



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 156 OF 2019

CONSOLIDATED WITH

CRIMINAL APPEAL NUMBER 157 OF 2019

BETWEEN

CAROLINE WAMBUI MACHARIA.....1ST APPELLANT

JOHN HENRY MWANGI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera

Cr. Case No. 3413 of 2013 delivered by Hon. J. Gandani (CM) on 17th May 2019).

JUDGMENT

1. The Appellants, **Caroline Wambui Macharia** and **John Henry Mwangi**, were charged with various offences in the trial court. In count 1, they were charged with conspiracy to defraud contrary to **Section 317** of the **Penal Code**. The particulars thereof were that on or about the 28th day of April, 2000 at unknown places within the County of Nairobi with intent to defraud the beneficiary of the Estate of **Josephine Wambui Mwangi** forged a certain Will of the deceased **Josephine Wambui Mwangi**.

2. In count 2, they faced a charge of forgery contrary to **Section 350** of the **Penal Code**. The particulars of the same were that on the 28th day of April 2000 at unknown place within Nairobi County, with intent to defraud, forged a certain Will purporting it to be the Will of the deceased **Josephine Wambui Mwangi**.

3. In count 3, they faced a charge of forgery contrary to **Section 349** of the **Penal Code**. The particulars of the same were that on unknown dates between 6th March 2004 and 21st February 2006, at unknown place within Nairobi County, with intent to defraud, forged a certain Consent to confirmation of grant vide Succession Cause No. 2505 of 2004 purporting it to be a Consent to confirmation signed by **David Ndungú Kinuthia**.

4. The Appellants pleaded not guilty to all the three charges. Upon trial, they were found guilty of counts 2 and 3 and convicted accordingly. Consequently, they were sentenced to serve seven (7) years imprisonment each in respect of count 2 and three (3) years imprisonment each in respect of count 3. Aggrieved by both their convictions and sentences, they preferred the present appeals to this court. The appeals have now been consolidated for purposes of this judgment.

5. The Appellants raised twenty one (21) similar grounds of appeal in their respective Petitions of Appeal filed on 19th July, 2019 and 16th December, 2019. I have condensed them into eleven grounds as follows:

i. THAT the trial was handled by different magistrates, the succeeding of whom erred in law and fact by failing to inform them of their rights to resummon witnesses to be reheard under Section 200 of the Criminal Procedure Code thus materially prejudicing them.

ii. *THAT the learned chief magistrate erred in law and fact by disregarding material evidence presented in favour of the Appellants by Advocate Gladys Wamaitha Karanja Kinyajui who confirmed that she prepared the Will of the deceased.*

iii. *THAT the learned chief magistrate erred in law and fact by accepting evidence based on uncertified copies of the Will and Consent of confirmation of Grant instead of the originals.*

iv. *THAT the learned chief magistrate erred in law and fact by failing to take judicial notice that the complainant raised his complaint eight years after the reading of the Will.*

v. *THAT the learned chief magistrate erred in law and fact by disregarding the submissions by the Appellants' counsel Mr. Korongo that the investigators used a wrong name (Josephine Wambui Ndungú) and the ID of the deceased to conclude that the testator's thumbprint on the Will did not match the one on the ID No. 19004261164 which did not belong to the deceased.*

vi. *THAT the learned chief magistrate erred in law and fact by failing to find that the evidence of the document examiner and Registrar of Persons were incurably defective.*

vii. *THAT the learned chief magistrate erred in law and fact by failing to note that the prosecution did not prove its case beyond a reasonable doubt.*

viii. *THAT the learned chief magistrate erred in law and fact by disregarding their defences.*

ix. *THAT the learned chief magistrate erred in law and fact by relying on circumstantial evidence since nobody testified that they saw the Appellants put ink on paper to forge the Will and the Consent.*

x. *THAT the learned chief magistrate erred in law and fact by shifting the burden of proof to the Appellants thereby arriving at a wrong decision.*

xi. *THAT the learned chief magistrate erred in law and fact by convicting and sentencing the 2nd Appellant yet in her judgment she clearly stated that the fake Will appears to be the work of the 1st Appellant only.*

Summary of Evidence

6. I am minded that this is a first appellate court whose duty is to reevaluate the evidence and make independent conclusions. See: **Okeno v Republic (1972) EA,32** and **Kiilu & Another v Republic (2005)1 KLR, 174**. I thus summarize the evidence adduced as follows.

7. The Prosecution's case can be summarized as follows: The complainant **PW1, David Ndung'u Kinuthia's** mother Josephine Wambui Mwangi (hereinafter "**the deceased**") died intestate on 6th March, 2004. His only sibling one Jane Njoki who was the Appellants' mother had died much earlier on 1st March, 1993. PW1 used to live in a rental house in Satellite Estate because of the bad blood between his wife and the Appellants' mother. However, as at the time of the deceased's death, he was living at her home in Kawangware together with his son **PW2, John Mwangi Ndung'u**, the 2nd Appellant and the Appellants' other sister one Irene Wanjiru. The 1st Appellant who had since gotten married by then lived in Buruburu.

8. In November 2004, PW1 contracted spinal Tuberculosis (TB) and remained sick until sometime in 2005. He sought treatment and thereafter the 1st Appellant took him to a rehabilitation centre called U-Turn for Christ in Ngong. Upon leaving the rehabilitation centre, he stayed at the 1st Appellant's house for some time then went back to the deceased's home in Kawangware.

9. In May 2005, the Appellants convened a meeting at the deceased's house in which an advocate called Kenyariri read a Will which was purported to have been made by the deceased on 28th April, 2000. The Will had also purportedly been witnessed by **PW4, Grace Wairimu Eustace**, a former tenant and friend of the deceased and one Mary Wambui Mugambi. In the Will, PW1 had been apportioned a plot which was to be sold and the proceeds shared amongst the Appellants and their sister Irene Wanjiru in case he declined to accept it. PW1 was surprised because the deceased had been seriously ill for a while and thus could not have had the capacity to make a Will. He had also not been in bad terms with the deceased.

10. Several people attended the meeting including PW2 who did not get to see the Will but heard what was read out. PW4 who was also in attendance denied attesting to the Will since the deceased had never asked her to be a witness to any Will. She however confirmed to the Advocate that the identity card (ID) Number indicated thereon was hers. According to PW4, at one point when the deceased had returned from hospital, the Appellants' sister Irene Wanjiru called her and asked her to sign for her a document to enable her claim the money she had used to buy medicine for the deceased. The document she signed was on a letterhead for Nairobi Hospital where the deceased had been discharged from and although she did not read its contents, she was sure that it was not a Will. PW4 also confirmed that the deceased never differed with PW1.

11. The Appellants were said to also have forged PW1's signature on a Consent to the Confirmation of Grant of Probate dated 19th January, 2006 consenting to the appointment of the 1st Appellant as the Executor of the deceased's Estate. PW1 reported the matter to the Chief but was referred to a lawyer, one Beatrice Chelagat who lodged an application for Revocation of the Will.

12. On 18th November, 2009, the law firm of Kamunye Gichege & Company Advocates lodged a complaint on behalf of PW1 at the CID Head Quarters, Nairobi regarding the forgeries. The request was for investigations on the authenticity of the deceased's purported Will and

the consent purportedly signed by PW1. **PW5, Cadet Sergeant Joseph Kiragu** formerly of CID Head Quarters Nairobi recorded the statements of PW1 and PW4 as well as a close confidant of the deceased called Margaret Wateiyo who told him that the deceased never told her that she had written a Will. He also took the specimen signatures of PW1 and PW4.

13. On 15th December, 2009, PW5 prepared an exhibit memo and forwarded the questioned documents as well as the specimen and known signatures of PW1 and PW4 to a forensic document examiner, for verification of the authenticity of the documents. The document examiner, one E. K. Kenga from the CID Headquarters confirmed that the two documents were forgeries because PW1 and PW4's signatures on the questioned documents did not match their specimen signatures. The document examiner's report was produced by PW5.

14. **PW6, Inspector Paul Waweru** of CID Head Quarters took over investigations into the matter at some point when PW5 went on transfer. PW6 forwarded the left hand thumb print on the contested Will to the Registrar of Persons to establish its owner. He was informed that the thumb print belonged to the holder of ID card No. [particulars withheld]. Thereafter, on 23rd June, 2010, he wrote a letter to the Registrar of Persons with a view of getting the name of the ID card holder. Vide a letter dated 5th July, 2010, one Evans Oyori for the Director National Registration informed PW6 that the ID card Number belonged to one Josephine Wambui Ndungu.

15. On 12th August, 2010, PW6 forwarded a copy of the contested Will (A2) of Josephine Wambui (the deceased) and the search results of ID card number [particulars withheld] (B2) belonging to Josephine Wambui Ndungu to the National Registration Bureau. He sought to establish whether the left hand thumb impression on the contested Will had any relationship with the thumb print impression on the ID card Report. It was found that the fingerprint impressions on the two documents were non-identical and not made by one and the same person. A report was prepared by Evans Oyori to that effect and produced by his colleague **PW3, Gladys Naliaka Soita**, a finger prints expert from the National Registration Bureau, since Evans Oyori had since retired. PW6 also traced the second witness to the contested Will one Mary Wambui Mugambi at her residence in Ruiru. She denied ever being a witness to the Will and recorded a statement to that effect but was adamant about testifying.

16. When PW5 returned to the station in 2012, PW6 handed over the investigations back to him as he was going on transfer elsewhere. PW5 wanted to charge the Appellants and their lawyer Kenyariri but the lawyer wrote a protest to the Director of Public Prosecutions. Their bosses thus directed that the Appellants be charged as they await a recommendation from the Director of Public Prosecutions. They however never got any directions from the DPP on the issue. PW5 produced the statement of the deceased's confidant Margaret Wateiyo as well as her Burial Permit since she died before she could testify in court.

17. Upon being placed on their defences, the Appellants gave sworn testimonies and called one witness. **DW1, the 1st Appellant** testified that her deceased mother was a single parent so she used to live with them at their grandmother's (the deceased) home. Being a first born, she would take care of both her mother and the deceased. Sometime in 1992, their mother fell ill. In January 1993, PW1 bought traditional pots and broke them outside their house after which their mother died a month later. The deceased believed that PW1 had cursed their mother because the breaking of pots is considered a curse in Kikuyu culture. As such, the deceased chased PW1 and his family out of the family property.

18. Before their mother died, she asked the deceased to write a Will since PW1 used to cause a lot of chaos at home. Their mother helped the deceased to initiate the Will preparation process at GBM Kariuki Advocates. The Will was prepared by Gladys Wamaitha of GBM Kariuki Advocates who visited the deceased's house to enable her and her witnesses sign the Will. She was however not present during the signing because she had been married by then and was living in Buruburu. Her sister Irene was present. Thereafter, the Will remained in the custody of GBM Kariuki until 2003 when he was appointed a judge. She thus went and signed an acknowledgement that their file be transferred to Kenyariri and Company Advocates. The documents in the file included Title Deeds for various properties belonging to the deceased, a Share Certificate, Letters, Fee notes and the Deceased's Will which was in a sealed envelope. She personally took the file to Kenyariri Advocate and he opened a file for her.

19. She went on to state that the deceased fell ill in 2001 and was hospitalized several times. At some point, the deceased lived with her for six months then she requested to be taken back to her house in Kawangware. When the deceased died in 2004, PW1's wife did not attend her burial. PW1 was still an alcoholic and was not in a position to do anything for the family. As such, she informed advocate Kenyariri about the deceased's death. Kenyariri told her that she was the executor of the will. He gave them a date and asked her to ensure that all her siblings were present as well as their uncle PW1 and the two witnesses to the Will. The four of them were all provided for in the Will. At the meeting, PW4 claimed that she could not remember signing the Will but later confirmed that she did after her ID Number and signature were shown to her.

20. Thereafter, Mr. Kenyariri prepared a Consent which was signed by all of them including PW1. PW1 was in court when the Grant was being confirmed. PW1 asked her for the share certificate of his sole bequest, a plot in Dagoretti Nyakinyua. Since none of them knew where the plot was, they went to see the chairlady of Dagoretti Nyakinyua who told them that the plot had not been sub-divided and some members wanted the land sold and proceeds shared among them. PW1 was to follow up on the issue.

21. PW1 would beg them for food since his wife was not looking after him. She allowed PW1 to live on the plot bequeathed to her and made him the care taker. She bought him furniture and a television set but he sold them. She later took PW1 to a rehabilitation centre in Ngong and thereafter housed him for a month then PW1 told her that he wanted to go back to Kawangware. She would take care of PW1's bills and food expenses but he relapsed and started drinking again. One day, PW1 fell into a hole and broke his leg. His son called asking for help to take him to hospital. Since she was upcountry, she told the son to borrow money and take PW1 to the hospital then she would refund upon getting back. She would visit him in the hospital and at home. However, she went to his home one day and found that his son had taken him away.

22. A week later, she received court summons that PW1 was contesting the Will. Their Advocate Kenyariri told them that the summons for revocation of the grant was dismissed for being time-barred. PW1 took them to the chief severally claiming that she had chased him from the deceased's property but each time she would explain and provide the necessary documents to prove otherwise. In 2013, they were summoned by the CID Nairobi on allegations of forgery of the Will. They were later arrested and charged in Court.

23. In cross examination, the 1st Appellant confirmed that she had no document to prove that the deceased allowed her to receive correspondences from the Advocate on her behalf. Further, that she indicated in her statement that it was her sister who took the deceased to GBM Kariuki to write a Will. She also confirmed that the land bequeathed to her and her sister was sold in 2009 since her sister had relocated to USA and wanted her share. Finally, that she got to know the contents of the will at the reading of the same.

24. **DW2, the 2nd Appellant** herein denied forging either of the documents. He testified that he was present when PW1 cursed their mother by breaking a pot in her presence and stated that the deceased believed that PW1 had caused their mother's death. When the deceased died, he continued living in her house together with his sister. PW1 became sickly so they took him back in and started taking care of him. At some point, PW1 fell seriously sick and went to live with the 1st Appellant who had gotten married by then.

25. They were all present when Advocate Kenyariri, whom he met for the first time then, read the deceased's Will at her home and no one raised any objection. Three months later, they went to the High Court for confirmation of the Grant. They appeared before Justice Kalpana Rawal together with PW1 and signed the relevant documentation hence the Grant was confirmed as per the Will. However, they were later arrested and charged with the offences in question. He got to meet Ms. Kinyanjui Advocate who drew the Will as per the deceased's intentions after they had been arrested.

26. In cross examination, he stated that he learnt through the 1st Appellant that the deceased had left a Will about two or three days before the lawyer went to read it. He also testified that after the deceased died, PW4 asked him to get her son a job but he told her that he could not. As such, it appeared that PW4 kept a grudge because of that. Further, he testified that he knew the Will was prepared and signed at home since the deceased was sickly and immobile and had been in that state for about six years prior to her death.

27. **DW3, Gladys Wamaitha Karanja Kinyanjui**, was a former associate in the law firm of G.B.M Kariuki & Company Advocates in the period 1995 to 2000. She stated that the deceased had been a longtime client of the firm and she personally interacted with her on several occasions. At one point, the deceased informed her that she wanted to transfer her properties to her beneficiaries who were the Appellants herein, the Appellants' sister Irene Wanjiru and PW1. She advised the deceased to prepare a Will to that effect and prepared a draft of the same incorporating the deceased's wishes on how her assets would be distributed, including the executor of the Will among other things.

28. The deceased wishes were that: Dagoretti/Riruta T103 be bequeathed to her grandson, the 2nd Appellant herein; Dagoretti/Riruta T103 be bequeathed to her two grand-daughters, the 1st Appellant herein and their sister Irene Wanjiru; Ngoku Subuko block 1/169 at Kihomwiriri Nyandarua to the 2nd Appellant; Plot No. 366 with Njiru Kageria Development Company Limited be bequeathed to the Appellants' sister Irene Wanjiru; Land parcel ward No. 1218 with Dagoretti Nyakinyua Cooperative Society to be bequeathed to her son PW1. Upon approval by the deceased, she proceeded to make a fair copy. The deceased was to inform her who the witnesses would be.

29. In April 2000, the deceased called her and informed her that she had obtained two independent witnesses and asked her to go to her home with the Will. On 28th April, 2000, she went to the deceased's home in Kawangware 46 and found her with two other ladies who were her witnesses. She read out the Will in their presence and the deceased confirmed them that the contents therein specified her wishes. She then affixed her left hand thumb print on it. Since she had not indicated the names of the two witnesses on the Will, she asked them for their ID cards. She then wrote their details on the Will in her handwriting and requested them to append their signatures against their names which they both did. Thereafter, she took the executed Will back to the office for further instructions.

30. In cross examination, DW3 stated that She did not know why the deceased contemplated that PW1 could decline his bequest and not the other beneficiaries. She also confirmed that the Will did not show that she is the one who drew it.

Analysis and Determination

31. This appeal was canvassed by way of oral arguments. The 1st Appellant was represented by learned counsel, Mr. Were and Ms. Kimani, the 2nd Appellant by learned counsel, Mr. Wambugu whilst the Respondent by learned State Counsel, Ms. Chege. Upon carefully reevaluating the evidence on record and considering the parties' respective submissions, I find that the following issues arise for determination: Whether **Section 200** of the **Criminal Procedure Code** was breached; whether the document examiner's report was produced in evidence and if so whether it was admissible and whether the prosecution proved the offences of forgery against the Appellants beyond a reasonable doubt.

Whether Section 200 of the Criminal Procedure Code was breached

32. The Appellants' first ground of appeal was that the succeeding trial magistrate failed to inform them of their rights to resummons witnesses as provided under **Section 200** of the **Criminal Procedure Code** thus materially prejudicing them. However, none of the Appellants tendered any submissions on this ground. **Section 200** of the **Criminal Procedure Code** deals with instances where a criminal trial is handled by more than one magistrate. The relevant provision in this case is Subsection (3) which provides as follows:

“(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

33. The record indicates that the Appellants' trial commenced on 9th October, 2014 before Hon. Wanjala (CM) who only took the evidence in chief of PW1. On 4th August, 2015, directions were taken before Hon. Ong'injo (CM) under Section 200(3) that the matter proceeds *de novo*. Thereafter, Hon. Ong'injo took the evidence of PW1 to PW4 after which she was appointed a judge of the High Court. On 10th February, 2017, directions under Section 200 were taken before Hon. Gandani (CM). The record shows that the said provision was explained to the Appellants and their advocate Mr. Korongo intimated that the matter proceeds from where it had reached. Indeed, it is also on record that

Hon. Gandani also sought to hear the Appellants' responses and they both said that they were in agreement with their lawyer. Thereafter, Hon. Gandani heard the case to conclusion and wrote the judgment.

34. In the premises, I am satisfied that the trial magistrates who handled the case fulfilled their mandatory obligation under **Section 200(3)** which stops at informing an accused person of his or her right thereunder. This ground of appeal therefore lacks merit and is hereby dismissed.

Whether the document examiner's report was produced in evidence and if so whether it was admissible in evidence

35. Mr. Were, Counsel for the 1st Appellant faulted the trial court for relying on the evidence of a document examiner's report which in his view was not produced in evidence. He argued that PW5 only produced the exhibit memo sent to the document examiner but not the report referred to. According to Ms. Chege however, PW5 produced the said report in evidence as *P. Exhibit 11*. In rebuttal, Mr. Were submitted that *P. Exhibit 11* was a death certificate. From the record, it is not clear what was produced as *P. Exhibit 11* because even the death certificate is only indicated as *P MF1-11*. However, what is clear is that PW5 produced the exhibit memo dated 15th December, 2009 as *P. Exhibit 10* and informed the court that the document examiner's report was attached thereto. (See page 51, paragraph 5 of the trial court's proceedings).

36. Mr. Were further questioned why the document examiner was not called as a witness so that he could produce his Report. He relied on the cases of ***Hellen Wanjiru Mwangi v Republic [2011] eKLR*** and ***Kenneth Njagi Mwigwe v Austin Kiguta & 2 others [2015] eKLR*** where the courts held that documents marked for identification but not formally produced in evidence have no evidential value. In response, Ms. Chege submitted that PW5 explained to the trial court what transpired since the matter was reported before he produced the report in evidence. She cited the case of ***Kenneth Mwenda Muturi v Republic [2017] eKLR*** where the investigating officer was allowed to produce medical evidence. Further, Ms. Chege argued that in the case of ***Hellen Wanjiru Mwangi v Republic [2011] eKLR*** cited by the 1st Appellant, even though the document examiner was not called to produce the Report, the court cited a tampered chain of custody whereas in this case the chain of custody was tamper-proof. It was also her submission that in any case, the Appellants' advocate in the trial court accordingly cross examined PW5.

37. In rebuttal, Mr. Were contended that in the case of ***Kenneth Mwenda Muturi*** (supra) cited by the Respondent, the court considered the evidence of other witnesses which was found to be overwhelming. He urged this court to apply the same principle arguing that if the expert report were expunged, the remaining evidence remained a shell. He cited the case of ***Donald Atemia Sipoendi v Republic (2019) eKLR (H.C.Criminal Appeal No. 299 of 2011)*** (para 2) to buttress the fact that where a trial court uses evidence that was not adduced to convict an accused person, the Appellate court can reverse the judgment.

38. Under **Section 77** of the **Evidence Act**, a document examiner's report is one of the documents that can be produced in evidence without necessarily calling the maker. The said provision states thus:-

“77. (1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence;

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it;

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.”

39. From the record, PW5 laid a basis by stating that on 15th December, 2009, he prepared an exhibit memo form through which he forwarded the contested Will and consent to the document examiner requesting for verification of their authenticity. In a report Ref CID/ORG/8/3/1/1309, the document examiner confirmed that the two documents were forgeries. Furthermore, when PW5 produced the said report in evidence together with the exhibit memo, the Appellant's advocate in the trial court one Mr. Korongo informed the court that he had no objection to the production of the two documents by the said witness. He did not raise any issue regarding the report and neither did he inform the court whether the Appellants, under whose instructions he was acting, wanted the maker to be summoned for cross examination. It trite that, unless in very exclusive circumstances, an advocate representing a party is deemed to have the full authority of instructions of his client. And therefore, when Mr. Korongo informed that court that he had no objection to the production of the expert report, it was deemed he was so stating with the full instructions of his clients. As such, I find that document examiner's report was duly admitted in evidence and no prejudice was occasioned to the Appellants by its admission.

40. I place reliance on the case of ***Chaol Rotil Angela v Republic [2001] eKLR*** where the Court of Appeal addressed itself as follows regarding a postmortem report produced by the investigating officer:-

“We observe, once again, that the appellant's advocate had no objection to the production of the report without calling the doctor. This issue was therefore, not raised before the learned trial judge. Nevertheless, we have considered it carefully and we are satisfied that it occasioned no injustice whatsoever to the appellant. We say so because the report was produced by the OCS purely on the basis of a document in his custody. He was the OCS of Ukwala Police Station under which the crime committed was being investigated. It was his duty therefore, as he said in his evidence, to receive and keep exhibits, including medical reports, recovered by police officers in the course of investigations. The post-mortem examination report in this case, was one of the exhibits that he had kept in his custody and he produced it at the trial on that basis. He laid a foundation for this by stating that he received it from the doctor who performed post-mortem examination and prepared the report.”

Whether the prosecution proved the offences of forgery beyond reasonable doubt.

41. On count 2, Mr. Were for the 1st Appellant submitted that the trial court failed to evaluate the evidence properly thus convicting the 1st Appellant wrongly. He argued that the trial court used the wrong identity card to conclude that the thumb print thereon did not correspond with the one on the Will. He stated that the ID card that was used was for Josephine Wambui Ndungi and not Josephine Wambui Mwangi who was the deceased. Counsel also pointed out that PW1 did not tell the court the documents he relied on to file the succession cause and/or the stage at which he realized that the subject Will was not genuine.

42. Further, Mr. Were questioned why the prosecution failed to call crucial witnesses to testify. In this regard, he referred to the second witness to the Will and the document examiner. In his view, this created an inference that their evidence would have been adverse to the prosecution's case. Counsel also faulted the trial court for dismissing the evidence of DW3 regarding her role of drawing the Will. He submitted that the fact that the Will was made in the absence of PW1 did not mean that it was fake. He submitted that had the prosecution produced the documents filed in the Succession Cause as ordered by the initial trial magistrate, the court would have confirmed that PW1 appeared before Justice Kalpana Rawal at the confirmation of the Grant implying therefore that the Will was uncontested. Finally, Mr. Were submitted that if the Appellants had wanted to disinherit PW1, the 1st Appellant would not have sent him to a rehabilitation center or lived with him thereafter.

43. On his part, Mr. Wambugu for the 2nd Appellant submitted that the trial court erred by relying on circumstantial evidence to convict the 2nd Appellant. He argued that the said evidence did not meet the threshold set by the Court of Appeal in the case of **Republic v Elizabeth Anyango [2018] eKLR**. Counsel submitted that the trial court relied on mere suspicion and pointed out PW5's testimony that he knew the Appellants prepared the Will because they stood to benefit from the same. He argued that PW1 did not challenge the Will in the succession cause.

44. Mr. Wambugu also pointed out that PW3 admitted that it was possible that Josephine Wambui (the deceased) and Josephine Wambui Ndungi were different people. Counsel contended that in any event, the trial court stated that the fake Will was the work of the 1st Appellant only and nothing pointed to the 2nd Appellant yet he was convicted on the basis of suspicion. In his view, the 2nd Appellant was charged and convicted just because he benefitted from the Will and the prosecution did not provide the court with any evidence linking him to the offences in question.

45. In response, Ms. Chege submitted that in count 2, the prosecution tendered evidence to show that the Appellants intended to defraud PW1. She stated that despite DW3 testifying that she prepared the Will, the same was not reflected thereon. She submitted that PW3 confirmed that the left thumb print on the Will does not belong to the deceased. She also pointed out that PW4 said that the only document she signed was a medical document from Nairobi Hospital and in any case, a report from the document examiner confirmed that she did not sign the Will. Further, Ms. Chege questioned how the deceased's grandchildren could have been bequeathed ascertainable properties yet the deceased's son was bequeathed a property which he could not even access because of a dispute amongst the shareholders of the same. She also questioned why only the clause bequeathing PW1 contemplated that he could decline his share and provided for the persons it would devolve to in that event yet the other clauses did not envisage such a situation.

46. Ms. Chege further submitted that it was clear from the Witness Statement of the deceased's confidant Margaret Wateiyo that the deceased never told her that she had left a Will. The learned state counsel was also of the view that the Appellants sold some of the properties immediately after distribution to stop PW1 from contesting the Will. In her view therefore, the prosecution tendered overwhelming evidence against the Appellants.

47. In rebuttal, Mr. Were contended that the evidence of DW3 that she wrote the witnesses names on the will with her handwriting was uncontroverted. On his part, Mr. Wambugu responded by arguing that although PW4 did not read the contents of the document that she signed, she confirmed that the ID card Number on the Will was hers. He also submitted that the deceased distributed her property in the manner she deemed fit and the evidence of DW3 in this regard was overwhelming. He therefore urged the court to disregard the statement of Margaret Wateiyo.

48. **Section 350(1)** of the **Penal Code** provides as follows:

“(1) Any person who forges any will, document of title to land, judicial record, power of attorney, bank note, currency note, bill of exchange, promissory note or other negotiable instrument, policy of insurance, cheque or other authority for the payment of money by a person carrying on business as a banker, is liable to imprisonment for life, and the court may in addition order that any such document as aforesaid shall be forfeited.”

49. **Section 345** of the **Penal Code** defines forgery as the making of a false document with intent to defraud or deceive.

50. Intent to defraud is defined in **Section 348** of the **Penal Code** as follows:-

“An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person ascertained or unascertained capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document.”

51. In **Caroline Wanjiku Ngugi v Republic [2015] eKLR** Mativo J. pronounced himself as follows:

“In the High Court of India in the case of Sukanti Choudhury vs State of Orisa CRL Rev No. 1407 of 2008 held that the

following ingredients are necessary for an offence of this nature to be proved:-

The document must be forged.

i. Accused used the document as genuine.

ii. Accused knew or had reason to believe that it was a forged document, and

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

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. Thus, the elements of forgery are:-

i. False making of - The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. "Writing" includes anything handwritten, type written, computer generated, printed or engraved.

ii. Material alteration - The person must have taken a genuine document and changed it in some significant way. It is intended to cover situations involving false signatures or improperly filing in blanks on a form or altering the genuine content of a document.

iii. Ability to defraud - The document or writing has to look genuine enough to qualify as having ability to mislead others to think its genuine.

iv. Legal efficacy - The document or writing has to have some legal significance.

v. Intent to defraud - The specific state of mind for forgery does not require intent to steal, but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting, through the use of type writer or a computer."

52. PW1 stated that the deceased had been gravely ill for quite some time prior to her death and thus did not have the capacity to prepare a Will. During investigation, PW6 forwarded a copy of the contested Will of Josephine Wambui and the search results of ID card number 19004261/64 belonging to Josephine Wambui Ndungi to the National Registration Bureau to establish whether the thumb impressions thereon had any relationship. In a report prepared by one Evans Oyori of the National Registration Bureau and produced by his colleague PW3, it was discovered that the fingerprint impressions on the two documents were non-identical and not made by the same person. Further, PW5 produced a statement by the deceased's close confidant Margaret Wateiyo indicating that the deceased never told her that she had a Will.

53. Further, PW4 who is purported to be one of the attesting witnesses to the contested Will denied doing so. She was categorical that the signature thereon was not hers and that the deceased had never asked her to be a witness to any Will. Vide an exhibit memo dated 15th December 2009, PW5 forwarded a copy of the Will as well as the specimen and known signatures of PW4 to a forensic document examiner, for verification of its authenticity. The document examiner, one E. K. Kenga from the CID Headquarters confirmed that the PW4's purported signature on the Will did not match her specimen signature. The document examiner concluded that PW4's signature thereon had been forged.

54. In view of the above watertight evidence by the prosecution, I find DW3's evidence that she witnessed the deceased affix her thumbprint and PW4 signing the Will unbelievable. In any event, there is nothing on the Will to show that the same was done in her presence if at all. I am therefore satisfied that the prosecution proved that the subject Will was a forgery.

55. As regards count 3, Mr. Were questioned why PW1 denied signing the consent form for confirmation of grant in **Succession Cause No. 2505 of 2004**. He argued that PW1 was the one who filed the Succession Cause and as such could not become an objector to his own cause. In rebuttal, the learned state counsel submitted that PW1's specimen signature was tested and found not to match the one on the Certificate of Confirmation of Grant.

56. **Section 349** of the **Penal Code** provides as follows:

"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 for three years."

57. PW1 denied signing the Consent for Confirmation of Grant. When PW5 sent the Consent and PW1's specimen signature to the document examiner, it was established that there was no agreement between PW1's specimen signature and his signature on the Consent. In the premises, I am satisfied that the Consent was also a false document as PW3's signature thereon was a forgery.

58. Further, the record is clear that the Appellants through their lawyer Kenyariri presented the forged documents in the Succession Court as genuine documents with the intention of misleading the court to issue the 1st Appellant with a Grant of Probate in respect of the deceased's Estate. As such, it was not necessary for the prosecution to establish who actually forged the documents since the Appellants were beneficiaries of the said forgeries.

59. Indeed, it suffices to add that from the evidence on record, it appears that once the 1st Appellant and her siblings realized that the deceased was gravely ill and therefore likely to die intestate, they hatched a well-choreographed plot to ensure that they benefitted from her Estate. This plot involved forging a Will to deceive PW1 that the deceased had bequeathed them prime properties at the expense of PW1 who was her only surviving child merely because they regarded him as useless and not able to do anything for the family.

60. I say so because in her evidence in chief, the 1st Appellant testified that before her mother died, she went to see GBM Kariuki Advocates to initiate the Will process for the deceased. In cross examination however, she conceded that she had indicated in her statement that the deceased asked her sister to get a lawyer so her sister took her to GBM Kariuki to write a Will. Indeed, it is not surprising that it is this same sister who PW4 testified had asked her to sign a certain document to enable her claim money that she had used to buy the deceased medicine. Further, the fact that the 1st Appellant was the one receiving correspondences from GBM Kariuki Advocates on behalf of the deceased and settling legal fees raises even more questions regarding her role in the making of the forged Will.

61. In view of the direct and circumstantial evidence hereinabove, I find that the prosecution proved the offences of forgery against the Appellants beyond any reasonable doubt.

62. It was also submitted on behalf of the 1st Appellant that PW1 lodged the criminal case to aid him in a civil matter which had been frustrated. In support thereof, Mr. Were cited the case of ***Beth Wanja Njoroge Misc Application No. 327 of 2011*** where the court advised parties to use the judgment in a succession cause. In response, Ms. Chege submitted that a criminal case can run concurrently with a civil suit.

63. Under **Section 193A** of the **Criminal Procedure Code**, the fact that any matter in issue in criminal proceedings is also directly or substantially in issue in any pending civil proceedings is not a bar to criminal proceedings. The latter can only be barred if it is demonstrated that the complainant is acting in bad faith. From my evaluation however, that was not the case in the instant suit.

64. Mr. Were further submitted that the fact that investigations were still on-going during the trial shows that the Appellants were charged and prosecuted on the basis of inconclusive evidence. I have perused the trial court's record and confirmed that this is not factual. Hence, the submission lacks merit.

Sentence

65. As regards the sentences, Ms. Chege submitted that since the Appellants have been drawing rent from the deceased's houses to the exclusion of PW1, she was amenable to a non-custodial sentence subject to an order of restitution of PW1. In rebuttal, Mr. Were submitted that by bringing up the issue of drawing of rents, the learned state counsel confirms that that the Appellants' prosecution was intended to advance PW1's civil dispute as opposed to the contested Will.

66. The trial court considered the circumstances of the case as well as the Appellants' mitigation before passing the sentences imposed for the two counts of forgeries. The circumstances according to the trial court justified custodial sentences so as to serve retributive and deterrent measures. The trial court observed that the offences involved total dishonesty committed by the Appellants to enable them gain advantage in the deceased's estate as against PW1. I cannot add more than concur with the learned trial magistrate. I find the sentences imposed by the trial court on the two counts were reasonable and I have no reason to interfere with the same.

Conclusion

67. In totality, I find that the Appellants' appeals lack merit and are hereby dismissed in their entirety. It is so ordered.

Dated and Delivered at Nairobi This 29th Day of April, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Were for the 1st Appellant.
2. Mr. Gatore for the 2nd Appellant.
3. Miss Nyauncho for the Respondent.