted that there were discrepancies in the evidence on prosecution witnesses. According to the appellant, whereas PW1 testified that he was injured and his tooth broke, the P3 form did not indicate so; PW1 did not see what he (appellant) had while PW2 testified that he (appellant) had a crowbar or a stick and PW2 testified that he (appellant) slapped him on the cheeks but he was injured on his waist. All these, he asserted, were geared towards having him incarcerated.

17. He also argued that the fact that the case was transferred from Kitengela police station to Kajiado police station and the charge sheet amended from the offence of malicious damage to property to the present charges, was evidence of the case being a ploy to get him out of the way so that PW3 could occupy his plot. It was his case that even if that were to be the case, the intention of the attackers was not stated to warrant counts I and II and the complainants did not state if he was the one who took all their properties or someone else from among the alleged gang.

18. According to the appellant, the charge sheet offended section 135 of the Criminal Procedure Code on the rule of duplicity. He relied on ***Amos v DPP*** (1988) RTR 198 DC and ***Mwaniki v Republic*** (2001) EA 158(CAK) to argue that the offences as drafted created a scenario where he did not know or understand what was expected of them. This, he argued, was also evidenced by the testimonies of PW1, PW2 and PW3.

19. The respondent did not file submissions.

Determination

20. I have considered this appeal, submissions and the decisions relied on. I have also perused the trial court's record and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind, that it did not see the witnesses as they testified and give due allowance to that. (***Okeno v Republic*** [1972] EA 32).

21. In **Kamau Njoroge v Republic** [1987] eKLR, the Court of Appeal stated that:

> **[I]t is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.**

22. In **David Njuguna Wairimu v Republic [2010] eKLR,** the Court of Appeal again stated:

> **The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.**

23. PW1, ***Patrick Kipkoech Sawe***, testified that on 8th November, 2015 he was at work with Manase (PW2) and Musangi, when someone knocked the gate at 2am. When they checked, they saw about 20 people including the appellant. PW2 had a torch and there was security light at a neighbor's house which enabled them to see the appellant and identify /recognize him because he was known to him. They were taken back into the compound and the appellant ordered them to lie down. The appellant took his Samsung galaxy phone valued at Kshs. 10,000 and stepped on it while the other people pulled down the perimeter fence/wall. He was injured on the left jaw and his lower tooth was broken. PW2 also lost a phone. The attackers had a crow bar and spear. He left the scene in the morning and called Hillary Kyengo (PW3) using his wife's phone and informed him what had happened. They also made a report at Kitengela police station. Police officers visited and photographed the scene. He identified the photos. He later went to hospital and a P3 form was filled for him.

24. In cross examination, he admitted that he had testified in Criminal Case No. 1871 of 2015 before **Hon. Mbicha** which was about damage to a wall that had been pulled down. He also admitted that he did not mention in his statement that appellant took his phone. He further admitted that the P3 form did not indicate that his tooth had been broken. He confirmed that he did not see what the appellant was carrying.

25. PW2, ***Manase Kiplangat Keter,*** testified that on 8th November, 2015 at about 2am, he was on duty with PW1 and Musangi, when about 20 people knocked at the gate. When they went to check, the attackers who included the appellant forced back to the compound. He used a torch light and the security light at a neighbor's compound to identify and recognize the appellant who had once vied for the position of MCA and whose voice he recognized. The appellant ordered them to lie down and guarded them while armed with a crow bar. He did not know the other people who were also armed with dangerous weapons. The attackers pulled down the fence. His jacket and Samsung galaxy phone worth Kshs. 10,000 were taken away. The appellant slapped him on the cheek and injured him at the waist. They reported the matter at Kitengela police station and went to hospital where P3 forms were filled for them. Police officers visited the scene and took photographs. The appellant said the plot was his and it was the third time he had pulled down the wall.

26. PW3, ***Hillary Ngondi Kyengo***, the owner of the plots, testified that on 9th November, 2015, he was at Kenya School of Government when PW1 called him at about 7am and informed him that they had been attacked at 4am at the plot by thieves who robbed them their phones and injured them. The plot had been fenced with 3 temporary houses and he had 3 guards on the plots 478 and 480 which are joined together. He told court that the appellant had previously attacked them with 20 to 30 men and who also pulled down the perimeter fence valued at Kshs. 1,200,00. He testified that Plot 96A and 96B (residential plots) belonged to Ann Waithera Abubakar (PW5) who sold them to

the appellant while his plots were commercial. He produced Practising Certificate for Surveyor, bill of quantities Report and receipts for the lost phones as exhibits.

27. PW4, ***No. 235215 IP Abel Onyapidi*** a scene of crime officer, testified that on 10th November, 2015 at 9am, he was called by CPL Titus Munialo of DCI Kajiado regarding the offence was malicious damage to property. He was shown a plot (100 by 100) whose wall had been pulled down. He took 28 photographs. He produced the photographs and the certificate as exhibits.

28. PW5, ***Ann Waithera Abubakar*** testified that she had two allotment letters for plot Nos. 96A and 96B and she sold them to the appellant at 40,000 each and transferred the plot to him. She gave the appellant all the documents including original allotment letters and transferred them into his name. In November, 2015 CID officers went with PW3 to her claiming that the two plots she sold belonged to PW3. She stated that she only sold the allotments letters but not the plot because by that time a plot was costing Kshs. 400,000.

29. PW6, ***Fred Swala*** assistant director of Urban Development at County Government of Kajiado, testified that on 22nd December, 2015 he received a notification from the DCI with a sketch plan. The Letter from DCI was dated 18th November, 2016, letter dated 22nd December, 2015 and sketch plan for Noonkopir. He was to confirm if the sketch plan was a true copy of what they had in their office. The numbering of the plot was not consistent with the plan. He told court that they advised the DCI that the sketch was not from their office. They also confirmed that master plan had been prepared in 1971. He produced the documents as exhibits. In cross examination, he told the court that the sketch had no name and that he had the sketch for Noonkopir. Plot Nos. 480 and 478 did not have numbers and the plan of 1971 was the one that had been approved.

30. PW7, ***Ruth Lengete,*** of Kajiado Sub-County Hospital Kitengela, testified that she had P3 forms for PW1, PW2 and Francis Musangi. PW1 said he was beaten by a known person on 9th November, 2015 and was injured on left jaw, neck, and back hand. PW2 was injured on the right lower jaw and tummy, was treated and seen by a dentist. Francis Musangi had pain in the lower back. She classified the injuries as harm and produced the P3 forms as Exhibits 2, 3 and 13 respectively.

31. PW8 Wesley Sankoya Risachi Survey Assistant at County Government Kajiado, testified that on 22nd September, 2015 he visited plot Nos. 96A and 96B, 478 and 480 and wrote a report dated 23rd September 2015. PW3 and the appellant were disagreeing over the same plots. The appellant used 96A and 96 B and said the plots are his while PW3 said his plots were 478 and 480. He confirmed that they were 400 meters apart and that the ground they were claiming is 478 and 480 which belonged to PW3. He made a report CGK/ SOR/VOL.1/106 dated 23rd September 2015 which he produced as exhibit 5. He testified that according to letter dated 4th December, 2018 by Joshua Lemaka, the site was for PW3. In cross examination, he stated that he had been in court twice over the same dispute. He confirmed that he did not give evidence in Criminal Case No. 762 of 2015 and Criminal Case No. 1871/2015. He also confirmed that Plot 96A and 96 B belong to appellant but not on the ground.

32. PW9 ***No. 59105 Sgt Titus Munialo,*** the investigating officer, testified that on 9th November, 2015 he was instructed by the DCI to take over investigations of a case reported at Kitengela Police station. The DCI had been instructed by CCI to have someone to take over the case. The case was being investigated by Kitengela police. There was previously a case of malicious damage to PW3's property in Cr. 1871 of 2015 in which the appellant had been charged.

33. He visited the scene with PC Muli and PW4 the scenes of crime officer. The perimeter wall had been damaged. They took photographs (exhibit 1). The complainant narrated to them what took place on 8th November, 2015 They then went to Kitengela police station where they found 3 complainants whom they interrogated and confirmed the situation. The complainants were issued with P3 forms which were filled and produced by PW7. The 3 complainants said there was a previous case and they knew the appellant very well. They gave them the letters of allotment for 478 and 480 of Noonkopir Business Valuation report by Kadivani who did the valuation of the perimeter wall exhibit 5 and Practising Certificate exhibit 4.

34. The appellant was arrested on 17th November, 2015 and handed over to them. They interrogated him and he gave them documents which he told them were issued by Kajiado Physical Planning Office. These were, two allotment letters for plot Nos. 96A and 96B, residential sketch plan, two certificates of search for the plots and letter from the Ministry of Lands and Survey dated 23rd September, 2015. They wrote an inventory of the documents which the appellant signed (Exhibit 15). The sketch plan the appellant gave them was not genuine. The appellant also had a report by Kasuku. He was informed that plots 478 and 480 were for PW3 and that the appellant's plots 96A and 96B were far from the complainant's plots. They charged him with the offences he was facing.

35. When put on his defence, the appellant (DW1) gave a sworn testimony and denied committing the offences. He testified that on the material night, he was at home and slept at 8pm. He did not leave the house. He had obtained an order on 5th October 2015 and issued on 12th October 2015 in a Civil Suit he had filed against PW3. He had no reason to damage any property. He told the court that he was the one on the ground and PW3 had been stopped from constructing. They were to go back to court on 17th November, 2015. After conducting the civil case in court 3, he came out only to find two people who blocked his way and arrested him.

36. The appellant told the court that Plot Nos. 96A and 96 B were residential and that there was no wall on the disputed plots but a live fence. There was also no electricity nearby. He further testified that his plots are not near those of PW3 and he had never gone to PW3's land. He maintained that he got the physical planning map on 22nd January, 2020 and applied for it from the physical planning by letter. He was also not found in possession of the stolen phones. He told the court that PW3 was frustrating him and that the case was a frame up since he had been acquitted in the other cases.

37. DW2, ***Mary Nyawira Ndirangu***, the appellant's wife, testified that on the material night the appellant was in the house and never left home. She told the court that she had visited the disputed plots several times. The scene has two plots and fenced with eucalyptus trees. The plots had no electricity and there was no wall or fence.

38. The trial court considered the evidence of both the prosecution and the defence and concluded that the prosecution had proved all counts beyond reasonable doubt except count 3. It convicted him on those accounts prompting this appeal.

39. It was the trial court's holding that from the evidence of PW1 and PW2, the appellant in the company of others, robbed PW1 and PW2 of their phones and beat them up. PW1 and PW2 were able to see and recognize the appellant by means of light from a torch the PW2 had and electric light from a neighbour's gate as a person they knew. PW2 also recognized the appellant's voice who had contested for MCA seat in the area. The attackers were more than one; were armed with dangerous weapons and used actual violence on PW1 and PW2. The trial court concluded, therefore, that the prosecution had proved the ingredients of the offence of robbery with violence beyond reasonable doubt.

40. The appellant faulted the trial court for failing to address the issue of his identification by PW1 and PW2. According to the appellant, the alleged light was insufficient for a proper and positive identification and that the voice of another person could have been mistaken to be his.

41. I have considered the evidence on record and arguments by both sides. The issues that arise for determination are whether the prosecution proved its case against the appellant beyond reasonable doubt, namely; whether the appellant was positively identified and whether he committed the offences he was charged with.

42. There is no doubt that the offences in counts 1, 2, and 4 were committed in the dead of the night. The prosecution case was, therefore, based on the evidence of identification or recognition. The law has long been settled that where the only evidence against an accused is that of identification or recognition, a trial court is enjoined to examine such evidence carefully and be satisfied that the circumstances of identification or recognition were favourable and free from possibility of error before it can safely make it the basis of a conviction. (***Wamunga v Republic*** [1989] eKLR).

43. In**Tumusiime Isaac v Uganda**[2009]UGCA 23(10th June2009)**,** the Court of Appeal of Uganda set out the factors a trial court should consider in deciding whether the conditions under which the identification was made were conducive for a positive identification, without the possibility of error or mistake. They include; whether the accused was known to the witness at the time of the offence, the conditions of lighting; the distance between the accused and the witness at the time of identification and the length of time the witness took to observe the accused.

44. The principles on identification were laid down in ***R v Turnbull & Others*** (1976) 3 ALL ER 549, where the court stated:

> **The Judge should…examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....?Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.(Emphasis).**

46. Further, in **Francis Kariuki Njiru & 7 others v Republic** [2001] eKLR, the Court of Appeal stated:

> **The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.** *(Emphasis)*

The above decisions emphasize that if the prosecution evidence is that of identification or recognition, the trial court must critically examine that evidence and the circumstances under which identification or recognition was made to ensure that they were conducive and eliminated the possibility of error or mistake before relying on that evidence to convict.

46. The trial court did not address itself on the issue of the appellant's identification. The witnesses (PW1 and PW2) did not tell the court how far they were from the appellant; how long they took to observe him; how far the neighbour's gate from which the light came was in relation to the scene and they also did not testify on the intensity of the light to enable the trial court determine whether the light was sufficient for a proper and positive identification or recognition of the appellant.

47. Further, given that the attackers were many, PW2 did not tell the court how he managed to shine the torch at the appellant alone and for how long he looked at him for a proper and positive recognition bearing in mind that the attackers were roughing them and forcing them to lie down. PW1 stated that he was fearful and did not see much. PW2 stated that he also recognized the appellant through his voice, but did not tell the court for how long he had known the appellant apart from stating that the appellant had stood for an elective position of the MCA which, on its own, would not be a sufficient reason to recognize the appellant's voice.

48. The trial court did not undertake any critical analysis of the evidence of identification and recognition to satisfy itself that it was free from the possibility of error or mistake before convicting the appellant on it. For instance, the trial court did not determine that indeed there was light from a neighbour's gate given that the appellant and his witness(DW2) testified that there was no electricity within the vicinity. There was no reason why the trial court believed the evidence of the prosecution that there was light but rejected that of the defence that there was no light.

49. Even the evidence of voice recognition was not full proof as the witness did not satisfy the trial court that he indeed recognized the appellant's voice and that it was free from error. The trial court fell into error when it failed to carefully scrutinize the evidence of

identification or recognition and only accept and act upon it if it was satisfied that the recognition/ identification was positive and free from the possibility of error or mistake.

50. Considering that the offence was committed at night and the only means of lighting were a torch and supposed light from a neighbour's gate which was disputed, and taking into account the number of attackers involved which obviously caused panic to the victims as PW1 admitted, the conditions were not conducive for a proper and positive identification or recognition. It would have been impossible for PW2 to shine a torch on the appellant only and positively identify or recognize him from a crowd of about 20 people who were attacking them, without facing hostility from the rest of the attackers.

Voice recognition could have also been mistaken to be that of the appellant given the circumstances under which the offence was committed. The prosecution did not, therefore, prove the offence of robbery with violence in counts 1 and 2 against the appellant beyond reasonable doubt.

51. The appellant was also charged and convicted for malicious damage to property. The prosecution evidence was that attackers led by the appellant brought down a wall belonging to PW3. The appellant however denied damaging any wall and argued, first; that there was no wall and, second; that he was not at the scene. This, he submitted was a land ownership dispute between him and PW3 over Plot Nos. 478 and 480 and 96A and 96B and that there was a civil suit in court through which he had obtained an injunction restraining PW3 from doing anything on the disputed parcels of land. He produced the order as DEX 1. He therefore argued that he had no reason to destroy any property as the dispute was already before court. DW2, the appellant's wife, supported the appellant. She testified that the appellant was at home on the material night and never left home. She also stated that there was neither a wall on the land nor electricity within the area.

52. The appellant faulted the trial court for not considering the fact that there had been other criminal cases against him including Criminal Case No. No.1871 of 2015, for malicious damage to a wall on the same property where PW3 was the complainant, but he was acquitted. PW9, the investigating officer, confirmed in his testimony about that case.

53. This issue again turns on appellant's identification. As already adverted to on the earlier counts, 1 and 2, the prosecution did not prove beyond reasonable doubt that the appellant was one of the perpetrators of the crime in those counts. With regard to this count, the trial court simply stated that the appellant meticulously damaged the wall as charged in count 4. There was no way the prosecution could have proved that the appellant damaged the property as charged under this count when it did not prove that he was present in the first place.

54. The foundation of count 4 would have been counts 1 and 2 . Failure to prove identification of the appellant as one of the perpetrators of the crimes meant a similar fate would fall count 4 too. The trial court, therefore, fell into error by proceeding on assumption that the prosecution had proved that the appellant committed the offence of malicious damage to property in count 4.

55. More fundamentally, the appellant argued that he had been charged with malicious damage to property in Criminal Case No. 1871 of 2015 where PW3 was again the complainant but was acquitted. He also argued, and was supported by DW2, that there was no wall which could have been destroyed. The prosecution produced photographs to show that a wall was indeed damaged. Which wall was destroyed leading to the appellant's arraignment in the previous criminal case? Was it the same wall and had it been reconstructed? The trial court did not address its mind to that fact and inquire to ascertain that the appellant was not being charged for an offence for which he had already been acquitted.

56. I have reevaluated the evidence on this issue and perused the record. PW1 admitted that he testified in criminal case No. 1871 of 2015. He told the court they used different photos but the ***"photos are the same as it is the same site."*** PW2 on his part told the court that in the earlier case, the wall was brought down in October 2015 while in the present case it was in November 2015. DW2 on her part stated that there was no wall but a live fence of eucalyptus trees.

57. Who was to be believed given the divergence in the evidence, and had the wall been reconstructed so that it could be destroyed again given that the alleged destructions were one month apart? That was not clear from the prosecution evidence which had the burden to prove its case beyond reasonable doubt. The trial court fell into error in failing to address itself on the conflicting evidence and resolve it in one way or the other. The law is clear that where there is doubt in the prosecution evidence, it should be resolved in favour of the accused. That is what the trial court should have done on this count.

58. The appellant was further charged and convicted in counts 5 for forgery, count 6 for uttering a false document and count 7 for making a false document. He argued that he did not commit the offences and asserted that he obtained all the documents relating to his plot from PW5. In its judgment, the trial court again simply stated that the appellant gave the physical plans to PW9, the investigating officer, but were confirmed not to be genuine. On that basis, the court found the appellant guilty in those three counts. I will deal with counts 5 and 7 first as they are related.

59. In count 5, the appellant was charged with forgery contrary to section 349 of the Penal Code. The prosecution case was that on unknown dates with intent to deceive, he forged a development plan for Noonkopir Trading Centre, purporting it to have been issued by Kajiado County Physical Planning office. The appellant denied the offence and argued that the documents were given to him by PW3. He also stated that he applied for the documents from the county government of Kajiado by letter. Indeed, there is a letter on record by the appellant addressed to the Director of Physical Planning Nairobi requesting for the Approved Plans for Noonkopir Township Kitengela. The letter was not addressed to the County of Kajiado Physical Planning Department. The document the appellant was charged of forging was headed Ministry of Lands and Housing, Department of Physical Planning. It is for Nooonkopirr (Kitengela) and is dated 17th November 1989. This was way before county governments came into existence.

60. Section 349 of the penal code provides:

> **Any person who forges any document or electronic record 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 of three years.

61. Forgery is defined in section 345, as "***the making of a false document with intent to defraud or deceive."*** Section 347 deals with making of a document while section 348 defines intent to defraud. The prosecution was required to prove beyond reasonable doubt that the appellant forged the development plan; that it was false and that it was intended to defraud. This it failed to do. First, the prosecution called a witness from the county government and not the National government where the document seemed to have originated. Second, apart from the prosecution's contention that the appellant forged the documents no evidence was led to prove that he actually forged the document.

62. The trial court did not even attempt to examine whether indeed the appellant forged the document. This went against the principle of law that in any criminal trial, the prosecution bears the burden of proving its case beyond reasonable doubt. It is not for the accused to prove his innocence. This principle has been stated in many leading decisions.(See ***Miller v Minister of Pensions*** [1947] 2 All ER 372); ***Pius Arap Maina v Republic*** [2013] eKLR. I am not satisfied that the prosecution discharged its burden on this count.

63. The appellant was again been charged in count 7 with making a false document. However, there was no evidence before the trial court that the appellant made the Physical Development Plan complained of. The prosecution was required to lead credible evidence to show beyond reasonable doubt that it was the appellant who made or signed that document. Section 70 of the Evidence Act (Cap 80), is clear that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting alleged to be in that person's hand writing must be proved to be in his hand writing. There was no such evidence before the trial court. The charge of making a false document was, therefore, not proved beyond reasonable doubt and the trial court was in error in convicting the appellant in that count too.

64. The appellant was finally charged and convicted in count 6 for uttering a false document contrary to section 353. The prosecution case was that on the 17th day of November, 2015 at Kajiado DCI office in Kajiado Sub-County, the appellant knowingly and fraudulently uttered a forged development plan for Noonkopir Trading Centre, purporting it to be development plan issued by the Kajiado County Physical Planning office. According to the prosecution PW6, an official from the county planning office testified that the document was not from the county planning office.

65. 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 word "**utter**" is defined under **section 4** of the Code as follows:-

Utter means and includes using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal, or act upon the thing in question.

66. According to the section and the definition above, it is an offence if one **knowingly** and with intent to **defraud** utters a false document, that is, uses, deals with, or attempts to use or deal with, or attempts to induce some other person to use, deal with or act upon the document or thing uttered to him. That is, the person who utters, must do so knowingly that the document is false and must have, in the cause of uttering, the intention to defraud. That is, the person to whom the document is uttered, is made to take action or steps or fail to take steps or action which save for the thing uttered to him, he would not have taken or vice versa.

67. As already stated above, the prosecution did not prove that he document was forged and that it was, therefore, false. The prosecution did not also show that the appellant knew that the document was false and that he intended to use it to defraud. Knowledge and intention were key in proving the offence of uttering. In the case before the trial court, the prosecution was not investigating ownership of the plot and the trial court was not determining that issue either. The issue of ownership of the disputed plots is a civil matter which was the subject of a live civil suit pending before the court.

68. In ***Kepha Moses Mogoi v Republic*** [2014], eKLR, the Court of Appeal stated that the offence of uttering a false document under section 353 of the Penal code is proved if a person *knowingly* and *fraudulently* utters the document.

69. The prosecution having failed to prove that the document was false, that appellant knew that it was false and that he intended to use it fraudulently, the offence of uttering a false document was not proved as required by law. The trial court was again in error when it convicted the appellant on this count.

70. Having considered the appeal submissions and the law and having reevaluated, reanalyzed and reconsidered the evidence afresh, the inescapable conclusion I come to is that the prosecution did not prove the offences the appellant was charged with beyond reasonable doubt.

71. Consequently, this appeal succeeds and is allowed. The appellant's conviction in counts 1,2,4,5,6 and 7 is quashed and the sentences set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

DATED SIGNED AND DELIVERED AT KAJIADO THIS 26TH DAY OF OCTOBER, 2021

E C MWITA

JUDGE