



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 14 OF 2019

FELIX CIRA MISHECK.....RESPONDENT

VERSUS

REPUBLIC.....APPELLANT

(Being appeal from original conviction and sentence in the Chief Magistrate's Court at Chuka in Criminal Case No. 873 of 2017 delivered by HON. N KAHARA - (Senior Resident Magistrate - S.R.M) on 18th March, 2019).

J U D G E M E N T

1. The Appellant herein was aggrieved by the decision of Hon. Kahara *Senior Resident Magistrate vide Chuka Chief Magistrate's Court Criminal Case No.873 of 2017* which found the Respondent herein with no case to answer.

2. Briefly from the background of the case before the Subordinate Court, the Respondent herein (Felix Cira Misheck) was charged with the offence of forgery contrary to **Section 345** as read with **Section 349** of the **Penal Code**. The particulars of the charge were that on 22nd August 2016 at unknown place within the Republic of Kenya, with intent to defraud forged a signature purporting to be of one Joyce Wangeci Nathan in Form 38 (under **Rule 26 (2)** Probate and Administration Rules) to consent to letters of administration of the estate of Nyangi Kibuga Alias Mershack Nyagi (deceased) vide *Succession Cause No.335/2016 at Chuka Senior Principal Magistrate's Court*.

3. The proceedings from the lower court indicates that the Respondent denied committing the offence and the prosecution called a total of four witnesses to prove their case. The four witnesses included the complainant Joyce Wangeci Nathan who told the trial court that her signature in Form 38, (which is a consent form by other beneficiaries to the making of a grant of administration intestate to a person agreed to be an administrator of an estate of a deceased person) under **Rule 26(2)** Probate and administration Rules was forged. The complaint was that the Respondent who was the accused person in the lower court forged the complainant's signature. The complainant is a sister to the Respondent herein. It was the complainant's case that she usually thumb prints her signature but the forged signature was written in pen. A document examiner (PW3- CIP Alex Mwongera) was called and he told the court the signature appearing against the name of the Respondent was similar to the one appearing against the name of the complainant. The question put before the trial court was simple and it was whether the prosecution's case had established a prima facie case sufficient enough to place the Respondent on his defence.

4. The trial court vide a ruling dated and delivered on 18th March 2019 found that the prosecution had failed to establish a prima facie case to place the Respondent in his defence and acquitted him on the charge of forgery under **Section 210** of the **Criminal Procedure Code**. The main gist of the trial court's finding was that a thumb print is not a signature capable of being forged and since the evidence tendered indicated that the forged signature was by pen rather than a thumb print the Respondent had no case to answer and that if the prosecution had shown that the Respondent had used his thumb print impression to deceive he would *"have been guilty of forgery."*

5. The Office of the Director of Public Prosecution, the Appellant herein felt aggrieved by the above decision and filed this appeal raising the following six grounds namely:

i. That the magistrate erred in failing to find that the prosecution had established a prima facie case and failed to consider the overwhelming evidence on record.

ii. That the magistrate erred in law and fact by holding that the accused did not forge the document in question because he did not use a thumb print impression and that the trial court failed to consider the intent which is key in forgery cases.

iii. That the magistrate erred in finding that the signature appended did not amount to forgery.

iv. That the magistrate erred in holding that the framing of the charge was erroneous.

v. That the trial magistrate erred by failing to exercise her discretion well.

vi. That the magistrate erred by acquitting the accused in total disregard of the evidence adduced.

6. In their submissions the Appellant has submitted that forgery as defined under **Section 345** is the making of a false document with intent to defraud or deceive. The State has further contended that **Section 347 (a)** states that a person makes a false document if he makes a document purporting it to be what in fact it is not. It has further cited **Section 347(d) (1)** which states that a person makes a false document when he/she signs a document in the name of any person without his authority, whether such name is or is not in the name of that person signing. The Appellant has faulted the trial court's decision contending that it is akin to holding that a thumb print impression is incapable of being forged.

7. The State further argues that a signature includes a thumb print which is recognized in all legal documents as a valid signature and that it was immaterial whether the Respondent used a thumbprint or a signature to make a false document. It contends that the Respondent signed Form 38 without authority of the complainant with intent to deceive.

8. The Appellant has relied on the cited decision in **Caroline Wanjiku Ngugi - vs- Republic [2015] eKLR** where the court found that in an offence of forgery the prosecution must prove that the document is in existence, that it was altered and it was used knowing it to be forged to deceive the person it was presented to.

9. The Respondent has opposed this appeal and has agreed with the trial magistrate in her finding. The Respondent has conceded that he signed Form 38 against the name of Joyce Wangeci Nathan but alleges that there was no intention to defraud. He argues that "*mens rea*" is missing from the prosecution's case. He further contends that the complainant was not excluded as a beneficiary of the estate and therefore the question of fraud does not arise according to him.

10. He further contends that he could have been accused of forgery had he thumb printed against the name of the complainant. He further contends that the correct charge should have been uttering a false document and that the charge of forgery was not proved.

11. This court has considered this appeal and the response made by the Respondent. This appeal and indeed the case before the trial court was about forgery and the starting point in the determination of this appeal before looking at the facts or evidence presented, is to look at the meaning of forgery. What is forgery? According to the online English Dictionary by google forgery is;

" The creation of a false written document or alteration of a genuine one, with intent to defraud."

Section 345 of the Penal Code define forgery as;

" Forgery is the making of a false document with intent to defraud or deceive."

12. Going by the above definitions the underlying fact of the act of forgery is intent to defraud based on the false nature of the signature passed by the wrong-doer to be genuine. In **Republic - vs- Rashid Mathobe Maalim [2019] eKLR** the court cited in approval the decision in **Caroline Wanjiku Ngugi -vs- Republic [2015] eKLR** which had cited a case in the High Court of India (**Sukanti Choudhuri -vs- State of Orisa**) in summarizing the key ingredients of a case of forgery as follows:-

i. The document must be forged

ii. The 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 reasons to believe that it was a forged document.

13. In a case of forgery the prosecution must establish and prove that the accused person knowingly and fraudulently uttered a false document in writing or counterfeit seal knowing the same to be false, forged or altered in order to deceive, injure or defraud another or to gain unfairly or reap some benefit.

14. Based on the above definition or the meaning of forgery it is quite clear that it was erroneous and a misdirection for the trial court to consider that a thumbprint and pen signature are materially different. They are not. According to the English Oxford Dictionary a signature is defined as a distinctive pattern, product or characteristic by which someone or something can be defined. In the Interpretation and General Provision Act a '*sign*' is defined as a '*sign*' with references to a person who is unable to write his name, includes a mark. A signature therefore includes a mark, a distinctive pattern or a thumbprint. I agree with the Appellant that it is immaterial whether a person uses a thumb print or a signature or a distinctive pattern to forge or make a false document. What is crucial is the intent of a person using a falsified document knowingly.

15. The Respondent herein has conceded in this appeal that he forged the complainant's signature which I find interesting because the admission in my view lends credence to the Appellant's grievance in this appeal. The reason is simple. It shows that the prosecution's case at the trial case established a *prima facie* case which required the Respondent herein to at the very least be put on his defence so that he can offer an explanation or a defence to the wrong he has conceded he committed. The Respondent states that the prosecution's case lacked *mens rea* or ill intention. While I agree that intent is central to a forgery case as seen from the definitions above, once the prosecution had established by evidence that the complainant did not execute the Form 38 which was the document present to the probate court as a genuine document executed by all the parties named thereunder, but that indeed it is the accused (Respondent) who had signed it, it established a *prima facie* case against the accused person. That standard of proof at that stage is lower than when a court is called upon to

determine the case after the defence case which standard is higher. It was erroneous or a misdirection for the trial court at the stage of trial to determine if the accused was guilty of forgery. The trial court based on the evidence presented should have placed the accused on his defence and give him a chance to defend himself on the accusations because the threshold of a case to answer had been met. Why did he forge her sister's signature and presented his own signature as her knowing fully well that it was false?

On that ground alone, I am satisfied that this appeal has merit and for the reasons aforesaid, I will allow this appeal by setting aside the finding by the trial court acquitting the Respondent for not having a case to answer and in its place I enter a finding that he indeed has a case to answer. I direct that the lower court file be placed before another court of competent jurisdiction who upon complying with the provisions of **Section 200** and **Section 211** of **Criminal Procedure Code** proceed with the case and finalize it. The subordinate court file be mentioned before the duty court in the lower court today for further directions and orders. The Respondent for clarity shall remain in custody until he is escorted to the lower court as per the orders herein.

Dated, signed and delivered at Chuka this 29th day of January 2020.

R. K. LIMO

JUDGE

29/1/2020

Judgment signed, dated and delivered in the open court in presence of Momanyi for Appellant and Murango holding brief for Mugo for Respondent

R.K. LIMO

JUDGE

29/1/2020